# LIVINGSTON'S

# MONTHLY LAW MAGAZINE

FOR

# 1854.

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OF THE NEW YORK BAR.

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VOLUME II.

NEW YORK:

OFFICE OF THE MONTHLY LAW MAGAZINE, 157 BROADWAY.

TERMS: THREE DOLLARS A YEAR.

1854.

JOHN W. AMERMAN, PRINTER,
No. 60 William-street, N. Y.

# DIGEST

OF

# LIVINGSTON'S MONTHLY LAW MAGAZINE

FOR 1854.

PREPARED AND ARRANGED IN THE FORM OF AN ALPHABETICAL INDEX.

## VOLUME II.

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REPORTED IN

# LIVINGSTON'S MONTHLY LAW MAGAZINE

FOR 1854.

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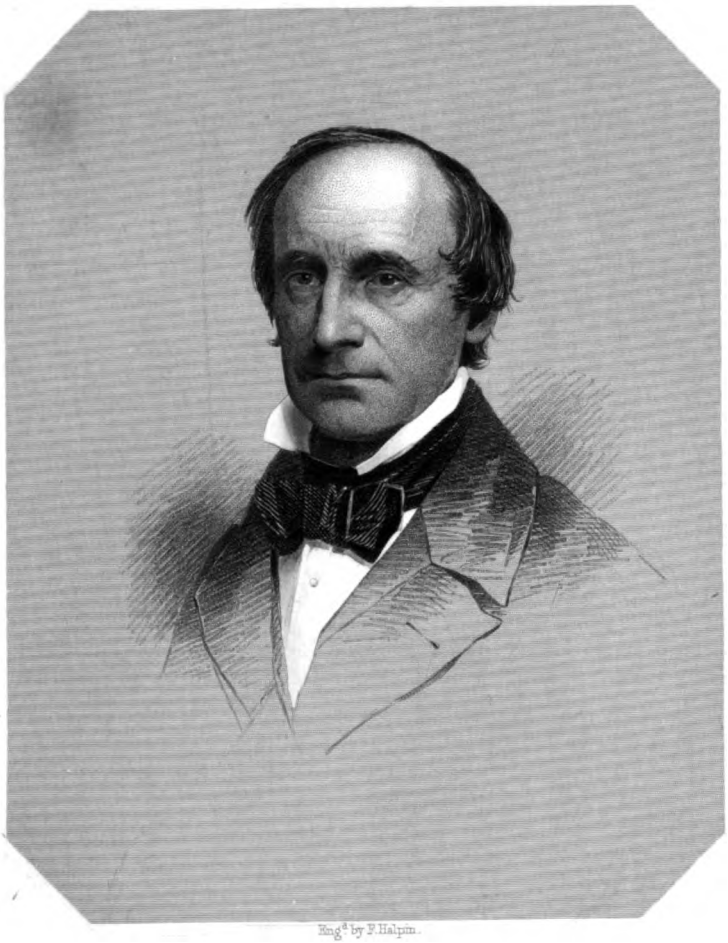

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# LIVINGSTON'S

## MONTHLY

# LAW MAGAZINE.

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## CONDENSED REPORTS OF RECENT CASES.

LIVINGSTON'S

MONTHLY

# LAW MAGAZINE.

VOL. II. JANUARY, 1854. No. I.

## LAWS OF EACH STATE RELATIVE TO THE COLLECTION OF DEBTS.

THE following concise statement of the statute laws of the several States for collecting debts, has been prepared with much care, and may be relied upon as being accurate. It is one of a series of articles we have prepared for this work, to inform our readers what are the laws of each state on various subjects of interest, and which will be found of great value.

ALABAMA.—No person can be arrested, unless the plaintiff make affidavit that the debtor is about to abscond, or has conveyed, or is about to convey, his property fraudulently, or has money or effects which he fraudulently withholds, or that the debt was fraudulently contracted. The debtor may discharge himself from arrest by making oath that the statement upon which he is arrested is untrue, and that he has nothing with which to pay the debt, or by rendering a schedule of all his property, and making oath that he has not property to the value of twenty dollars besides that named in the schedule, and such as is exempt by law from execution, and that he has not disposed of any property to secure the same to his own use, or to defraud creditors. A person convicted of rendering a false or fraudulent schedule, is liable to imprisonment for one year. The plaintiff may controvert the truth of the debtor's oath.

Upon an affidavit that the debtor absconds, secretes himself, or resides out of the limits of the state, so that process cannot be served upon him, or is about to remove his property out of the state, whereby the plaintiff may lose his debt or be compelled to sue in another state, or that the debtor has fraudulently disposed of, or is about disposing of his property; or that he has property liable for the satisfaction of his debts, which he fraudulently withholds; and stating the amount due, and that attachment is not sought for the purpose of vexing or harassing the debtor; and upon the plaintiff's executing a bond in double the amount sworn to be due, for the payment of damages which may ensue to the debtor by reason of a wrongful attachment, an attachment may issue against the property of the defendant.

Attachments ancillary to suits pending may be sued out on the same grounds as original attachments.

Judgments create a lien on real property throughout the state from

the date of rendition. Executions, upon their delivery to the sheriff, bind personal property within the state. One year is the shortest time in which money can be collected by legal proceedings.

ARKANSAS.—If a creditor, at the time of filing his declaration, file his own affidavit or that of another person, stating that the defendant is justly indebted to him in a specified sum exceeding one hundred dollars, also that the defendant is not a resident of the state, or that he is about to remove himself or his goods from the state, or that he secretes himself so that process cannot be served upon him, an attachment may issue against the property of the defendant. A bond in double the amount claimed, must also be filed, conditioned for the payment of such damages as may be awarded against the creditor.

Justices of the peace may issue attachments upon similar conditions, when the amount claimed does not exceed one hundred dollars.

Boats running on the navigable waters of the state are liable to attachment for debts contracted on account of work or supplies furnished the boat.

An arrest, in a civil action, can take place only in case of fraud alleged by the plaintiff, and supported by his own affidavit and that of some disinterested and credible person to the facts on which the allegation is founded.

CALIFORNIA.—An order of arrest may be obtained against a debtor in the following cases. Where the action founded upon contract is for the recovery of money or damages, when the defendant is about to depart from the state to defraud his creditors. Where the demand is for fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to the defendant's own use, such as moneys received by an attorney, factor, broker, agent, in the course of his employment as such, or by any other person in a fiduciary capacity. When the defendant was guilty of fraud in contracting the debt, or incurring the obligation for which action is brought. When the defendant has removed, concealed, or disposed of his property, or is about to do so with intent to defraud creditors.

Before the order of arrest is issued, the plaintiff must prove, by his or some other person's affidavit, the facts entitling him to the order, and must execute an undertaking, with two or more sureties, conditioned to pay the defendant the costs that may be awarded and damages sustained by reason of the arrest, to the amount at least of two hundred dollars.

So soon as the arrest is made, the officer must notify the plaintiff.

Defendant can demand a trial immediately, which must be had within three hours, except the trial of another action is pending. In case of a delay of more than three hours not caused by another trial, the defendant is discharged: if the plaintiff obtain judgment in the trial, he may obtain another arrest on the same grounds as in the first instance.

The defendant may be discharged by giving an undertaking, with two sureties, in the amount named in the order of arrest, binding themselves to that extent, if the defendant does not at all times render himself amenable to the process of the court.

The personal and real property of a debtor may be attached for an obligation founded upon a contract for the direct payment of money in this state, whether the contract be made in California or elsewhere, if not secured on real or personal property.

A writ of attachment may issue upon the plaintiff's affidavit or that of some person in his behalf, that he has a good cause of action, and filing the same with the clerk of the court, together with an undertaking with two or more sureties in a sum not less than two hundred dollars, nor more than the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, the plaintiff will pay all costs awarded, and all damages sustained by a wrongful attachment, not exceeding the sum named in the undertaking. After the attachment is issued the sheriff is bound to execute it, unless the defendant give bonds with two or more sureties for the payment of the demand and costs, should the plaintiff recover judgment. At any time before judgment, the defendant may give the undertaking to the clerk after reasonable notice to the plaintiff, and upon doing this, the property attached and not sold, will be delivered up by the sheriff, together with the proceeds of any sale already made. The sureties given by defendant or plaintiff must be worth double the amount named in the bond, and residents, householders, or freeholders of the state. In the matter of attachment, it makes no difference if the debtor or person to whom the debt is due be a citizen or foreigner, but the demand must grow out of a California contract.

All property exempt from execution is also exempt from attachment. When the debtor's property is sold on execution, the personal estate must be sold first, then the real property, or so much as is necessary to satisfy the demand. The debtor may at any time within six months after the sale redeem all real property, except leasehold estates of unexpired terms of less than two years, by paying the amount for which it was sold, together with eighteen per cent. interest thereon. The purchaser is entitled to receive the rent from tenant, but not from the debtor if he be in possession.

CONNECTICUT.—No execution, founded upon an action of contract merely, can be levied on the person of the debtor, except in actions upon promises of marriage, or misconduct, or neglect in any office or professional employment, or to recover moneys collected or received by a public officer or person acting in a fiduciary capacity.

Whenever any person is guilty of fraud in contracting a debt, or conceals, removes, assigns, withholds, or conveys away his property, not exempt from attachment, in order to prevent its being taken by legal process, or refuses to pay any debt, having sufficient funds or estate in his hands for its discharge concealed or withheld, or refuses to disclose his rights of action, any creditor aggrieved may institute an action on the case against the person setting forth his debt, and the fraudulent act or acts, and have process of attachment and execution against the body of the defendant, to be proceeded with as in other actions of tort.

Attachments on execution may be granted against the goods and chattels of the defendant, or for want thereof against his lands, or against his person when not exempt from imprisonment.

DELAWARE.—No free white citizen may be arrested except upon oath that he is justly indebted in a sum exceeding five dollars, and that the plaintiff verily believes that defendant has secreted, conveyed away, or otherwise disposed of property above the value of twenty-five dollars, with intent to defraud his creditors: he must also set forth the alleged fraudulent transactions.

Attachment may issue against a resident, upon an affidavit that defendant is justly indebted to plaintiff in the sum of fifty dollars, and has absconded with intent, as is believed, to deceive and defraud creditors. This is called domestic attachment. Another writ known as foreign attachment, issues upon the oath of the plaintiff or of some credible person for him, that the defendant resides out of the state, and is justly indebted to plaintiff in the sum of fifty dollars or upwards.

FLORIDA.—Attachment may issue upon an affidavit, that there is a debt due, or to become due within nine months, and that the debtor is actually removing from the state, or resides beyond its limits, or absconds and conceals himself so that ordinary process cannot be served upon him; or that he is removing his property from the state, or secreting the same for the purpose of defrauding his creditors.

Imprisonment for debt does not exist. (Thom. Dig. 367.)

GEORGIA.—In case of non-residence, or where both debtor and creditor reside without the limits of the state, the creditor may attach the real and personal property of the debtor within the state. If the debtor be a partner his goods may be attached if he removes from the state after the contract was made; notwithstanding his copartner or co-contractor may reside within the state. (Act of 1850.)

If the debt be not due, and the creditor or his agent make oath of the amount to become due, and that the debtor is about removing from the state, an attachment may issue against his property.

In all cases *pending a suit*, if the defendant place himself in such circumstances as would by the laws of the state authorize an attachment, one may issue.

Any person arrested or imprisoned for debt, who shall make it appear to the court that he is insolvent, and shall deliver a schedule of all his property, and shall take the poor debtor's or insolvent's oath, shall obtain a discharge; and he shall not be liable to further imprisonment on execution for any debt incurred previous to the discharge, at the suit of any creditor having notice of the discharge, nor can he be arrested or held to bail in mesne process for any debt contracted prior to the discharge. An unmarried woman, or widow, cannot be arrested for debt. (Act 1847, Cobb's Dig. 392.)

ILLINOIS.—When any debtor shall refuse to surrender his property for the satisfaction of any execution issued against it, the plaintiff or his attorney may make affidavit of such fact before any justice of the peace for the county, and upon filing such affidavit with the clerk of the court from which execution issued, or with the justice of the peace who issued

the execution, the clerk of court or justice may issue a writ against the body of the defendant. (Rev. Stats., 382.)

In all actions to be commenced in any court of record in the state, founded on any specialty judgment or contract in which the plaintiff or other credible person can ascertain the sum due or damages sustained, and will make affidavit before the clerk of the court from which process issues, or a justice of the peace, or if the plaintiff resides out of the state, before any person who may be authorized to administer an oath in the state or kingdom in which he resides, that the same is in danger of being lost, or that the benefit of any judgment which may be rendered will be lost, unless the defendant be held to bail, and such affidavit be delivered to the clerk of the court, the clerk must issue a writ against the body of the defendant, with directions to the sheriff endorsed, to take bail.

When damages are unliquidated, the affidavit must state facts, and the nature and cause of action, and the clerk must fix the amount of bail. (Rev. Stats., 80.)

When any person is arrested for debt on execution, or on original process, for the purpose of being held to bail, it is the duty of the officer having the custody of the debtor, at his request to convey him before the judge of the county in which the arrest is made. The county judge must require of the debtor a complete schedule of his property of whatever description, with an account of the debts owing by the debtor at the time. The debtor may then take the oath prescribed by statute, and if no fraud appears upon examination of the debtor, or of the witnesses produced, and the debtor assign the property named in the schedule, not exempt, and produce the receipt of the assignee to the court, he is discharged. (Rev. Stats., 282, &c.)

The plaintiff in execution may, after the defendant has taken the oath prescribed, pay the sheriff the jail fees on the Monday of each week, and keep the defendant in jail until the debt is paid, at the rate of one dollar and fifty cents per day, upon the happening of which event the sheriff returns the execution satisfied by imprisonment.

If any creditor or his agent shall make complaint, on oath or affirmation, to the clerk of the circuit court of any county in the state, that his debtor is about to depart from the state, or has departed, with the intention of having his effects and personal estate removed without the state limits, to the injury of such creditor, or stands in defiance of any officer authorized to arrest him on civil process, so that ordinary process of law cannot be served upon him, and that he is indebted to the creditor in a sum exceeding twenty dollars, specifying the nature and amount of such indebtedness, such creditor may sue out a writ of attachment against the property of the debtor, or so much thereof as will satisfy the debt sworn to with interest and costs. (Rev. Stats., 63.)

When any creditor or his agent shall make oath or affirmation before any justice of the peace in the state, that any non-resident is indebted to him in a sum not exceeding one hundred dollars, and in similar cases as in the circuit court, such justice may issue an attachment against his personal estate. Attachment may issue, in the case of a non-resident, against all his property, for a sum exceeding twenty dollars, from the clerk of the circuit court of any county.

The constitution forbids imprisonment for debt except in case of refusal to deliver up his estate for the benefit of creditors as prescribed by law, or of strong presumption of fraud. (Const. of 1848, Art. 13, § 15.)

INDIANA.—Actions brought for the recovery of any debt, or for damages only, may be commenced either by the issuing of a *capias ad respondendum*, or by a summons. Special bail shall not be required in any case until the plaintiff, his agent, or attorney, shall make and file with the clerk of the court where suit is instituted, an affidavit specifying the plaintiff's rights to recover an existing debt or damages from the defendant, and also stating that he believes the defendant is about leaving the state, taking with him property subject to execution, or money or effects which should be applied to the payment of the plaintiff's debt or damages, with intent to defraud the plaintiff.

No *capias ad respondendum* shall be delivered to any officer to be executed until an order for special bail has been obtained and endorsed on the writ.

The real and personal property of a debtor, an inhabitant of the state, may be attached whenever the debtor may be secretly leaving, or shall have left the state, with intent to defraud his creditors, or to avoid the service of a civil process, or shall keep himself concealed, so that process cannot be served upon him, with intent to delay or defraud his creditors, or when the defendant has disposed of, or is about disposing of his property, for the purpose of delaying or defrauding his creditors. No writ of attachment shall issue against any absent debtor while his wife and family remain settled in the county where his usual place of residence may have been, unless he continue absent from the state more than one year, except an attempt be made to conceal his absence, or unless the debtor be secretly removing his property to avoid the payment of his debts. If the wife or family of the debtor refuse, or are unable to account for his absence, or to tell where he may be found, or give a false account, such refusal, false account, or inability, shall be construed an attempt to conceal his absence.

IOWA.—The person of a debtor cannot be taken in execution upon a judgment rendered in any civil action.

In an action for the recovery of money, an attachment may issue, if the plaintiff file in the office of the clerk of the district court a petition, under oath, stating that the petitioner verily believes the defendant is a foreign corporation, or is acting as such, that he is a non-resident of the state, that he has disposed, or is about to dispose of his property in whole or in part, with intent to defraud his creditors, or, that he has absconded, or is about to abscond, to the injury of his creditors, or that he has property not exempt from execution, which he refuses to give in payment of the debt, or as security for payment. (Act of 1853.) If the demand is founded on contract, the petition must state that something is due, and as nearly as practicable the amount; if not, the original petition is to be presented to a judge that he may make an allowance thereon of the amount in value that may be attached. (Code, § 1846, &c.) A

debtor's property may, in some cases, be attached previous to the time when the debt becomes due.

KENTUCKY.—A defendant in a civil action can be arrested and held to bail only when an affidavit of the plaintiff is filed in the office of the clerk of the court in which the action is brought, showing the nature of the plaintiff's claim, that it is just, its amount, and that the affiant believes, either that the defendant is about to depart from the state, and with intent to defraud his creditors, has concealed or removed his property, or so much thereof that the process of the court after judgment cannot be executed, or that the defendant has money or securities for money, or evidences of debt in his own possession, or in that of others for his use, and is about to depart from the state without leaving property therein sufficient to satisfy the plaintiff's claim.

The plaintiff must give security to pay the defendant's damages if the order be wrongfully obtained.

An attachment against the property of the defendant may issue:—First, in an action upon contract for the recovery of money where the action is against a defendant, or several defendants, who, or some one of whom, is a foreign corporation or a non-resident of the state, or who has been absent therefrom four months, or has departed from the state with intent to defraud his creditors, or who has left the county of his residence to avoid service of summons, or who so conceals himself that summons cannot be served upon him; or who is about to remove his property or a material part thereof from the state, not leaving enough to satisfy the plaintiff's claims, or has disposed of his property, or is about to do so, with intent to defraud his creditors. Second, in an action to recover the possession of personal property, where it has been ordered to be delivered to the plaintiff, and when the property or a part thereof has been disposed of, or concealed, or removed, so that the order for its delivery cannot be executed by the sheriff.

LOUISIANA.—Women and non-residents cannot be arrested. No debtor can be arrested after judgment, to compel payment thereof, but a debtor may be arrested before judgment upon an affidavit that he is about to leave the state permanently without leaving sufficient property to satisfy the judgment which the creditor expects to obtain. A creditor may obtain an attachment of the property of his debtor in the following cases. Where the debtor is about leaving the state permanently, without there being a possibility of obtaining or executing judgment against him previous to his departure, or when such debtor has already left the state never to return, or when such debtor resides out of the state, or when he conceals himself to avoid being cited. It may also be attached in the hands of third persons in order to secure the payment of a debt, whether the amount be liquidated or not, provided the term of payment has arrived, and the creditor who prays for the attachment states expressly and positively the amount which he claims. The plaintiff must give a bond, with a surety, for the payment of all damage which may ensue to the defendant from the attachment if wrongful.

If a creditor know or suspect that a third person has in his possession

property belonging to his debtor, or that he is indebted to such debtor, he may make such a person a party to the suit, by having him cited to declare on oath what property belonging to the defendant he has in his possession, or in what sum he is indebted to defendant, even when the term of payment has not yet arrived. (Acts of 1839.)

MAINE.—Any person within the state may be arrested and held to bail, or committed to prison on mesne process, on any contract or judgment founded on contract, amounting to ten dollars, if the debtor is about to depart and reside beyond the limits of the state, with means more than necessary for his own immediate use, and the creditor or his agent will make affidavit to the above facts. In all actions not founded on contract, or on a judgment rendered upon contract, the original writ may run against the body of the defendant, and he may be thereon arrested and imprisoned or held to bail.

All goods and chattels not exempt at common law, or exempt from levy and sale on execution, may be attached to satisfy the judgment, both damages and costs, which plaintiff may recover. All real estate, liable to be taken in execution, may be attached on mesne process and held as security to satisfy any judgment. (Rev. Stats., c. 148, § 1 et seq.)

MARYLAND.—Any person having obtained a judgment, may take out an attachment against the real or personal estate, or rights of action of the defendant. Any creditor making affidavit that the debtor is indebted to him in a specified sum, producing evidence thereof, and that he knows or is credibly informed and believes that the debtor is not a citizen of the state, and does not reside therein, or that the debtor has actually fled from justice, or removed from his abode, with intent to injure or defraud his creditors, an attachment may issue against his real or personal property or rights of action.

No person can be imprisoned for debt. (Latrobe's Justice, 269.)

MASSACHUSETTS.—No person can be arrested and held to bail for any debt or demand arising on any contract, unless the plaintiff, or some person in his behalf, shall make oath before some justice of the peace, that the plaintiff has a demand upon the defendant, upon the cause of action stated in the writ, which the deponent believes to be justly due, and upon which he expects the plaintiff will recover ten dollars or upwards, and that the deponent has reasonable cause to believe that the defendant is about to depart beyond the jurisdiction of the court in which the writ is returnable, not to return until after judgment may probably be recovered, so that he cannot be arrested on the first execution, if any, which may issue on the suit. All property except such articles as are exempt from attachment at common law, may be attached upon the original writ, and held as security to satisfy such judgment as the plaintiff may recover.

MICHIGAN.—No person can be arrested on a demand arising from contract, except promises to marry, or for moneys collected by a public

officer, or for any misconduct, or neglect in office, or in any professional employment, unless the plaintiff or some other person make affidavit that there is a debt due the plaintiff from the defendant, specifying its nature and amount, as near as may be, for which the defendant cannot be arrested, and establishing that the defendant has property which he conceals or refuses to apply to the payment of his debts; or, that he has removed or disposed of his property, or is about to do so, with intent to defraud his creditors, or that he fraudulently contracted the debt in suit. (Rev. Stats. 604.)

Upon affidavit made by the creditor, or some person in his behalf, stating that, according to the belief of the deponent, the defendant is justly indebted to plaintiff in a sum therein mentioned, more than one hundred dollars, and that the same is due upon contract or upon a judgment rendered, and that deponent knows, or has good reason to believe,—either, that the defendant has absconded or is about to abscond from the state, or that he is concealed therein, to the injury of his creditors, or that he has disposed of or concealed any of his property, or is about to do so, or that he has removed or is about to remove any of his property with intent to defraud his creditors, or that he fraudulently contracted the debt on which suit is brought, or that the defendant does not reside in the state, and has been absent therefrom for three months immediately preceding the application, or that defendant is a foreign corporation, the clerk of the circuit court shall issue an attachment against the entire property of the defendant. (Rev. Stats. 514.)

Mississippi.—If any creditor shall make complaint, on oath or affirmation, to any judge of the supreme court, or justice of the peace of any county, that his debtor has removed or is removing out of the state, or so absconds or conceals himself that process cannot be served upon him, and further makes oath to the amount of his demand, an attachment may issue. A bond must be given by the plaintiff to secure the payment of costs and damages that the defendant may recover against him.

Arrest for debt is abolished.

Missouri.—Imprisonment for debt does not exist in this state.

Attachment may issue when the debtor is a non-resident, when he conceals himself or absconds, so that process cannot be served upon him, when he is about to remove his property out of the state, or has disposed or is about disposing of it, or has concealed or is about to conceal it, with intent to defraud, or when the debt was contracted out of the state and the debtor has absconded or removed his property within the state, with intent to defraud or hinder his creditors. In all these cases, excepting the first two, attachment may issue though the debt be not yet due.

Before attachment can issue, affidavit must be made by the plaintiff that the defendant is justly indebted to the plaintiff in the sum claimed after allowing offsets, stating on what account the debt was contracted, and that affiant believes and has good reason to believe in the existence of one or more of the particulars which entitle him to an attachment. If the defendant put in issue the truth of the affidavit, the plaintiff must prove the facts therein alleged, and must

give a bond, with one or more sureties, resident householders of the county in which the action is brought, in a sum double the amount of the claim sworn to, for the payment of any damages which may ensue from a wrongful attachment. Non-residents wishing to sue their debtors in this state by attachment, should send with the demand an affidavit setting forth the above facts, or one of them, and should provide the required security.

NEW HAMPSHIRE.—The following persons cannot be arrested under the laws of this state: any female upon a writ in an action of contract; any person on mesne process in any real action or action of ejectment; any executor or administrator for any cause of action against the deceased; any sheriff while in office upon any civil process. No person entitled to vote at town meeting can be arrested on the day when the meeting is held.

No person shall be arrested upon any writ or execution founded on a contract, unless the plaintiff or some person in his behalf shall make affidavit before a justice, on the back of the writ, that in his belief the defendant is justly indebted to him in a sum exceeding thirteen dollars and thirty-three cents, and that he conceals his property so that no attachment or levy can be made, or there is good reason to believe he is about to leave the state to avoid the payment of his debts. If any person be committed to prison by the officer or his bail, or upon surrender by his bail, he shall, unless he be bailed before judgment, be held in prison, until the expiration of thirty days after the rendition of such judgment for the plaintiff as execution may issue upon, unless sooner legally discharged. The defendant, when arrested, may require the officer making the arrest, to take him before two justices, one of the quorum. If the justices, on considering his affidavit and such evidence as may be adduced, believe he does not conceal his property and has no intention of leaving the state, they may order his discharge.

All property liable to be taken in execution may be attached and held as security to satisfy judgments. (Compiled Stats. §1 seq.)

NEW JERSEY.—No female can be arrested on any process issuing from a civil action. Any person held in custody in any civil action, or upon an attachment for not performing an award, or surrendered in discharge of bail, shall be discharged from arrest by the officer, if he make out and deliver a true and perfect inventory under oath or affirmation of all his property, and give bond to the plaintiff in double the amount claimed, that he will appear before the next court holden in the county where the arrest is made, and petition for the benefit of the insolvent laws. In case of forfeiture of the bond, the plaintiff may bring an action thereon, and recover debt, damages, and costs. (Rev. Stats. 325.)

If any creditor make oath or affirmation before the proper authority, that he verily believes his debtor has absconded from his creditors and is not resident in the state, then an attachment may issue against the property of the debtor wherever it may be found: and the writ binds the property of the defendant from the time of executing the same.

All conveyances of the property attached, made by the defendant pend-

ing the attachment, are void against the plaintiff, and the creditors who shall become parties to the attachment. (Rev. Stats. 48.)

New York.—A defendant may be arrested in this state under the following circumstances.

When the defendant has been guilty of fraud in contracting the debt or incurring the obligation for which action is brought, or in concealing or disposing of the property, for the taking or detention of which the action is brought. When the defendant has removed or disposed of his property or is about to do so with intent to defraud his creditors.

An order for the arrest of the defendant must be obtained from a judge of the court in which this action is brought or from a county judge. The order may be made where it shall appear to the judge, by the affidavit of the plaintiff or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned above.

Before making the order, the judge will require a written undertaking on the part of the plaintiff, to the effect that if defendant recover judgment the plaintiff will pay all costs, and damage consequent upon the arrest, not exceeding the sum specified in the undertaking, which must not be less than one hundred dollars. If the undertaking be executed by plaintiff without sureties, he must annex thereto an affidavit that he is a resident and householder or freeholder within the state, and worth double the sum specified in the undertaking over all his debts and liabilities.

The order may be made, to accompany the summons, or at any time afterwards before judgment, and it requires the sheriff forthwith to arrest the defendant wherever found, and hold him to bail in a sum named, and to return the order at a time and place therein mentioned to the plaintiff or attorney by whom it is subscribed or endorsed. This order the sheriff is bound to execute.

The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that the defendant shall at all times render himself amenable to the process of the court.

At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or the defendant may surrender himself to the sheriff, and the sheriff will detain him as upon an order of arrest.

No female can be arrested in any action, except for a wilful injury to person, character, or property.

The property of foreign corporations and of non-residents, absconding or concealed defendants, may be attached.

A warrant of attachment must be obtained from a judge of the court in which the action is brought or from a county judge.

The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of claim and the grounds thereof, and that the defendant is a foreign corporation, or a non-resident of the state, or has departed therefrom with intent to defraud his creditors or to avoid the service of summons, or keeps himself concealed with a like intent. An attachment may issue against

one or more of several defendants when the co-defendants are not liable to attachment.

Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded the defendant, and all damages he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

The warrant is directed to the sheriff of the county in which the defendant's property is, and requires him to attach and safely keep all the property of the defendant within the county, or enough to satisfy the plaintiff's demand, together with costs and expenses: the amount must be stated in conformity with the complaint.

The sheriff proceeding as in the case of absent debtors, must make and return an inventory of the property seized, or the proceeds of such as is sold to answer any judgment which may have been obtained, and subject to the direction of the court or judge, must collect and receive all debts, credits, and effects of the defendant.

The sheriff may also take such legal proceedings, either in his own name or in that of the defendant as may be necessary for that purpose, and discontinue the same under the direction of the court.

The rights or shares which a defendant, may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property of the defendant, in the state, is liable to attachment, and levy and sale on execution.

The execution of the attachment upon any such rights or other property incapable of manual delivery, is made by leaving with the president or other head of the association or corporation, or the secretary, cashier, or managing agent, or with the debtor or person holding the property, a certified copy of the warrant of attachment, with a notice showing the property levied on.

Whenever the sheriff shall, with a warrant of attachment or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching or levying upon the property, the person applied to shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of the corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by the corporation for the benefit of the defendant; or any debt owing to him. If the officer, debtor, or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such orders may be enforced by attachment.

North Carolina.—Upon any complaint, made on oath to any of the judges of the supreme or superior courts, or to any justice of a county court, by any person, his attorney, or agent, that any person indebted to him has removed, or is removing, out of the county, privately, or so absents or conceals himself, that the ordinary process cannot be served on him, and further swears to the amount of his debt or demand to the best of his knowledge or belief, an attachment may issue against

the estate of the debtor wherever the same may be found. An attachment may issue in favor of a resident of the state against the estate of a non-resident.

Clerks of the county and superior courts may issue attachments returnable to their courts, and may take bonds, and administer oaths in such cases (Act of 1850).

OHIO.—The constitution declares that no person shall be imprisoned for debt in any civil action, unless in cases of fraud.

A defendant in a civil action can be arrested either before or after judgment in the following manner, and not otherwise, except in proceedings for contempts, and suits brought by the state for fines and penalties.

An order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, made before any judge of any court in the state, or any clerk thereof, or justice of the peace, stating the nature of the plaintiff's claim, that it is just, and the amount thereof as nearly as may be, and establishing one or more of the following particulars.

That the defendant has removed or begun to remove any of his property out of the jurisdiction of the court, or that he has begun to convert any part thereof into money, with intent to defraud creditors; that he has property which he fraudulently conceals; that he has disposed of, or is about disposing of, his property, with intent to defraud; that he fraudulently contracted the debt, or incurred the obligation sued upon.

The affidavit must also contain a statement of the facts on which the belief in the existence of one or more of the above particulars is based.

The order of arrest will not be issued until there has been executed by sufficient sureties of the plaintiff, a written undertaking to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the arrest, if the order be wrongfully obtained, not exceeding double the amount of the claim stated in the affidavit. The order may accompany the summons, or be issued at any time afterwards, and before judgment (Stats. vol. 41, p. 79).

An execution against the person of the debtor, requiring the officer to arrest such debtor and commit him to the county jail until he pay the judgment, or is lawfully discharged, may issue upon any judgment for the payment of money when the judgment debtor has removed or begun to remove any of his property out of the jurisdiction of the court, with intent to prevent the collection of money due on the judgment; when he has property which he fraudulently conceals with the like intent; when he has disposed of any part of his property with a like intent, or to prevent its being taken in execution; when he fraudulently contracted the debt, or incurred the obligation on which judgment is rendered; or when he was arrested on an order before judgment and has not been discharged as an insolvent debtor, or the order has not been set aside.

An execution against the person of the debtor, except where he is still under arrest, or an order issued before judgment, can be issued only when the same is allowed by the supreme court, the court of common pleas, or probate court, or some judge of either, upon satisfactory proof of the existence of one or more of the particulars mentioned above; with the same conditions a justice of the peace may issue an execution (Stats. vol. 41, p. 139).

An order of attachment will be made by the clerk of the court, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing the nature of the plaintiff's claim, that it is just, the amount which the deponent believes the plaintiff ought to recover, and the existence of some of the grounds of attachment mentioned above. When the ground of attachment is, that the defendant is a foreign corporation, or a non-resident of the state, the attachment may issue without an undertaking. In all other cases, the plaintiff must give a bond with sufficient sureties approved of by the clerk, to the defendant, to pay all damages which may ensue from a wrongful attachment, not to exceed double the amount of the plaintiff's claim.

A creditor may bring an action on his claim before it is due, and have an attachment against the property of his debtor, when he will show by affidavit that his claim is just, that it will become due at a specified time, and that the defendant has disposed of his property, with intent to cheat, hinder, or delay his creditors, or that he is about to dispose of or remove his property, or a material part thereof, with a like intent. The order cannot be issued until the plaintiff give a bond for the payment of damages as above described. The plaintiff in such an action cannot have judgment until the claim be due (Stats. vol. 41, p. 94).

Pennsylvania.—Arrest is abolished in all cases of civil process, issuing in any action for the recovery of money due upon judgment or decree founded upon contract, or due on any contract, express or implied, except in proceedings as for contempt to enforce civil remedies, actions for fines, or penalties, or on promises to marry, on moneys collected by any public officer, or for any misconduct or neglect in an officer, or in the practice of any profession, or certain actions for both. In other cases, as when the debtor is about to remove any part of his property out of the jurisdiction of the court in which suit is brought, with intent to defraud his creditors, or has disposed, or is about to dispose of his property, or to secrete it with a fraudulent intent, or has rights in action, or interest in any public or corporate stock, or evidences of money due him, which he refuses to apply to the payment of any judgment rendered against him, or when he has fraudulently contracted the debt, or incurred the obligation in suit, he may be arrested.

Property of the defendant may be attached when he is about to remove any of it from the county with intent to defraud, or has disposed of, or secreted any part of it with a like intent, or is about to do so. Property may also be attached if the debtor, being an inhabitant of the state, absconds, remains absent from the state, confines himself in his own house, or conceals himself with design to defraud his creditors; or being a non-resident, if the debtor shall confine, or conceal himself within the

county, to avoid the seizure on process, and to defraud creditors. The property of a non-resident may be seized by virtue of a foreign attachment; the remedy, by that process, according to the custom of London, being now adopted, under some modifications, by statute in Pennsylvania.

Rhode Island.—In this state there is no exemption from arrest, except in the case of a female; and a female may be arrested upon execution issuing under a judgment founded on contract, not under seal, where the debt, or damages recovered, amount to fifty dollars or more; or, if the contract be under seal, for any sum.

Whenever a writ authorizing an arrest is delivered to a sheriff, and he cannot find the defendant, he shall attach his goods and chattels.

South Carolina.—Attachment may issue against the property of a non-resident debtor, or of a debtor who absconds, who is removing from the district, or who conceals himself, so that process cannot be served upon him (Acts of 1744 and 1788, Grimke's P. L. 187 and 315).

A debtor about to abscond before the maturity of the debt, may be held to bail (A. A. 1839, p. 62).

A debtor may be held to bail in any case where the debt exceeds thirty dollars and sixty-two cents, upon affidavit of the fact being annexed to the writ or process (Act of 1767, Grimke's P. L. 273).

Tennessee.—In this state imprisonment for debt does not exist.

Citizens of other states may sue either in the circuit court of the United States, or of the state. After judgment rendered, execution issues against the real and personal property of the defendant. It may be levied upon property, and a bond taken by the officer, with security for the delivery of sufficient property to satisfy the judgment on or before the first day of the term of court succeeding that in which execution issued. If this bond is forfeited, a writ authorizing a sale issues against the property of the defendant and his surety, or the officer proceeds to sell under the original execution, and if he fails to make the money by the second term after judgment, he and his sureties are liable.

Sureties and accommodation endorsers may obtain judgments on motion, without notice, against their principals, or co-sureties, for their proportion of the debt.

In all cases where a debtor or defendant has removed, or is about to remove, himself or his property, beyond the limits of the state, or is concealing himself or his effects, any creditor may attach his property. The attachment may be issued by a clerk of a circuit court, or by a justice of the peace (Acts of 1843, c. 29, and 1846, c. 108).

The property, debts, and other effects of non-resident debtors, being in the state, or if debts, owing by persons residing within the state, may be attached by any creditor, by bill in chancery, without first having obtained a judgment at law, and be held as security for the payment of the creditor's demand. In all cases of attachment the usual affidavit of

the amount due, and of the knowledge or belief of the creditor that the defendant is about to do, or has done some act rendering his goods liable to attachment, must be filed, and a bond given conditioned for the payment to the defendant for any damages he may incur by reason of a wrongful prosecution of the action.

Sureties and creditors, after obtaining judgment, can recover from any person who may have received usurious interest from their principal or debtor, the amount so received above legal interest; and this excess, in all cases, constitutes a fund in the hands of the usurer for the satisfaction of *bonâ fide* creditors and securities (Acts of 1844, c. 182).

TEXAS.—The constitution provides that no person shall ever be imprisoned for debt.

When a sheriff returns upon a summons that the defendant is not to be found in the county, the plaintiff may sue out a judicial writ of attachment against the property of the defendant; this attachment is discharged by the appearance of the defendant. The judges and clerks of the district courts, or justices of the peace, may issue original attachments, if the plaintiff, or his agent or attorney, make affidavit that the defendant is justly indebted to him, stating the amount of the debt; also, that the defendant is not a resident of the state, or is about to remove, or secretes himself, or is about to remove his property from the state; and that thereby the plaintiff will probably lose his debt, and that the attachment is not sued out for the purpose of injuring the defendant.

A bond must at the same time be given, with sureties, payable to the defendant, in double the amount sworn to be due, conditioned that the plaintiff will prosecute his suit to effect, and pay such damages as shall be adjudged againt him, for wrongfully sueing out such attachment (Hartley's Dig. Acts 22, et seq.).

VERMONT.—No female can be arrested or imprisoned on any process founded upon contract.

No person, a resident citizen of any of the United States, can be arrested or imprisoned on any process issuing in an action founded upon contract, unless the plaintiff, his agent, or attorney, shall file, with the authority issuing the writ, an affidavit, stating that he has good reason to believe, and does believe, that the defendant is about to abscond, or remove from the state, and that he has secreted about his person, or elsewhere, money, or other property, to the amount exceeding twenty dollars, or sufficient to satisfy the demand upon which he is to be arrested.

Writs of attachment may issue against the goods, chattels, or estate of the defendant, and for want thereof, against his body (Compiled Stats., c. 31).

VIRGINIA.—Imprisonment for debt does not exist.

When any suit is instituted for debt or damages for breach of contract, on affidavit stating the amount and justice of the claim, that the defendant, or one defendant, is a non-resident, and that the affiant believes he has estate, or debts due him, within the county or corporation in which

the suit is, or that he is sued with a defendant residing therein, the plaintiff may thereupon sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount stated. (Va. Code, 601, 716.)

Wisconsin.—No person shall be imprisoned for debt arising out of a contract.

An attachment may issue against the property of a debtor when the plaintiff, or some one in his behalf, shall make an affidavit stating that the defendant is indebted to the plaintiff the amount of the debt, above offsets, and that the same is due on contract, judgment, or decree, and stating that the deponent knows, or has good reason to believe, either that the defendant has absconded, or is about to abscond from the state, or that he is concealed therein to the injury of his creditors, or that the defendant has disposed of or concealed, or is about to dispose of or conceal some of his property, with intent to defraud, or that the defendant has removed, or is about to remove some of his property from the state with a like intent; or that he fraudulently contracted the debt; or that he is a non-resident, or that the defendant is a foreign corporation. The above applies to attachments issuing from the county and circuit courts, where the amount claimed exceeds one hundred dollars over and above offsets. In justices' courts, under similar circumstances, an attachment may issue when the amount due, as stated in the affidavit, above offsets, exceeds five dollars, and the defendant resides in another county, and above one hundred miles from the residence of the justice.

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## THE QUESTION OF CAPITAL PUNISHMENT.

Perhaps there is no legal question which has been so thoroughly and extensively discussed as that concerning the death penalty; no law which has been enacted, repealed, and re-enacted, as has that of Capital Punishment. The expediency or inexpediency of most legal enactments, is determined by a comparatively short discussion, or, at the farthest, by a few years' experience. But in the case of capital punishment, reason and experience seem alike in vain; each new statute leaves the question still open, and the discussion waxes louder and more earnest at each new step in legislation. Neither party in the debate are able to see any reason on their opponent's side. Both wonder that the world remains so long in doubt. Each finds new strength even in the arguments of the other. In some instances, both claim the same fact as giving weight to their arguments; such, for example, as the great age of capital punishment. "Capital punishment," say its advocates, "has received the sanction of unbroken custom from time immemorial. It has come down to us endowed with all the sanctity of the common law;—nay, with as much more as its age is greater." Its opponents, on the other hand, consider capital punishment differently. "It is a relic," say they, "of the barbarous times from which it sprang; well fitted for the semi-civilized Jews, surrounded by, and in constant communication with

barbarous nations; not ill-suited to the dark ages, when fine and imprisonment were impracticable, and the value put upon human life was so much lower than it is now; but unnecessary and barbarous at the present time, when so many other modes of punishment may be substituted in its place. Its age is no argument in its favor. If we never alter the usages of the past, we can never improve them in the future." Thus between the two, the impartial observer is puzzled to know whether to look at it with reverence for its old age, as does the one, or with pity for its weakness, and impatience for its death, as does the other.

In another respect also, the question of capital punishment is very peculiar. The mere expediency or inexpediency of a law is generally considered sufficient to determine the question of its enactment. But on the very threshold of this discussion, before the question of expediency has arisen, we are met by the supporters of capital punishment with the declaration that the death penalty is divinely enacted. We propose, then, to consider these two distinct questions:—Is Capital Punishment commanded by the law of God? and,—Is it expedient?

First. *Is Capital Punishment commanded by the law of God?*

There are, throughout the whole of the Old Testament, very severe denunciations of the crime of murder. Under the Mosaic dispensation, it was universally punished with death, and the Mosaic law abounds with particular directions for the execution of the murderer. The text upon which the supporters of capital punishment chiefly rely, however, is the familiar passage, Gen. ix. 6, Whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man.

It is doubtful whether this was ever intended as a command. From its form, it might equally well be intended as a prophecy, a mere statement of the future.

Granting, however, that the verse in question is a statute, and unrepealed, there still remains another point to be considered, whether it is binding upon us at the present day; whether indeed it was addressed to us, or ever intended for our observance. The verse is peculiar. It contains not only a command, but also the reason for the command; "For in the image of God created he man." Both the statute and the cause of its enactment are given; and it is argued that so long as the reason continues, the statute remains binding. That is, it is laid down as a general principle, that laws retain their authority as long as the reason for their enactment continues to exist. The upholder of capital punishment does not, perhaps, expressly state this principle, but it is no less the foundation of his argument because it lies hidden from view beneath the structure which it supports. What is termed the "Bible argument" for capital punishment, stated in a syllogistic form, stands thus:—

I. It is a general principle respecting laws, that they retain authority as long as the reasons on which they are founded retain their force, unless indeed they should be expressly repealed.

II. The legal enactment stated in Gen. ix. 6. has not been repealed, neither has the reason for it lost its force. Therefore,

III. The law is at this day of binding force upon the human race, to whom it was addressed.

Without discussing further its statutory character, its universality, the

question of its repeal, or the binding force of the reason which is given for its enactment, we purpose to discuss the principle upon which the argument is founded, or in logical language, the major premiss of the syllogism.

Does the force of a law depend upon the reason of its enactment? Plainly *not*. The *wisdom* of the law does indeed, but not its *force*. A *resolve* rests upon a reason. It will not survive the reason which gave it birth, and other things unchanged, will live as long. But a *law* derives no force from the reason which called it forth. A law enacted by competent authority for an unwise or fanciful reason is not thereby invalidated: nor is a law enacted by incompetent authority valid, if the reason for its enactment be ever so good. It may be true, that human laws may be so unreasonable as to be held void, but this is because human legislators have not authority to enact a law which contravenes the general reason of mankind. Laws in general, however, receive their binding force, not from the reason for their enactment, but from the authority and will of the enactor.

The scriptural law of capital punishment may therefore have lost its force in one of two ways.

I. By an expressed or implied change of the Divine determination as embodied in the enactment. This is a repeal of the law; of this there is no evidence.

II. By surrender or expiration of the authority in virtue of which God enacted it. This authority cannot of itself have expired, for as it is absolute, so is it eternal. But he may, of his own free will, have surrendered or abandoned it. Has any such surrender taken place?

During the Old Testament dispensation, God acted in a double capacity. He was not only the moral governor of man,—he was also the civil ruler. He was not only God, as we understand that term,—he was also king, emperor, legislator. The laws were enacted in his name, and executed by his authority. He is not, in a similar manner, the civil head of the United States. He has resigned the right of making civil laws to man himself. It is true that he might have the authority to make civil laws—that is, if he chose to exercise it. But he does not; and until he does, the laws he has made in his civil capacity are not of binding force; since he has ceased to be a civil ruler, and has delegated his authority to other powers. When or how he did this, matters not. If any one is inclined to doubt it, it is perhaps difficult of direct proof. All America, however, must hold, that we are living under a republic, not under a theocracy; that our civil laws are enacted by ourselves, not by God; that the position of the Divine Ruler in regard to us is very different, not only in the circumstances, but in the very nature of his government, from his position towards the Jewish nation;—in a word, that God has abdicated his civil throne in favor of man, reserving to himself the enactment and enforcement of moral laws.

It remains then to be determined, whether the law of capital punishment as given by God to Noah is moral or civil. If moral, it is still in force; if civil, it expired whenever God surrendered to man the right to enact his own civil laws. It makes no difference whether the law is Mosaic or Noachic. These are historical classifications that have no more to do with the force of laws, than has the binding of the volumes of

State Statutes to do with their validity. The ten commandments are Mosaic; their validity is almost universally acknowledged. The directions of God concerning the ark are Noachic; and Noah is the only one who ever obeyed them, or was ever intended to. The only question is this. Is the law in question moral or civil? If moral, it is still binding; if civil, it has lost its force. To determine then which of the Old Testament laws are moral, and which are civil, we submit the following test:

*Those laws, the execution of which God reserved to himself, are moral; those, the execution of which he intrusted to man, are civil.*

The only means of proving this test to be reliable, is, perhaps, by applying it in many instances.

We shall then find that the execution of those laws which are universally considered moral in their nature, is reserved by God for himself; the execution of those generally admitted to be civil laws, is intrusted to man.

The punishment is generally, perhaps, at the direction of God, but not immediately by God himself. For example;—the law, "Thou shalt not take the name of the Lord thy God in vain," is a moral law. Its enforcement is reserved for God. "For the Lord will not hold him guiltless, that taketh his name in vain." But the law, "He that blasphemeth the name of the Lord, he shall surely be put to death," Lev. xxiv. 16, is a civil law. Its execution is reserved to the people. "All the congregation shall certainly stone him." The Law, "Honor thy father and mother" is a moral law. God has reserved the execution of it to himself. "That thy days may be long upon the land, which the Lord thy God giveth thee." But the particular statute found in Ex. xxi. 15 is a civil law, and no longer in force.

(So also compare Ex. xx. 3, 6, with Ex. xxii. 20; Ex. xx. 7, 11, with Ex. xxxi. 14; Ex. xx. 14, with Lev. xx. 10. The examples are without number. Those referred to, however, serve to illustrate the truth of our test.)

So much as this is clear; that the various statutes against crime found in the Old Testament, do not, as a whole, form a rule by which we can be guided. Certainly there are but few who would wish profanity, Sabbath-breaking, idolatry, to be punished with death by the law of the land.

What now is the character of the law of capital punishment delivered to Noah? Is it a moral or civil law? According to our test it is plainly civil; for its execution is intrusted to man. "By man shall his blood be shed." In this it is different from the law, "Thou shalt not kill," the execution of which is reserved by the Divine Governor to himself. The difference is exactly the same as in the instances of those laws against profanity, Sabbath-breaking, and the like, which we have already quoted.

In short, the law given to Noah (if one at all) is a *civil* law. It may have lost its force by the expiration of the authority in virtue of which it was enacted; which was the authority exerted by God as a civil ruler. That authority has expired, inasmuch as God has ceased to be a civil ruler, and has delegated to man his civil authority. The law in question has consequently lost its force; in a word, it is obsolete.

SECOND. *Is capital punishment expedient?* That is, does it accomplish the true objects of punishment in the best way?

The true objects of punishment are chiefly the protection of society

from future crime, and the reformation of the criminal. Besides these two objects of punishment, two others are not unfrequently added, viz. reparation of the injury, and the exemplary reformation of others. The first of these, whether a proper object of punishment or not, can never be attained in the case of murder.

The second, the exemplary reformation of others, is attempted by society only because it thereby protects itself from the future crime of others. The protection of society, therefore, which should be the main object of punishment, is two-fold; protection from others, and protection from the criminal himself.

It is the theory of punishment to prevent crime by coupling with it fear. The great problem is to awaken in the heart of every man tempted to commit a crime, the most effective possible fear, that if he yields, a serious evil will fall upon him. It is by the *terrors* of the law, that we deter men from crime. Now in estimating the effect of fear upon the mind, we must carefully distinguish between a *great fear* of an evil, and a fear of a *great evil*. The fear may be very great, may rise almost to a certainty, yet the evil dreaded may be very slight. Or the fear may be weak, and the calamity contemplated overwhelming.

Thus a statute may awaken a fear of an enormous penalty, while the fear itself may be very slight. And the advantage anticipated from the substitution of imprisonment in the place of death, is, that though the calamity would be lessened, the fear would be increased.

It is a true principle in criminal legislation that a penalty should be so graduated that the fear may be as great as possible, and the penalty so great only as is consistent with the certainty of its infliction. For men are always ready to take risks. They are not so much actuated by remote calamities, as by immediate inconveniences. More people have been deterred from going abroad in a thunder-storm, by the certainty of getting wet, than ever were by the risk of being struck by lightning. Such is human nature. Therefore it is not the *heaviest* penalty, but the one *most sure to be inflicted*, which is most efficient.

In the present state of public opinion, the infliction of capital punishment has become uncertain, and the penalty is therefore inefficient. The public mind is filled with disapprobation of capital punishment,—with a dread that innocent persons may be put to death,—with a prejudice against circumstantial evidence. Thus capital convictions are more difficult than they should be. Jurors are now constantly found who do not hesitate to say, that they would not upon any evidence convict a man of a crime punished with death. Others, whose scruple is less strong, still feel the same bias. So do judges, and advocates, and spectators. The result is, that the evidence of a capital crime, after being given by sympathizing witnesses and prosecutors, favorably, because the penalty is death;—and attacked by the defendant's counsel violently, because the penalty is death;—and sifted by the judge scrupulously, still because the penalty is death;—the evidence, or so much of it as makes its way through all these barriers, is at last admitted to a *timid* jury, who dread to consign a fellow-man to death. They *think* him guilty,—they would readily imprison him, but they fear to hang him, and so they set him free. Nor are these feelings unnatural or worthy of blame. It is a mark

of our civilization that we are thus tender of human life. The law should respect this feeling, not labor to eradicate it. Though human law guides the current of public opinion, yet public opinion should form the law; as the banks of a river confine the stream within its course, yet are themselves cut and shaped entirely by the waters they inclose.

The objection to capital punishment, therefore, is, that the greatness of the penalty prevents the certainty of its execution; and its uncertainty defeats, not only the protection of society from the criminal himself, but also its protection from others. For so long as capital punishment acts as a preventive to capital convictions, so long as the maxim, "it is better that ten guilty men should go free, than that one innocent man should suffer," constitutes, as it does at present, the principal legal lore of a jury,—so long there is danger that criminals by their impunity will not only be encouraged themselves to go on in crime, but will encourage others also. The fallacy in the argument in favor of capital punishment is, that its advocates argue as if the question were, "Ought every *murderer* to be hung?" Whereas its only practical form is, "Shall every man *convicted of murder* be hung?" Death may be a *just* penalty, but it is an uncertain one. By substituting for it imprisonment, it is urged that we shall lessen the penalty, but greatly increase the fear of it, by the increased certainty of its infliction. Thus lighter strokes, but more of them, shall build the protecting wall around our homes more surely.

Such are some of the arguments of the opponents of capital punishment, who propose to increase the fear by lessening the penalty, and to deter from crime by making the punishment more certain. There must, however, be some limit. The punishment must be sufficiently fearful to overawe and terrify, yet must not be impracticable. The question is therefore a question of gradation of punishment. To be effectual, the punishment must be both *certain* and *fearful;* to make it certain by making it insignificant, is as unwise as to make it terrible at the expense of its certainty. It will be the object of the wise legislator to gain the right medium, so that it may neither be uncertain nor insignificant; and it is scarcely to be wondered at, that so much difficulty should be found in determining properly what that medium is. Of all crimes, murder is by far the worst, and excepting treason, which is as it were a civil murder (the conspiring the death of the state), the most injurious to society. It is wholly irreparable, above all other crimes.

It seems, therefore, proper to take special care in guarding from such an injury, and not unwise to mark a crime so heinous in its character, and so peculiarly injurious in its results, with a punishment equally peculiar, which shall stand out from among all other punishments, as one *sui generis;* as the crime which it punishes does, from among all other crimes. This, then, is one of the great uses of capital punishment. It is not so much that it raises a serious fear of death in the mind of any particular individual tempted to commit murder, but that it gives a peculiar and terrible prominence to the crime which it punishes. It is an act of civil excommunication, whereby society declares the offender irreformable, itself endangered by his existence, the ties by which society was bound to protect him dissolved, his rights gone, and himself outlawed. Other punishments may have in view the reformation of the offender;

this abandons the criminal as hopeless; the only thing to be done, being to expel him from the world as soon as possible. It is not death merely, but this virtual abandonment of the offender, which gives efficacy to capital punishment. It is claimed then, by the supporters of capital punishment, that the death penalty declares, as no other punishment can, the peculiar abhorrence with which society regards murder; and this public and solemn expression of the peculiar hatred which the law has for murder, induces similar feelings in the mind of the community, and strengthens those which nature has already implanted. So that the great benefit of capital punishment is not that it awakens fears of death in particular individuals,—though this is important,—but that it builds up and strengthens a public opinion against murder, which in fact is a better preservative from crime than the heaviest penal laws. And this public opinion is built up, it is noticeable, by the greatness, not by the certainty of the penalty; by the existence, not by the execution of the law. These, then, are the two more important arguments for and against capital punishment. The opponents of the death penalty insist upon its uncertainty, and consequent insufficiency to awaken terror. Its defenders rest upon its salutary influence in giving, by the peculiarity of the punishment, a peculiar prominence to the crime which it punishes.

As to the second object of punishment, the reformation of the criminal, this surely is not contemplated by capital punishment. And its advocates seldom claim that it is. Occasionally, indeed, some one urges that the apprehension of approaching death, awakened suddenly in the breast of the condemned, has a valuable tendency to accomplish a reform in his character. When a man has arrived at the gallows, a reform in his *conduct* is valueless. It is only that deep and permanent reform of heart, which may fit the rejected of man to be the accepted of God, which can then be desirable. Now it is not true that a sense of approaching death will in general accomplish the reform of the heart. The fear of death is not a reformatory fear. It is a blow which is more likely to stun the sleeper upon whom it falls into a dreadful insensibility, than to awaken him to life. It hardens quite as often as it subdues. And even the faint shadow of penitence which the approach of death sometimes casts across the human heart,—how quick it vanishes, when the dark fear which it casts is removed, and rays of bright hope stream uninterrupted down again. The experience of the world shows that the simulated penitence and reform, which spring from the fear of death, is unreliable. It is not true then that the death-penalty either directly or indirectly tends to reform the offender. However useful capital punishment may be to society, it is not a blessing to the offender.

We propose to finish this article with a short account of the state of the laws respecting capital punishment at the present day, together with a few statistics comparing the effects of capital punishment with those of perpetual imprisonment.

In Russia, exile to Siberia was substituted for capital punishment above a century ago, by Queen Elizabeth. In a country where everything depends upon the will of the sovereign, no law is unchangeable. Some criminals have consequently been executed since the repeal of the law; but the legal punishment is exile to Siberia.

In Belgium, capital punishment is repealed. No execution has taken place there since 1830. In England, the number of capital crimes has been reduced, within the last century, from 160 to a comparatively small number. In this country, capital punishment is generally confined to murder and treason; in some states arson also is punished with death. In Maine, the criminal, when convicted, is to be imprisoned for one year, and after that time until the governor and his council, upon a certified copy of the proceedings in the case, shall issue an order under the great seal, for his execution. It is not made obligatory on the clerk, however, to send any record of the proceedings, nor upon the governor to issue any warrant thereupon; and the consequence is that no criminal has been executed in Maine, since 1835. The law is similar in Louisiana, Massachusetts, and Vermont. In the latter state no execution has taken place for thirty-nine years. In Rhode Island and Michigan, capital punishment has been repealed. In the other states of the Union it is still in force.

Capital punishment has been repealed for so short a time in Rhode Island and Michigan, that little reliance can be placed upon statistics in either of those states. H. Taylor, secretary of that state, says, in a letter dated Dec. 1853: "I have seen no evidence of the increase of crime in consequence thereof (referring to the repeal of capital punishment), nor do I believe that any well informed citizen of our state will contend that there has been an increase."

The effects of capital punishment in England are thus stated in a letter by Robert Rantoul to the Governor and Legislature of Massachusetts.

"The capital crimes created by statute bear date as follows: four under the Plantagenets, twenty-seven under the Tudors, thirty-six under the Stuarts, one hundred and forty-six under the House of Brunswick.

"More crimes were denounced as capital during the reign of George III. than in the reigns of all the Plantagenets, Tudors, and Stuarts combined. The advance in crime was never so rapid as in the latter part of the reign of George III. In 1814 the committals in England and Wales were 6,590; and in 1817 they were 13,392. *They had more than doubled in three years.*"

The following table from the same source exhibits the effects of capital punishment as experienced in Belgium.

*Number of Convictions for Murder, and Whole Number of Executions, in Belgium, from 1799 to 1834 inclusive, divided into eight nearly equal periods, with the average of convictions and executions per year.*

| Periods. | Executions. | Convictions for Murder. | Executions per Annum. | Convictions for Murder per Annum. |
|---|---|---|---|---|
| 4 years to 1799 | 137 | 103 | 34 | 26 |
| 5 " " 1804 | 235 | 150 | 47 | 30 |
| 5 " " 1809 | 88 | 82 | 18 | 16 |
| 5 " " 1814 | 71 | 64 | 14 | 13 |
| 5 " " 1819 | 26 | 42 | 5.2 | 8.4 |
| 5 " " 1824 | 23 | 38 | 4.6 | 7.6 |
| 5 " " 1829 | 22 | 34 | 4.4 | 6.8 |
| 5 " " 1834 | | 20 | | 4 |

"It appears from this table that while executions increased, murders increased. Executions reached their highest point in 1801–2, averaging for those two years, 68 a year; and murders reached their highest point one year later, in 1802–3, averaging for those two years 41 a year. After executions declined, murders also declined, until they averaged but four a year. If a diminution of the average of murders, while there were no executions, to *less than one tenth* the average of 1802–3, does not show a sufficient change, in only thirty-two years, to warrant a favorable inference for the modern practice, it is difficult to imagine any facts short of the cessation of crime altogether, from which such an inference might be drawn. Observe also the uniformity between the falling off in the number of convictions, and in that of the executions for murder."

Now these statistics do not show such an increase in capital crimes upon the repeal of capital punishment as would make it appear that the death penalty is necessary for the preservation of the state, or of its individual members. On the contrary, with a diminution of the executions, there is a proportionate diminution of convictions; and with an increase of capital punishments, there is a corresponding increase of capital crimes.

In this short view of the argument on both sides of this controverted question, we have not aimed to express our individual convictions so much as to acquaint our readers with the present state of public opinion, and of legislation upon the subject. Since it is not likely that the death penalty will soon be given up by its friends, or that the advocates of reform will soon cease to urge its abolition, we may perhaps expect that the question will acquire more importance in the future than it has ever in the past.

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## RESTRICTIONS OF COMMON CARRIERS' LIABILITY.

That there is a growing tendency in our courts to release as far as may safely be done the restrictions to which common carriers were subjected by the ancient common law is evident. It is true that our supreme court, in *Gould* vs. *Hill* (2 Hill, 623), declared that a common carrier could not limit his responsibility by express contract. But in the case of *Parsons* vs. *Monteath*, lately decided in the supreme court, the foregoing decision was reversed; although it remains to be known whether the court of appeals will sanction the doctrine in question. The goods delivered to the carrier in the last mentioned case were burned without the fault of the carrier, and upon an action brought against him it was shown that the goods had been receipted to the owner as follows:

"Received, goods, etc., which I agree to transport (the danger of the lakes, of fire, breakages of looking-glasses, leakage of oil and acts of Providence excepted), at the rate of, etc." And by virtue of this receipt the carrier was held to be discharged from liability in consequence of the burning of the said goods.

This decision accords with the spirit of English legislation and adjudication in respect to common carriers.

# CONDENSED REPORTS OF RECENT CASES.

## MUNICIPAL CORPORATIONS—STOCK SUBSCRIPTIONS.

**It is within the power of a State Legislature to authorize a municipal corporation to subscribe for the stock of joint stock company, and to raise funds to pay for such subscription by levying taxes upon the individual members of the corporation.**

[*Police Jury Right Bank of the Parish of Orleans* vs. *The Succession of John McDonough.* Louisiana Supreme Court: Official Report not yet published.]

This case drew in question the power of the legislature of Louisiana to authorize the plaintiffs, a municipal corporation, to subscribe to the stock of public works; a subject now of very great public importance.

The legislature of Louisiana, in 1852, passed a general act, authorizing the police juries and municipal corporations of the state to subscribe to the stock of corporations undertaking works of internal improvement, under the laws of Louisiana. The act provided that the ordinances for making such subscriptions should contain a levy of a tax on the landed estate within the corporation, to pay the subscription; and also that no such ordinance should be valid until approved by a majority of the voters of the corporation, at a special election; and further, that the stock should not belong to the corporation, but to the tax-payers; each of whom should receive a certificate equal to the amount of his tax paid.

The plaintiffs in this action, assessed a tax on lands within its jurisdiction, to meet its subscription duly made to the stock of the New Orleans, Opelousas & Great Western Railroad Company; and brought this suit to collect a portion of said tax. The answer of the defendants raised the question of the constitutionality of the statute and ordinance.

SLIDELL, C. J.—The argument here has been confined to the question of the constitutionality of the statute and ordinance, which we have considered with the care due to the great public importance of the subject.

The right of the legislature to delegate the power of taxation, for local purposes, to municipal authorities, is established in our state and in our sister states, by an uninterrupted train of legislative precedents and judicial decisions. The necessity and propriety of such delegations are obvious. The supreme jurisdiction has not leisure nor information to take cognisance of and manage all the matters which concern a particular locality. The interests of a particular town or country are best understood, and can be best administered, by its inhabitants or persons of their choice, selected under legislative authority. Our own statute books, and those of our sister states, are filled with acts creating these political corporations, whose powers are emanations from the legislative will, and subject to be enlarged or curtailed by their will from time to time, as the wisdom of the legislature may dictate.

But it is said that, in the present case, the legislature has attempted to delegate to municipal bodies a power to tax for a purpose not local; that the

constitution intended to confine the raising of money from the people for general purposes, to one body, the general assembly of the state, and that body cannot evade the performance of the duty, and shift the responsibility upon others.

This makes it proper to inquire, what is a local purpose, and how far the particular enterprise which this taxation was intended to aid, could, as regards the municipal corporation which is plaintiff in the cause, be considered as concerning its local interests and welfare.

This question is not a new one. On the contrary, it has been frequently subjected to vigorous judicial investigation, and its answer may be satisfactorily found in the illustrations which are presented in decided cases.

A signal exercise of this legislative power was exhibited in a statute enacted in 1848, authorizing the city of Philadelphia, the county of Alleghany, the cities of Pittsburg and Alleghany, and the municipal corporations of Philadelphia county, to subscribe for shares of the capital stock of the Pennsylvania Railroad Company, to borrow money to pay therefor, and to pay the principal and interest so borrowed. The exercise of this authority necessarily entailed additional taxation upon the inhabitants of the places designated. Before that statute the right of a municipal corporation to subscribe for stock was strongly contested. A member of the bar whose reputation as a jurist is national, acting upon the invitation which was made by this court to the profession to afford us assistance in the important constitutional question before us, has favored us with an opinion, prepared with his characteristic ability. It is an opinion well worthy of perusal by those who desire to know the just limits of municipal power, when not aided by express legislation. But we are told by the Supreme Court of Pennsylvania that, after the enactment, no one has contested the right of those municipal corporations to subscribe for the stock, and on its faith millions of dollars have been subscribed. (*Commonwealth* vs. *Williams*, 1 Jones, 71; see also *Goddin* vs. *Crump*, 8 Leigh. Va. Rep.; *Talbot* vs. *Dent*, 9 B. Monroe, 526.)

If the decisions cited be true exponents of the law, as we think they are, their application to the present case is obvious. The contemplated railroad passes through the territorial limits of this corporation, and has one of its termini there. If the enterprise is successful, the results which have been experienced in other towns and sections of the Union may be realized here. Its facilities for commerce may be enhanced, an impulse to industry within its limits be given, its population be augmented, its land rise in value. Whether these prosperous results will ensue, is in the womb of the future. But it is evident that the legislature expected them, and it is clear that the police jury and a majority of the voters so thought. The legislature plainly declared such an enterprise to be within the range of their corporate purposes; the police jury, acting under the legislative sanction, declared by their ordinance their opinion that the measure would conduce to the interests of their locality, and a majority of the tax-payers have concurred in that opinion.

Whether their representation is false or well founded, is not, under such a state of legislation, a judicial question. We take it to be a well settled principle, that if the legislature can constitutionally exercise a

power, it is to be presumed by the judiciary, in just deference to a co-ordinate branch of the government, that in the particular case it was exercised discreetly, and with a deliberate and just regard to the interests of its citizens. (*Norwich* vs. *The County Commissioners*, 13 Pick. 62.)

The peculiar nature of this work certainly can make no difference in the question of constitutional power. A few years ago railroads were unknown. But if the legislature in former years had authorized the construction by a private corporation of an ordinary road traversing the State, and had given permission to the police juries through whose territorial limits it passed, to contribute to its completion, by taking stock, and by local taxation, if they thought it advantageous, we question whether any one in the community would have disputed such a grant of power upon the ground that such a road did not involve a local purpose. Surely the principle cannot be affected by the magnitude of the outlay, the extent of the enterprise, or the peculiar means by which the transportation of persons or property is to be effected. The subject of roads is a matter which, since the foundation of our government, has been submitted in some form by our legislature to the action of police juries, and this from the obvious consideration of their intimate connexion with local wants and local purposes.

Having thus considered the general power of the legislature to delegate to local political corporations the power to levy taxes of this nature, it remains to inquire whether the conditions with which this grant of power is accompanied vitiate the grant; whether any invasion of the constitutional rights of individuals is involved in the peculiar mode in which the exercise of the power delegated is commanded to take place.

The court considered that no objection could be successfully maintained to the details of the mode in which the power was allowed to be exercised, and affirmed the constitutionality of the act and ordinance, and the binding force of the tax.

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### TAXATION—REAL ESTATE.

**The pipes laid in the street of a city, by a gas company, under grant in their charter, are fixtures, and taxable as real estate.**

[*Providence Gas Company* vs. *Thurber*, 2 R. I. R., 15.]

This action was brought to recover back from the defendants as assessors of taxes in the city of Providence, a portion of the tax assessed upon the plaintiffs. The case was submitted upon an agreed statement of facts, from which it appeared that the defendants had assessed the plaintiffs for their gas pipes, laid in the streets of Providence, as for real estate. It was conceded on the one side that if they were real estate, the assessment was valid, and upon the other, that if they were not such, it was illegal. The only question was whether the pipes were fixtures, and therefore real estate.

GREEN, C. J.—We think the true rule is, that a personal chattel does

not become a fixture so as to be a part of the real estate, unless it be so affixed to the freehold as to be incapable of severance from it without violence and injury to the freehold. And if it be so annexed, it is a fixture whether the annexation be for use, for ornament, or from mere caprice. (His honor derived this rule from the following authorities: *Farrar* v. *Stackpole*, 6 Greenl. 157. *Voorhies* v. *Freeman*, 2 Watts and S. 115. *Pyle* v. *Pennock*, ib. 390. *Gale* v. *Ward*, 14 Mass. 352. *Smith* v. *Thompson*, 9 Conn. 67. *Walker* v. *Sherman*, 20 Wend. 638.) In the present case the pipes are sunk in the soil of the street, to the depth of several feet under the surface, and cannot be removed without digging up the earth, and if the Gas Co. owned the land in which the pipes were laid, we should have no doubt they would be fixtures.

But being laid in the public streets, by consent of the Board of Aldermen, under power granted to the corporation by the second section of their charter, the question is whether such annexation gives them the character of fixtures.

The charter of the corporation is liable to be repealed by an act of the General Assembly, whenever that body shall think proper to pass such an act.

On the part of the plaintiff, it is contended that the power was a mere license, revocable at the will of the General Assembly, and the pipes, being laid under this license, cannot thereby become fixtures, and the case was likened to a class of cases, in which it has been held that if A erect a building on the land of B by parole license from B, such building is a personal chattel (*Ashmun* v. *Williams*, 8 Pick. 402. *Marcey* v. *Darling*, 8 Pick. 288. *Aldrich* v. *Parsons & Latham*, 6 N. H. Rep. 555.)

If these pipes had been laid in the land of an individual by parole license, they would not become fixtures thereby. But if the owner had granted by deed the right in fee to lay the pipes through his land, they would be fixtures, because the annexation would be under legal title.

Is the grant of power contained in the charter, when executed, of no more effect than the parole license of an individual, revocable at his will? Are the corporation to be considered as tenants of their charter and of all the rights and property they hold under it, at the will of the General Assembly? Nearly all the charters which have been granted in Rhode Island for many years past are subject to repeal, especially banking and manufacturing corporations. A deed of land to such corporation and their successors conveys a fee, just as much as if they were not subject to repeal. And so corporate rights and franchises generally, under a repealable charter, are the same until the charter is repealed, as if not subject to repeal, and such is the case with the rights and franchises of the plaintiffs.

What then is the nature of the right which the plaintiffs take under their charter? We think, when exercised, it is an easement,—an incorporeal hereditament, like the right of a railroad company to build and occupy their road, or a canal company their canal, under the provisions in their charter.

The court considered that this view was well supported by the following cases, in which similar easements vested in companies have been

held taxable as real estate. (*Binney's Case*, 2 Bland, Ch. R. 145. *Boston Water Power Company* v. *City of Boston*, 9 Metc. 202. *Drybutter* v. *Bartholomew*, 2 P. Will. 127. *Buckeridge* v. *Ingram*, 2 Ves. Jr. 652. Co. Lit. 19. *Queen* v. *Cambridge Gas Comp.* 35 Eng. Com. Law R. 333. *Queen* v. *London, Brighton, and South Coast Railway Comp.* 3 Eng. R. 329.)

The pipes being annexed to the freehold, and the Gas Co. having an easement in fee, or right so to annex them and to use them, we think they are fixtures, and rightfully assessed as real estate.

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### TAXATION—STOCKS.

**As a general rule, every person is liable to be assessed for his *personal* property, in the state of which he is an inhabitant.**
**Stocks in corporations, are personal property within the rule.**

[The State *vs.* Ross; 3 Zabriskie's (N. J.) R., 517.]

One James Potter was assessed for taxes, and instituted these proceedings to determine the validity of the assessment. He owned and cultivated a rice plantation in Georgia, which he considered his place of residence or permanent domicil; he voted, and exercised other rights of citizenship in Georgia, and not in New Jersey. He, however, owned a house and establishment in Princeton, N. J., in which he resided, with his family, for five or six months in each year, during the sickly season in Georgia.

One of the assessments complained of, was upon his bonds of the Camden & Amboy Railroad Company, a corporation created under the laws of New Jersey, and having their road within the state.

GREEN, C. J.—The term inhabitant means something more than a person having a mere temporary residence. It imports citizenship and municipal relations. A temporary residence for the purpose of business or pleasure continued for days, weeks, or even months, while the party's domicil is elsewhere, and while he has no intention of becoming a citizen of this state, does not constitute an inhabitant. It is perfectly immaterial for this purpose whether he makes his temporary residence in his own dwelling, with his domestic establishment and retinue about him, or as a mere lodger in the house of another. The only question, presented by the exception, is whether the bonds, notes, stocks, or other property in action of persons not inhabitants of this state, are liable to taxation by our law; this debtor or corporation in which the stock is owned being within this state. The fact that the individual whose property is assessed is living temporarily within the state, cannot vary or affect his rights.

It cannot be denied that the language of our act is broad enough to cover the property thus circumstanced. It is true, as was contended on the argument, that the fourth section of the act does, in very terms, declare that the personal debts made liable to taxation by the act, shall include debts due from solvent debtors, whether on contract, note, bond or mortgage, public stocks and stocks in corporations whether within or

without the state. But it is apprehended that the whole office of this fourth section is to define the meaning and extent of the phrase "personal estate," used in the second section; that it applies exclusively to the inhabitants of this state. There is no phraseology in the act which, properly considered, includes the property in action of non-residents; and I am of opinion that the legislature did not design that the property in question should be liable to taxation: and this, mainly on two grounds.

1. Because every law must be presumed primarily to apply, when not otherwise clearly expressed, to the citizens of that state or the subjects of that government by which the law is enacted, and not to the citizens of other states or the subjects of other governments.

2. By the law under consideration, the legislature have declared that all the property in action of every citizen of this state, wherever it may be situate, shall be liable to taxation. They have legislated, upon the principle that property in action, having no visible location, should follow the domicil of the owner, and be subject to taxation there. Adopting this principle in regard to their own citizens, it is not probable that the legislature designed to repudiate it in regard to the citizens of other states. Such a course of legislation, besides its tendency to provoke retaliatory legislation by other governments, would operate unjustly and oppressively upon every individual living in one state and owning property in another, by subjecting him to double taxation. If a law be enacted in Georgia precisely similar to our own, it is certain that the prosecutor would be liable to taxation for this property as a citizen of Georgia, and if it be held liable to taxation in this state also, it must necessarily bear the burden of double taxation.

It cannot be presumed, in the absence of clear and explicit enactment, that the legislature designed to weaken the bonds of the Union by discouraging commercial intercourse and business relations between the citizens of our own and sister states. True, it may be objected that this construction leaves the property of inhabitants of other states to the protection of our laws without being amenable to taxation. In both cases the taxes are paid at the domicil of the owner, and the principle being universally adopted and applied, is just and uniform in its operation. There may be instances of deviation from the principle in the legislation of some of the states of the Union, but they constitute the *exception*, not the *rule*. The general rule appears clearly to be, that in regard to public taxes every person is liable to be assessed for his *personal* property in the state of which he is an inhabitant. And stock owned in incorporated banks, &c., by non-resident holders thereof, is not subject to the taxing power of the state. Indeed, the stock is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner, who, if he be a non-resident, is beyond the jurisdiction of the state and not subject to its laws. (Ang. & Ames on Corp., 4th Ed., § 458.)

The assessment is unlawful, and must be set aside.

Elmer, J.—It is undoubtedly the general rule of law that personal property follows the domicil of the owner (*Varnum* vs. *Camp*, 1 Green.

326. *State* vs. *Falkinburgh*, 3 Green. 320), although this rule is subject to exceptions and limitations.

Without meaning to dispute the power of the legislature to tax even a casual visitor in common with its permanent citizens, if it thinks proper unequivocally so to determine, the obvious impolicy of doing so in the cases of citizens of other states in the Union, and the general, if not universal, usage not to do so, are sufficient reasons for holding that such an intention cannot be inferred from the general language of the act in question. The assessor in this case, it would seem, did not attempt to assess the prosecutor for the whole of his bonds or stocks, but only for bonds of the Camden and Amboy Railroad Company, supposed to be held by him. If he was liable to be assessed for any bonds, he was liable to be assessed for all he owned. The bonds of a company incorporated under the laws of this state are no more "personal estate within this state," than the bonds of any other company or of any individual citizen or foreigner. If owned by a person whose residence is in this state, within the meaning of the act, then they are personal property within the state, otherwise not. I do not think that it is the meaning of the act that the citizen of another state who comes into this with his family, and lives for a few weeks or months in a lodging house or in his own dwelling, with the intention of returning, should be considered as residing in the township or ward in which his dwelling happens to be situate, so that he is liable to be taxed for bonds or other personal property, having no proper locality within this state.

Potts, J.—The act concerning taxes (Rev. Stat. 1003), and the supplement thereto (Pamph. L. 1851, p. 271), use the word "inhabitant" as the designation of the class of persons liable to taxation in this state. The word, as defined by lexicographers, means one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. And where the question is one upon which certain municipal privileges and obligations depend, such as taxation, settlement, and voting, this definition is generally adopted. It is very clear that for these purposes a person cannot be considered an inhabitant of more than one state at one and the same time. And if in this case Mr. Potter was a legal voter, was liable to a personal tax, and had a legal settlement in Georgia, it seems quite certain that, for these purposes, he was not an inhabitant at the same time of Princeton, in New Jersey. (*Cadwalader* v. *Howell*, 3 Harr. 138; *Guier* v. *O'Daniel*, 1 Binney, 349; 21 Bos. & P. 230; 5 Ves. 750; 3 Merivale Rep. 67; *Harvard College* v. *Gore*, 5 Pick. 369; *Sears* v. *City of Boston*, 1 Metcalf, 250.) There can be no doubt that he is, in contemplation of law, an inhabitant of Georgia; and that his residence, his legal domicil, is there.

Is he liable, then, to pay a tax upon these bonds in this state? The general rule in reference to personal property is, that it follows the person; and wherever the domicil of the proprietor is, there the property is to be considered as situate. (Story's Conf. of Laws, § 379, and cases there cited.) And this principle is adopted in the supplement to the act concerning taxes. As, therefore, Mr. Potter was not, at the time the assess-

ment was made, in contemplation of law an inhabitant of Princeton, and had no legal residence there, he was not either upon general principles, or by the language of the statute, liable to be assessed there for any bonds or other choses in action which he held; and the assessment upon the bonds, of which he complains, was clearly illegal.

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TAXATION.—SITUS OF PERSONAL PROPERTY.

That rule of law which regards the *situs* of personal property, as following the person of the owner, ought not to be applied in questions of taxation.

[*New Albany* vs. *Meekin*; Indiana Supreme Court, November, 1852. Official Report not yet published.]

This action was brought by the city of New Albany, to recover taxes assessed upon the defendant, and the cause was submitted upon a statement of facts.

The charter of the city empowered the Mayor and Council to assess the defendant for all lands, goods, chattels, &c., &c., "*which are within the city.*" The defendant had been assessed under this provision for his interest in a certain steamboat. The other owners of the boat were not residents of the State of Indiana. The boat herself was employed in running on the Ohio and Mississippi rivers, and occasionally touching at New Albany; and when not running, she had been laid up at points not in New Albany. It was the tax upon the defendant's interest in this boat that the plaintiffs sought to recover. The defendant claimed that the ownership was not taxable.

By the Court.—The city has power to tax property situated within her limits, and we have therefore only to determine whether the steamboat in question, or the share of it belonging to the defendant, is thus situated.

We shall not attempt to lay down a general proposition, specifying what property is, and what is not, situated within the corporation of New Albany, but shall confine ourselves to the article in this suit subjected to taxation—and we think that neither the steamboat, nor the share of the defendant in it, is within the city. It is certainly not *actually* there, and we think not constructively, within the meaning of the charter. We do not think that for the purposes of taxation, a court is authorized to apply the rule of law governing the personal estate of deceased persons, which regards its *situs* as following the person of the owner. Surely no one would risk asserting the general proposition, that under the charter of New Albany, all the personal property owned by every resident of that city is embraced, or, that if a citizen of New Albany has a portion of a steamboat, plying on some river in California, or in a flock of sheep kept upon some farm in Kentucky, or in some part of Floyd county, in this state, out of the corporation of New Albany, he is liable to be taxed for it under said charter.

The case before us cannot be distinguished. We do not deny that the

state might have authorized the city to tax such property, but we think she has not.

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RAILROAD COMPANIES.—DAMAGES.

A lunatic, travelling under his father's charge, was, during his father's absence, put out of the car for non-payment of fare, by a conductor unaware of his insanity, and was run over by a following train. Held, that the case involving negligence on the part of the father, the company were not liable in damages.

[*Willetts* vs. *The Buffalo & Rochester Railroad Company*; 14 Barbour's (N. Y. Supreme Ct.) R., 585.]

The plaintiff was administrator of Washington Willetts, deceased, and brought this action under the statute of 1847, which allows the recovery of damages by the personal representatives of any person whose death is caused by the wrongful act or neglect of another.

The deceased was about thirty years of age, a lunatic, but had the appearance of a sane man, except that his eyes had a sort of wild stare, and was in general capable of taking care of himself. The father of deceased, having deceased in his care, took passage in the cars of defendants' railroad at Utica, paying the fare of himself and son to Buffalo, and taking tickets for the two. At Utica, a station on the way, the father left the car to procure refreshments. On his return, missing his son from the seat where he had left him, he passed through all the cars, and not finding him, he concluded that he must have been left behind. Meanwhile the conductor called upon the son, supposing him to be an ordinary passenger, for his ticket. The young man handed him a hotel card. The conductor told him that was not his ticket, and insisted upon his paying, or that he would be put off the car.

The demand was not understood by the young man, and the conductor, considering himself mocked and trifled with, obtained the help of another man, and put the lunatic off the cars.

The father, inquiring for his son, was soon after informed of these circumstances, and left the cars, and returned in search of his son. After searching in one or two directions to no purpose, the father got upon a baggage train, and having communicated to the engineer the circumstances, he was taken upon the engine. It was now after dark. They had proceeded about a mile, when an exclamation was made by the engineer, the whistle sounded, and the engine was reversed and stopped. The son was found under the car, having received injuries which caused his death the next day.

MARVIN J.—If we assume that the deceased was sane, it is clear, upon general principles, that the action cannot be maintained. The evidence does not show any negligence or want of care on the part of the agent of the defendants at the time the injury happened, but it shows great negligence and imprudence by the deceased. I am now assuming him to be sane. Under such circumstances no action will lie. Had negligence on the part of the defendants' agent been shown, the negligence and imprudence of the deceased would have prevented his sustaining any

action. The defendants were engaged in their lawful pursuits, in a lawful and proper manner, upon their own possessions or road; and the deceased was carelessly and unlawfully upon the road. It can hardly be necessary to cite authorities to show that when the plaintiff has materially contributed by his own negligence, or wrongful act, to the production of injury, he cannot recover, in an action founded upon the negligence of the defendant. And in this view, it is not material whether the act of putting the deceased off the cars was justifiable or not. The act was too remote and disconnected from the act occasioning the injury. The calamity was occasioned by the negligence of the deceased.

But the deceased was not sane, and we are to consider the case with that fact in it. In this view it may be material to inquire whether his removal from the cars was justifiable; and whether the rule touching the negligence of the injured party is properly applicable to the case.

If the deceased was removed from the car with full knowledge of his insanity, and left upon the road exposed to danger, it would not be unreasonable to hold the defendants liable for such gross act of negligence, for any injury that might happen to him before his protector had an opportunity to take care of him. Had the conductor any notice of the insanity of the deceased? The evidence does not tend to establish the fact that the conductor had notice of, or suspected any insanity. The fact that the deceased, when applied to for his ticket, offered a hotel card, cannot be regarded as evidence of insanity, nor did any part of his conduct furnish sufficient evidence. Neither the conductor nor witness had any suspicions of insanity, or that anything was wrong with deceased, until he was removed from the car, and then the witness recollects, as he looked up, he had a sort of wild look about his eyes. The father of the deceased states that he had the appearance of a sane man, save his eyes, which had a sort of wild stare. No notice had been given to the conductor, or in the cars, so far as we can learn. It seems to me the evidence falls far short of notice to the conductor.

It is, however, argued, that as the fare of the deceased had been paid to Buffalo, the act of the conductor cannot be justified. The fare was not paid to the conductor who removed the deceased, and he had no notice that the fare had been paid. Is it not the duty of the passenger, when called upon by the conductor, to exhibit the evidence of the payment of fare, or at least give notice that his fare has been paid? May he remain silent, leaving the conductor to understand that the fare has not been paid, and when expelled from the cars maintain an action by showing that in fact he had paid his fare to some other agent, at a place hundreds of miles distant? Such a rule would operate as a snare. Can it be maintained that the company and its agents are bound to know whether the particular individual has paid his fare? This would be impossible. A train of cars often contains many hundred passengers, who seat themselves in the cars promiscuously, and to suit their own convenience. It is utterly impossible for any conductor to recognise and distinguish each individual, though their fare may have been paid some time previously to himself. But the fare is not usually paid to the conductor, but, as in the present case, to an agent at the office, who delivers to the passenger the number of tickets paid for. It is necessary that

carriers, in steamboats, and cars upon railroads, should establish reasonable rules for the transaction of their business, and for the convenience of travellers. They do establish rules and regulations, and it is the duty of the passenger, when apprised of them, to conform to them in a reasonable manner. They are the terms upon which he applies for and obtains a passage, and may be regarded as an element in the contract between the carrier and the passenger. The conductor should have been notified that the fare had been paid. No notice was given, and from what actually occurred, he had good reason to suppose that the deceased was trifling with him. (*Commonwealth* vs. *Powers*, 7 Metc. 601.)

In the present case we are to keep in mind that the passenger was insane, and we may suppose incapable of giving notice; and how does this affect the case? As we have seen, the conductor had no notice of the insanity. Must it be held that he acted at his peril? This would be to hold him, or his principals, responsible, though his conduct may have been characterized by the utmost prudence and caution. The general rule requires care—the absence of negligence—in the party complaining. Infants and lunatics may be incapable of exercising care, and in such cases, other parties, having notice, may be held to a stricter responsibility for their negligence; but without notice, upon what principle can the general rule be departed from? All persons incapable of diligence, should have guardians to care for them; upon them the duty of diligence and care is devolved, and their negligence must, in law, be regarded as the negligence of the incapable infant or lunatic, when they have been injured, in cases arising between them and third persons acting without notice. (*Hartfield* vs. *Roper*, 21 Wend. 615.)

The deceased was in charge of his father, his natural guardian and protector. His father imprudently and negligently left him, without notice to any one of his condition. The lunatic changed his seat from the car where he was left to another car. His father, on his return, failing to find him, seats himself with the intention of proceeding to Buffalo and returning, instead of communicating with the conductor, and requesting permission to leave the cars. It would seem that he was not seriously alarmed, and perhaps there was no cause for serious alarm, as the deceased is described as careful and skilful in taking care of himself. The cars proceeded ten miles, when they were stopped, not at a station, and the deceased was put off. The father must have noticed the stopping of the cars, and it is somewhat strange that he should not have ascertained the cause, having an insane son in his charge, who he supposed had been left at Attica, but might still be, as he was, in the cars. Had he been diligent upon that occasion, the calamity would not have happened.

It was negligence in him not to be with his son when the tickets were demanded. But the prominent act of negligence was leaving him in the cars under the charge of no one, and without notice, exposed to any and all dangers that might arise from his condition. Doubtless the father was kind, and generally considerate, and on this occasion supposed no evil would happen. His son was most unfortunately removed from the cars; through his negligence the calamity followed; and however

afflicting it has been, the responsibility cannot be thrown upon the defendants

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RAILROAD COMPANIES—DAMAGES.

Railroad companies are not liable for necessary consequential damages accruing to premises not taken by them from the prudent construction and operation of their roads.
But they are liable for diverting a stream of water from its natural course to the injury of a neighboring proprietor.

[*Hatch* vs. *Vermont Central Railroad Company*; *Whitcomb* vs. *the same.* Vermont Supreme Court, June, 1853. Official Report not yet published.*]

These two cases involved very nearly the same general principles, with some difference of application to the circumstances of each.

The claim of Hatch was for consequential damage to premises of his, lying near the railroad of defendants but not taken for the purposes of the road, occurring in consequence of the use and employment of their road by the defendants.

The claim of Whitcomb was based on the facts that defendants had built their road over his land, and across a stream running through it; and had built no proper culvert or sluice for the stream, but had diverted the stream from its course, to the plaintiff's injury.

In the opinion, the court first discuss the question how far a railroad company is liable upon general principles, or under the constitutional provision for making compensation for private property taken for public use, and aside from the conditions of their charter, for damages occasioned to land not taken by them for the use of their road. They then adjudicate the special questions presented by each case.

Redfield, Ch. J.—The important question is, how far this railroad company is liable for consequential damages to lands near their track, but no part of which is taken by them for any purpose.

It seems to be conceded in the argument for the plaintiff, and assumed on all hands, that nothing in the company's charter or in any general statute of the state, in force at the time, in terms made them liable for such damage.

Indeed, this assumption seems indispensable to enable the plaintiff to maintain his case. For if such remedy is given by statute, it is probably exclusive, or at all events, it would doubtless often have been resorted to, long before this. But no such claim has ever been made, by any one; and this may be regarded as pretty satisfactory that no such express provision exists. The English courts seem to consider a provision in the charter for assessing damages, in a summary way, an exclusive and not accumulative remedy (*East and West India Docks & Co.* vs. *Gattke*, 3 Eng. Law and Eq. 59; *Watkins* vs. *Northern R. W. Co.* 6 ib. 179.)

It must be conceded, then, that so far as a general unqualified grant of the legislature will enable the defendants to build the road, and

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* Furnished us by his honor, Chief Justice Redfield.

continue its operation, without liability to consequential damage to the proprietors of land not taken, they are free from all such liability. There is no doubt the legislature might have granted the charter with this liability attached to the company or any other which they saw fit to attach. And it seems to us fair to assume, that no such obligation being imposed upon the company in the charter or by the general statutes of the state then in force, it was the purpose of the legislature to exempt them from such obligation, so far as they had the power to do so. But if the legislature sees fit to annex no such condition to the charter, and thus virtually, so far as they have the power, exempts them from any such obligation, the company are entitled to have their rights fairly and fully vindicated, in the tribunals of the state, equally with other citizens.

If, then, the legislature have purposely exempted this company from such an obligation, we do not well perceive how the plaintiff will be fairly able to deprive them of the benefit of the exemption, unless he can show that it is a violation of the constitutional restrictions upon the power of the legislature, or else that it is exempting a particular person from the general liability by law attaching to all other persons, similarly situated. In the latter case the exemption would be void, probably as an act of special legislation, upon general principles of reason and justice, like a particular act, allowing one citizen perpetual exemption from punishment for all offences or for all liability for torts.

Perhaps it may be useful to consider this latter ground first. It should be presumed, in the very outset, that it is no fair test of the general liability of a railroad company for their acts, to argue from what natural persons may lawfully do, and what, if done by them, becomes a nuisance. There is no doubt, that if an individual or a mere partnership should do all that the defendants' company do daily, in the village of Burlington, they would become indictable for the continuance of a common nuisance, and a mere statute exempting them from liability to prosecution for crime, would not affect their liability. And any citizen suffering special damage, by means of such nuisance, might have his action or enjoin the offenders ordinarily in equity.

But here the sovereign power of the state has seen fit to confer upon this company an important franchise, the right to construct and continue a railway almost from one extreme of the state to the other, with slight limitations as to its course, and providing no tribunal but their own engineers to determine its location. The location which they adopt, then, is conclusive of their rights to build the road in that place as to every one, unless resisted by some proceeding taken at the time of the location, and brought to bear directly upon the question of the location of the road.

It will therefore scarcely be claimed, that the operations of the defendants in the village of Burlington are a mere nuisance; there was nothing in the proof tending to show that they were so conducted as to be made such, by reason of mismanagement as to the time and manner of carrying on their operations.

The question recurs, what is to be regarded as a legal injury? If the operations of the railroad in that place are to be regarded as altogether legal, and the adjoining proprietors have no interest in the soil under the

street, as in the case of an ordinary highway in the country, which seems to be the view taken by the court here, then the ordinary carrying forward of the business of the railroad, although it may cause annoyance and damage to the dwellers along the street, could scarcely be regarded as a legal injury, for which an action will lie. In the language of the law it is *damnum absque injuriâ.*

If the company constructed their road in an improper manner, thus causing needless damage to the adjoining proprietors, or if they wantonly or negligently run their cars or carry on their operations, so as in any manner to cause needless damage to such proprietors, they would be entitled to a remedy by action.

But upon general principles the defendants may conduct their lawful business, in as reasonable and prudent a manner, "with as little injury to plaintiff's premises as was consistent," &c., in the language of the bill of exceptions in this case. It seems to be well settled law that the first occupier of land acquires no right (within the period of prescription for presuming a grant) to exclude an adjoining proprietor from the free use of his land, in any proper mode, by erections or excavations. (1 Bac. Ab., 77, citing 22 H. 6, 9 Co. 15, 59. *Bland's case*, Bulstrode, 115, 2 Rolle's Ab., 107, 143, 3 Leon, 93; *Parker* vs. *Foote*, 19 Wend., 309.) The adjoining proprietors may excavate or put up erections to any extent, with impunity, using proper precautions to cause no unnecessary damage. Prior occupancy gives no exclusive rights. (*Panton* vs. *Holland*, 17 Johns R., 92. *Thurston* vs. *Hancock*, 12 Mass. R., 220. *Lasala* vs. *Holbrook*, 4 Paige, 169. *Partridge* vs. *Scott*, 3 M. & W., 220. *Wyott* vs. *Harrison*, 23 E. C. L. R., 205. *Governor of Plate Manufacturers* vs. *Meredith*, 4 T. R., 790. *Sutton* vs. *Clark*, 1 E. C. L. R., 229. *Boulton* vs. *Crewther*, ib., 229. *King* vs. *Pegham*, 15 ib., 237. *Henry* vs. *The Pittsburg & Allegany Bridge Co.*, S. & Watts, 85. *Shrunk* vs. *Schuylkill Nav. Co.*, 14 S. & R., 71. *Commonwealth* vs. *Fisher*, 1 Penn., 467.) The court also referred to and commented upon the following cases analogous to that of the plaintiff Hatch: *Trustees of the Presbyterian Society in Waterloo* vs. *The Auburn & Rochester R. R. Comp.*, 3 Hill, 567. *Fletcher* vs. *The Auburn & Syracuse R. R. Comp.*, 25 Wend., 462. *The Seneca R. R. Comp.* vs. *The Auburn & Rochester R. R. Comp.*, 5 Hill, 770. *Miller* vs. *The Auburn & Syracuse R. R. Comp.*, 6 Hill, 61. *Zimmerman* vs. *The Union Canal Comp.*, 1 Watts & S., 346. *Philadelphia & Trenton R. R. Company's case*, 6 Whart., 25. *Rail Road Comp.* vs. *Heiser*, 8 Barr, 366. *Monongahela Nav. Comp.* vs. *Coombs*, 6 Watts & S., 101 S. C., 6 Barr, 379. *Susquehanna Canal Comp.* vs. *Wright*, 9 Watts & S., 9. *Mayor* vs. *Randolph*, 4 ib., 214. *Lossing* vs. *Smith*, 8 Cow., 148. *Aldrich* vs. *Cheshire R. R. Comp.*, 1 Fost., 359.

From all these considerations and authorities we must infer that the defendants are not liable upon general principles for necessary consequential damages accruing to the premises or business of the plaintiff Hatch by the prudent erection or operation of the defendants' road.

The defendants being impliedly exempted by statute from all liability, it only remains to inquire how far such an exemption is consistent with the constitution of the state. The article embracing this subject in our

State Constitution is in these words, Part 1, Art. ii.: "That private property ought to be subservient to public uses, when necessity requires; nevertheless, ..... the owner ought to receive an equivalent *in money*." And altogether aside from any such express provision, a statute taking property, without necessity of a public character, or without compensation in some form, would doubtless be regarded as entirely without the just limits of legislative power. (*Railroad Co.* vs. *Davis*, 2 Dev. and Batt., 451. *State* vs. *Dawson*, 3 Hill R., 100.) Assuming then that it is necessary, upon general principles, to make compensation to the proprietor in some form, even when less interest in land than a fee is taken, the extent of the compensation is still open. (*Wilkinson* vs. *Ireland*, 2 Pet. R., 659.) It seems little better than an evasion to say that no compensation is required, where a perpetual easement in the land is taken for public use. There is the same reason and justice, in allowing compensation in such case, as when the absolute fee is taken. And it has always been so regarded. But the general rule may now be regarded as settled in this country, that any advantages accruing to the proprietor of the land taken, by the contemplated public work, may be taken into the account in appraising the damage. So, too, where any portion of the land is taken, the commissioners may doubtless estimate consequential damages to the remaining portion of the land. It is scarcely possible to come fairly at the value of the land taken, or the actual damage suffered, in any other mode. (*Symonds* vs. *City of Cincinnati*, 14 O. R., 147.)

The charter of defendants (Sec. 7) requires the commissioners to appraise such damage to the owner of land taken as he may have sustained or shall be liable to sustain, by the occupation of the land for the purpose aforesaid. It is not now regarded as essential that the damages should be paid in advance of assuming possession of the land. (*Bloodgood* vs. *U. and H. Rail Road Comp.*, 14 Wend., 51, C. S. reversed, 8 Wend., 9 to 59. *Lister* vs. *Farrer*, 7 Ad. & E., 124; 34 Com. Law R., 51.) But so far as this court have been able to learn, merely consequential damages to lands not taken, where no statute provision upon the subject exists, have never been regarded as entitling the party to compensation, either from the state or those upon whom the state confers a public franchise, in the exercise of which the damage occurs.

But in the absence of all statutory provision to that effect, no case and certainly no principle seems to justify, the subjecting a person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damage to other persons in their property or business. This always happens more or less, in all rival pursuits, and often where there is nothing of that kind. One mill, store, or school injures and often ruins another. One's dwelling is undermined, or its lights darkened, or its prospects obscured, by the erection of other buildings upon the lands of other proprietors. One is beset with noise, or dust, or other inconvenience, by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railroad, as much as in the other cases supposed. These public works come too near some, and are too remote from others. They benefit many, and injure some. It is not possible to equalize their advantages and disadvantages; those of a single

railway could not be satisfactorily balanced, by all the courts in the state in forty years. Hence they must be left, as all other consequential damage and gain is left, to balance and counterbalance itself as it best can. If the legislature had seen fit to annex a similar condition to these grants, with that found elsewhere, making the company liable for damage to all land "injuriously affected by the road," it might have been very well, and far more just than it is; but not having done that, and having made an unqualified grant to the defendants, thus legalizing their proceedings in building and running the road, it is impossible for the court to impose any further restrictions upon them, than upon other legal business which one carries on upon his own land.

But some of the cases seem to justify some limitation upon the right of railway companies or other grants for public purposes, in regard to diverting water courses, rivers, and other streams. (*Broughton* vs. *Carter*, 18 Johns. R., 404.) Where it is practicable, within the range of any reasonable expense, to save the adjoining properties from damage by the water flowing from the road, or from a natural stream of water, and this is not done and the land owner suffers damage, the company is liable to an action. (*Hooker* vs. *New Haven & Northampton Company*, 14 Conn. R., 146. *Gardner* vs. *Newbury*, 2 Johns. Ch. R., 162.) These cases seem to be founded in reason and justice; and not at all to conflict with the general principle before laid down by us, that the defendants are not liable for merely consequential damages to lands not taken, or expressly affected in themselves, as is the case where water is diverted or caused to overflow the land. But upon general principles, every one, in diverting a stream of water, is liable for the damage caused to those from whom it is diverted, and to an action at law. One may use water running over his land, in any manner he chooses, but he may not divert it from its ordinary channel. The state cannot do this more than an individual, unless it become necessary to the accomplishment of some public work, and in that case is bound to make a compensation. Here the land is not taken, but the water which makes the land valuable is taken, and that is the same in law as if the land were taken. So, too, if by making imperfect sluices or other passage for streams which defendants' road crosses, the land of adjoining proprietors is injured, the defendants are liable, whether any portion of this had been taken by the company or not, and whether damages for land taken had been appraised or not.

We here consider the case of F. Whitcomb against the same defendants. This claim is for an omission of duty in building their road, and is a virtual tort. Upon this ground it seems to the court, that the plaintiff was entitled to recover his full damage. The damages are claimed for an injury occasioned by the want of a sufficient sluice or culvert, which it was the duty of the defendants to build, and of this they seem to have been aware, as they built one of wood, which failed. It is possible some of the cases which we have remarked upon, may seem to favor the idea, that a railway company is not liable for diverting a stream of water, when it might be restored to its former state; but that certainly is inconsistent with general principles of reason and justice, and common law, and equally at variance with the express provision of defendants' charter: that all water courses and streams shall be restored "to their former state and

usefulness, as near as practicable." This would not impose upon the defendants impossibilities. (*Queen* vs. *Scott*, 3 Ad. & Ellis R., 543. 433 C. L. R., 858.) Nor will it probably require the defendants to build culverts where it is not obvious that one will probably be needed, or where one would only be needed once in twenty, or thirty, or forty, or fifty, or one hundred years, in the most extraordinary freshets, and which might therefore be regarded as accidental, or the act of Providence, and not to be provided against by mere common prudence.

But in the present case, it seems such a culvert or sluice was needful every year, and that this became known to the defendants before constructing their embankments, and that they attempted to build one, which was so imperfectly built, that it filled up. We think, therefore, that the plaintiff is entitled to have such damages of the defendants as he has sustained by reason of their not building such a culvert, as would be ordinarily needful in that place, such as prudent men, under the circumstances, would have been likely to build.

The result of all which would seem to be, that in the case of Hatch, the judgment must be affirmed, unless the plaintiff thinks it an object of some importance to him to have the question submitted to the jury, whether the road was built in a manner to do him no unnecessary damage. In the case of Whitcomb the judgment is reversed and the case remanded.

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### RAILROAD COMPANIES—DAMAGES.

**The owner of animals suffered to go astray, and *trespassing* upon a railroad, cannot recover for their destruction by a train, without negligence on the part of the servants of the company, even where the company is under a special statutory obligation to fence their road, and have omitted to do so. Two cases.**

(I. *Jackson* vs. *Rutland & Burlington Railroad Company.* Vermont Supreme Court, Feb. 1853. Official report not yet published.*)

This action was brought to recover the value of some horses, killed upon the track of defendants' road, by a train in motion.

By the provisions of their charter, as well as by the general law of the state, the defendants were required "to build and maintain *sufficient fence*, upon each side of their railroad, through the whole route thereof."

At the station in Brandon, the railroad crosses a public highway at right angles, at or near grade, and the lands for a certain distance on each side of the highway are used for dépôt purposes. It appears from the case, that the company had omitted to fence certain lands directly adjacent to their road on the east side of the highway, the owners of some of these lands having consented to their omission; and that the horses, which were kept in plaintiff's pasture, *a mile or a mile and a half distant* from

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* This case is kindly furnished to us in MS. by his Honor Judge Redfield. We presume it may appear in 25 Vt. R.—*Ed.*

the railroad, escaped from the pasture, and came upon the track by crossing, either the highway or the lands unfenced with the owners' consent, or those unfenced for other reasons, and there were run over by an early train. It was too dark at the time of the accident for the engineer to discover the horses in season to check the train; and no negligence in that respect was attributed to the defendants.

REDFIELD, C. J.—The question arises, for whose benefit is the company required to maintain the fences on each side of their road? This will, in a good degree, determine who may have an action for injuries consequent upon the omission to build or to maintain such fences. For right and obligation, in regard to these matters, are, for the most part, correlative and co-extensive. One cannot ordinarily have an action for any evil consequences he may suffer, by reason of the omission to perform a duty not owing to himself. There is, in law, no such priority between one remotely affected by such omission, and the person owing the duty, as will lay the foundation for an action. (*FitzSimmons* vs. *Joslyn*, 21 Vt. R., 129.)

We cannot conceive, then, how any one can be said to be directly interested in the maintaining of fences upon a railway, beyond the adjoining proprietors of land, and those who may travel upon the road, either as passengers or workmen. And, in regard to this latter class of persons, who are only interested in this matter temporarily, for the purpose of their own security while upon the road, we have no occasion to speak here. The adjoining proprietors certainly are primarily and principally interested in the maintaining of fences upon the line of railways. There is no doubt a remote, incidental, and contingent interest in all the citizens in having such roads carefully used. One's teams, cattle, and children even, are thereby rendered less likely to receive damage by reason of the running of such roads. But this is an interest of so remote and contingent a character, as scarcely to be supposed to form the basis of so extensive and expensive a charge upon such companies by the legislature; certainly it should not be so held, unless so expressed, *in totidem verbis*, or by the most obvious implication.

Assuming, then, that this general provision in the charter of this company is for the benefit of the landowners, and to prevent all uncertainty of construction as to the party upon whom this burden ought to rest, it seems to follow, that only the adjoining proprietors can complain of the omission, and that a proprietor can only complain of the omission adjacent to his own land. This enactment only places the defendant in the position of an adjoining proprietor who is bound by contract or prescription to build the fences between himself and an adjoining proprietor. The statute imposes this burden exclusively upon the railway, which, as between adjoining proprietors generally, is to be borne jointly and equally. But the matter of such division fence is always a subject of stipulation between the adjoining occupants or proprietors, or may become so, at any time, without the right of interference by any other one. Hence it was competent for the defendants to stipulate with the landowners adjoining the road, to let the land remain unfenced, or to assume that burden themselves, and no other landowner could complain upon the mere ground of the mere increased liability of injury to his cattle.

The idea of any obligation upon railways to fence their roads, for the security of cattle passing along the highway, must rest upon the hypothesis that such cattle are rightfully in the highway. Cattle are rightfully driven along the highway, and, in such case, if fences and cattle guards are omitted when they can be properly kept up, consistent with the proper use of the railway, and damage ensues, very possibly an action may lie. But in the present case the cattle were estrays upon the highway. They could certainly claim to be regarded in no more favorable light. And in this state, it is not now considered that the owners of cattle have any right to depasture them in the highway. The owner of cattle is here left, since the Revised Statutes of 1839, as at common law. He is bound to keep his cattle at home. If found doing damage in one's field, they may be impounded without reference to the legality of the outward fences of the field, where such cattle are found. Fences adjoining the highway are expressly excepted by the statute, while all other fences surrounding such field, are required to be found legal in order to justify the party distraining. We are then compelled to fall back upon the common law, as to the obligation to build fences adjoining the highway, and the right of the owners of cattle to feed them in the highway. And here there seems little doubt.

At common law the subject of fences is seldom much discussed, it being every man's duty to keep his own fields fenced for the purpose of restraining his own cattle, rather than those of others. If his cattle went at large, and did damage, they are liable to distress as matter of course, unless in some way the owner could show a right to have his cattle where they were found, or unless some prescription or contract changed the general obligation to fence.

This subject is a good deal discussed in the English books, in regard to rights of common and pasturage, but the question in regard to fences never arises, unless as connected with certain rights of exclusion from the commons, permanently or temporarily, or in regard to some prescription or duty, attaching to the land. And so fences are always good enough at common law, which answer their end of keeping one's own cattle inclosed, and always insufficient if they fail to answer that purpose. If one's cattle went abroad, either by permission or accident, the owner was liable for all damage. One had no right to depasture his cattle in the highway. For by so doing, he was infringing the rights of the owner of the soil and freehold, although encumbered by the public right of way. This right of way gave the public no right to the trees and herbage growing upon the land, or to the stone and minerals under the soil. That was as much the property of the freehold as before. Cattle have only the right of *passage* upon the highway; if upon it for any other purpose, they are trespassing. (2 Roll. Ab. 566, pl. 1. *Dovastan* vs. *Paine*, 2 H. B., 527.)

It is nowhere pretended that taking land for a highway gives the public anything more than a right of way in the land. And if all the other rights in the soil remain to the owner as before, and this is nowhere questioned, but recognised in all the cases at common law, we do not readily comprehend, how any one can be said to have any more right to have his cattle in the highway either as estrays or *levant* and

*couchant*, than in any other man's field. And such is the language of the cases upon the subject. But it is competent, no doubt, for the owner of land incumbered by the highway, to occupy it in common, as is generally done in this state, and to suffer others, not having any interest in such lands, to feed cattle in the highway, and so long as he acquiesces in this mode of occupying the highway, and until he give notice of dissent, he may probably be bound by it. But I should entertain no doubt of the right of any one to dissent from any such arrangement by common consent, and exclude cattle from his lands, across which the highway passed, and to maintain an action against the owner of cattle depasturing upon such lands, after notice to restrain them. And it is certain that our statute since 1839 expressly excuses all landholders from fencing adjoining the highway. For if they may impound cattle found doing damages in a field where the fence is not legal, they may where there is no fence; and by parity of reasoning, if cattle are thus liable to distress, it must follow that they are wrong-doers in the highway, as, if they were rightfully there, the adjoining proprietors must of necessity be made to fence against them. And if land owners generally are not bound to fence their lands off from the highway, much less should railway companies be required to do so. For in most cases, such a requirement of them would, on the present plan of crossing highways at grade, be altogether impracticable, and would impose upon such companies, the burden of raising their roads and station houses above grade, so as to exclude all highways from their level, which it is believed was never required by their charters.

The right of a railway company to the exclusive possession of the land taken for the purposes of their road, differs very essentially from that of the public in the land taken for a common highway. The railway company must from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy, by the former owners, in any mode and for any purpose. Any other view of the subject must lead to the imminent peril of life and property, and ultimately to the most glaring absurdities. How far this difference will affect the right of the former owners to the herbage growing upon the land, or to dig up the soil and subsoil, it is not needful here to consider. It is obvious that the right of the railway to the exclusive occupancy must be, for all the purposes of the roads, much the same as that of an owner in fee, and the company certainly owes no duty to persons or property in the highway, or the fields adjoining the railway, unless rightfully there. Hence from what has been said, we must conclude that estrays or cattle suffered to go at large in the highways for the purpose of pasturage, are altogether at the risk of the owners, until they are brought back to some point, where they may rightfully remain. And the fact that the business of the defendants is one of extraordinary peril to cattle coming upon the road, can make no difference. The business of the defendants is one legalized by the legislature, by universal consent, and one where the public, at present, make very extraordinary demands, in regard to speed.

which it would be ruinous to the interests of defendants to disregard. Under such contingencies, it is of the first necessity that cattle should be excluded altogether, and beyond all peradventure, from the track of the railway. This it is impossible for the company to do effectually, short of a very disproportionate expense. But the owners of cattle may each restrain his own, as the law requires him to do, with very little difficulty. And if this is not done, the loss should fall upon the owner who is legally in fault.

And if sometimes, through defect of fences or from any other cause not implying moral delinquency, his cattle stray accidentally, so to speak, upon the railway, he must be content to take the chance of their destruction, and under the circumstances, should, one would think, deem himself fortunate if no greater damage is sustained by any one than the destruction of the cattle, where so much must of necessity be put at hazard. And this has always been regarded as the law upon analogous subjects, where animals trespassing have met their destruction. (*Blythe* v. *Topham*, Cro. Jac., 158; *Drane* vs. *Clayton*, 7 Taunton R., 789; 2 Eng. C. L. R.,183; *Scott* vs. *Wilkes*, 3 Barn. & A., 304; 5 Eng. C. Law R., 295; *Bird* vs. *Holbrook*, 4 Bings, 628; *Jordin* vs. *Crump*, 8 M. & W., 781 (1841); *Townsend* vs. *Walker*, 9 East R., 277; *Bush* vs. *Brainard*, 1 Cow. R., 78; *Johnson* vs. *Patterson*, 14 Conn. R., 1.)

The principle of these cases, applied to the case in hand, would certainly most obviously require that plaintiff should keep his cattle off defendants' road, or else not complain of their destruction.

But a brief consideration of the rules of the common law, in regard to the rights and liabilities of different parties in reference to fences, will show still more obviously the utter want of foundation in the plaintiff's claim. It is well settled, that where one suffers loss through the want or insufficiency of fences, which he is himself bound to repair, he cannot recover. If then the obligation upon defendants to build a fence along their road, is a duty to the adjoining proprietors only, and by consequence may be omitted or shifted to the other party by his consent, it must follow, that in such event that party could not recover for any damage done to his cattle by the company, and of course no third party could recover of them for damage done to his cattle by straying into said field, and thence upon the track of the railroad, if it was at the time the duty of the *landowners* to fence the land. And it certainly could not be fairly contended that the owner of such cattle, which were trespassing in such field, could recover of the owner of the field for not fencing it. If so, any trespasser might recover of a party for damage sustained by reason of the land not being kept in the safest possible state, for all uses to which anybody might choose to put it; which would be absurd, and at variance with all the cases upon the subject.

But in looking farther into the laws upon this subject, it will appear, that even while the obligation to fence rests upon the defendants, they are only bound to fence against cattle *rightfully in such adjoining fields.* This obligation to fence only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers there, and stray cattle are nothing but trespassers, presumed to have escaped through the in-

sufficiency of their owner's fences, which in law is the same as if the owner had suffered them to go at large without any restraint whatever. (Fitzherbert N. B., 298; *Rust* vs. *Low*, 6 Mass. R., 99.)

The result of all our examination then is, that the plaintiff's horses were at large through the defect of his own fences, so far as the case shows, and were trespassers upon the defendants' lands, and the plaintiff had no legal claim either upon the defendants or the adjoining proprietors to keep the railroad on the adjoining lands fenced for the security of the plaintiff's cattle, while thus going at large; and that he has no remedy against any one, if they were killed by defendants' engines, without negligence at the time, in the management of the engines. This view of the case is fully sustained in a late case in the Common Pleas, in England (*Ricketts* vs. *The East and West India Docks and Birmingham Junction Railway Company*, 12 Eng. Law and Equity Reports, 520), which is this identical case almost, in so many words, *nomine mutato*. The note of this case is in these words, "Where the plaintiff's sheep trespassing on A.'s close strayed on the defendants' railway which adjoined, through defect of fences which the defendants were bound as against A. to make and maintain, and were killed—Held, that the plaintiff could not recover either at common law (or under the English statute of 89 Victoria, Ch. 20, Section 68), or on the ground that the defendants exercised a dangerous trade, the obligation to make and maintain fences, both at common law and by the statute, applying only as against the owners or occupiers of the adjoining close." The only difference in the two cases seems to be in the names of the parties, and the kind of cattle killed.

The American courts have for the most part adopted the views we have taken of this case, in regard to the right of cattle to depasture in the highways, and the liability of railways for killing them when casually upon their roads. (*Little* vs. *Lathrop*, 5 Greenleaf, 156. *Lord* vs. *Wormwood*, 29 Me. R., 282. *Perkins* vs. *Eastern Railroad Company*, ib. 307. *Wells* vs. *Howell*, 19 Johns., 385. *Halloday* v. *Marsh*, 3 Wend. R., 142. *The Tonawanda R. R. Co.* v. *Munga*, 5 Denio, 255; S. C. affirmed, 4 Comst., 255.) And in some of the states it is held even that the negligence of the railway company in driving their engines at the time, will not render them liable for killing cattle thus wrongfully upon the road. (*Clark* vs. *Syracuse and Utica Railroad Company*, 11 Barbour R., 112. *Williams* vs. *The Michigan Central R. R. Company*,* decided in 1851; *New York and Erie Railroad* vs. *Skinner*, Supreme Court of Pennsyl-

* This case, a copy of which we have received from his Honor Judge Pratt, who delivered the opinion of the Supreme Court of Michigan in it, does not go the length assigned to it above. Judge Pratt says, "If the injury complained of had occurred in consequence of any negligence or fault on the part of the defendants, or the engineer conducting the train, without any negligence or fault on the part of the plaintiff, the defendants most unquestionably would have been liable for all the damages sustained by the plaintiff; but such is not the case presented. The wrongful injury alleged, constitutes the foundation of the plaintiff's right of action; and yet the facts submitted for the purpose of sustaining it, show not the least degree of negligence or want of care or skill on the part of the defendants or the engineer; and the ground upon which the action was brought, cannot be perceived, for the case submitted neither shows a *malfeasance, a misfeasance, nor a nonfeasance.—Ed.*

vania, Dec. No. Law Register, 97.) But this last proposition is expressly repudiated in the English cases upon this subject, and is most unquestionably unsound. The railroad company cannot justify either recklessness, want of common care, at the time, and after the cattle are discovered, or wanton injury. But short of that, it seems they are not liable, either upon principle or the decided cases.

The judgment of the county court is reversed, and judgment upon the case stated, entered for the defendant.

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[II. *Marsh* vs. *The New York and Erie Railroad Company.* 14 Barbour's (N. Y. Supreme Ct.) R., 364.]

This action was brought to recover the value of a cow belonging to the plaintiff, but killed by the engine of the defendants, upon their road. The plaintiff claimed to recover on the ground of defendants' neglect to fence their road at the place where the cow was killed. The defendants denied the allegation in the complaint, and gave notice that they would prove that the cow killed, was at the time unlawfully on the railroad track, and was a trespasser thereon; and that she was killed in consequence of the negligence and misconduct of the plaintiff. The killing of the cow was proved. She was running on the railroad track at the time, at a place where the railroad was not fenced. She was usually pastured in the highway and commons, and had been seen running at large in the road on the morning of the day on which she was killed. The justice overruled a motion for a nonsuit, and rendered a judgment in favor of the plaintiff, for the value of the cow; and on appeal the county court affirmed the judgment.

STRONG, J.—The acts of 1848 and 1850, after requiring railroad companies to erect and maintain fences on the sides of their roads, and cattle guards at all road crossings, provide that until said fences and cattle guards shall be made, the corporations and their agents shall respectively be liable for all damages done by their agents or engines to animals thereon; but that after such fences and cattle guards shall be made, the corporation shall not be liable for damages, unless from acts negligently or wilfully done. These provisions render the companies responsible when they omit to make the fences or cattle guards, if the damages are caused by *them*, whether from carelessness, mismanagement, or wilfulness, or from inevitable accident. But they do not make them answerable for the carelessness or wilful misconduct of those who from such causes sustain injuries from them. If one should wilfully or negligently leave a horse upon the track when the train was approaching, and the horse should be killed, he assuredly could not recover any damage for his loss. It is true, that in such case, the misfeasance of the company would not cause the loss; neither would it in any case where it would not have occurred except from the misconduct or negligence of the person injured. Where the damage would not have been sustained but for his fault, the company cannot be said, in truth, to have caused it, and therefore the case is not within the statute. In other words, an injury inflicted by the

joint agency of two distinct parties, and which would not have happened without the acts of both, cannot be said to have been caused by either of them. It is well settled that a party in fault shall not recover compensation for an injury which would not have befallen him, without it. It could not have been the design of the legislature, in making the provisions which I have quoted, to prevent the application of so just and appropriate a rule, to allow one to recover damages caused by his own negligence or folly, or which would not have happened without it. It is enough to make railroad companies responsible for damages, resulting from their omission to fence their roads, to innocent parties. That will protect those whose cattle have strayed from their inclosures without their knowledge or fault, or have casually passed over the track when carefully driven on the highway crossing it, or in its vicinity.

There is no question but that the accident of which the plaintiff complained was the result of his own carelessness. His own witness testified that the cow pastured in the road and common, and that he saw her on the highway on the morning of the day on which she was killed at night, at large, without any one with her. There was no evidence that cattle were permitted to pasture on the highways in the town of Deerpark, where the accident occurred, by any by-law, if indeed a town by-law could sanction the practice. And if there had been a lawful ordinance to that effect, it would not have justified the plaintiff's negligence, or exempted him from its consequences. That it is gross negligence for a man to suffer his cattle to go at large on the highways in the immediate vicinity of a railroad, there can be no doubt. The owner not only endangers the lives of his cattle, but jeopardizes the lives and property of the passengers over the road. To suffer him to recover damages for the loss of his property, under such circumstances, would be not only against private rights, but contrary to public policy. (*New York and Erie Railroad* vs. *Skinner*, Am. Law Reg. for Dec. 1852, 102. *Suydam* vs. *Moore*, 8 Barb. 358, and *Waldron* vs. *The Rensselaer and Saratoga Railroad Company*, Ib. 390.)

Brown, J.—If it be true that the absence of these fences and cattle guards, from the sides of the road, relieves the owner of all care and attention over his horses and cattle, and he may wilfully or negligently suffer them to wander and stray in front of a train of cars in full motion, and then recover damages for any loss or injury he may thereby sustain, the statute will receive a construction in conflict with the plainest dictates of justice and common sense.

The occasion is not inappropriate for the expression of an opinion upon what must be regarded as the main question in this action. Assuming, therefore, for the present, that there is an obligation resting upon the defendant to erect and maintain the fences and cattle guards, it may be worth while to inquire how far the plaintiff is relieved from the operation of the rule of common law, which requires a plaintiff seeking to recover damages against another for negligence, to acquit himself of fault and show that his own negligence and misconduct did not contribute to bring about the accident of which he complains. (*Rathbun* vs. *Payne*, 19 Wend, 399. *Tonawanda Railroad Company* vs. *Munger*, 5 Denio, 255.) The argument of the plaintiff is, that the statute must have a

liberal interpretation; that the provision is not limited in its application to animals rightfully being on the adjoining lands, and to those rightfully passing over the public highway, but that corporations who omit to make the erections are also liable for injuries done to animals wrongfully being on the adjoining lands, and wrongfully depasturing in the public highway and in the track of the railroad. The argument must go this length, or it cannot aid the plaintiff in this action. The act must have a reasonable and sensible interpretation, and we must suppose that the provision under consideration was inserted to effect a reasonable and sensible purpose. That purpose manifestly is the protection of cattle and other animals, rightfully being upon the adjoining lands, and rightfully passing over the public highway. The owners of animals in either of these conditions, that casually stray upon the track of a railroad, where there are no fences or cattle guards, and are injured, have their action therefor against the company, and the want of such erections can no longer be imputed to such owners as a fault, because the duty of erecting them has been imposed upon the company. But I apprehend the statute was not designed to change the rule of the common law applicable to such cases, where the injury proceeds as well from the fault of the owner of the animals, as from the omission of the company. The owner who drives his animals out to depasture upon an unfenced railroad track, when he has no adjoining lands, and one who turns his animals out to depasture upon a public highway, contiguous to such track, when he has no right except the mere easement in common with the public, stand in the same predicament; and if injury results to the animals from contact with the railroad trains, the owners in both cases are equally in fault, and equally without remedy.

In the present case, the plaintiff was not the owner or occupant of any lands adjoining or in the vicinity of the road. He was not driving his cow over the public highway for the ordinary purpose of travel in passing from one place to another, as he lawfully might do. The conduct of the plaintiff was in all respects equivalent to pasturing his cow upon the track of the road, as there was nothing whatever to prevent her going thereon from the highway in the immediate vicinity, where she was habitually permitted to run. The injury was as much the immediate result of the wrongful act of the plaintiff, as it was the result of the wrongful omission of the defendant.

The judgment of the courts below should be reversed.

PRINCIPAL AND AGENT.—CONTRACTORS.

Contractors undertaking the construction of works for a company, are no less the servants of their principals, because they work by contract, and for a stipulated price; and the principals are liable for all acts of the contractors, performed under their contract.

[*Lesher* vs. *The Wabash Navigation Company;* Illinois Supreme Court, November, 1852. Official report not yet published.]*

The charter of the Wabash Navigation Company authorized them to enter upon certain premises, including those of plaintiff, and to take therefrom materials necessary and proper for the construction of their works. The owners of such premises were also authorized to file a petition in the circuit court, and have their damages assessed, and a judgment for the amount was to be rendered in favor of the owner, and against the company. The company entered into a contract with the Culbersons for the construction of a portion of the works, under the terms of which the Culbersons were to furnish all the materials, and to do all the work, for a stipulated price. In the performance of their contract, the Culbersons took timber from the plaintiff's land, which was necessary and proper for the construction of the work, and they applied it to that purpose. This was done without objection on the part of the plaintiff, who subsequently filed his petition to recover his damages from the company, in the mode pointed out by their charter.

CATON, C. J.—The only question presented for our consideration is, whether the company is liable.

The contractors were none the less the servants of the company because they were doing the work by contract, and for a stipulated price. The work was still done by the company, by and under the authority of their charter. The privileges which the charter conferred upon the company, to enable them to execute the work, devolved upon the contractors for the same purpose. The very erection of the works was an obstruction to navigation, and would have been unlawful but for the authority conferred by the charter. Had the Culbersons been prosecuted for the damage occasioned by reason of such obstructions, they would immediately have sought protection under the charter; so, too, had Lesher objected to their taking the material which they did take, they would have asserted their right to do so under the charter, and must have been protected in their right to the same extent that the company would have been had they prosecuted the work without the intervention of contractors. If it was necessary for the company to take private property to enable them to prosecute the work for the public good, it was equally so for the contractors. Had a cause of action accrued to an individual by reason of the obstruction erected in the river, the company whose work it was would have been liable as much as if they had erected it with their own hands. If they are liable for one act done, under the charter, by the Culbersons, they are equally so for another.

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* W. Harrow, Esq., has kindly furnished us with a MS. copy of this case.

It is no answer to say that the contractors were bound by their contract to furnish all the materials at their own expense, and for which they were to receive a full compensation. The public were not bound to know the relations existing between the company and these servants.

It was enough that they saw them engaged in the works of the company, and under the direction of the company's engineer. The person who was injured by reason of acts done by those in the employ of the company, and in pursuance of their charter, had a right to look to the principal, who alone had authority to direct the acts to be done for compensation, and was not bound to seek redress from every servant who cut a tree or removed a stone. Were the rule otherwise, the company might, by the employment of irresponsible servants, compel the owner of the land to stand by and see it stripped of all that made it valuable, without a hope of remuneration. They would desire the benefits of their charter, and to be protected from the liabilities that it imposes. It may be true, that it is the duty of the contractors to pay these damages, as they were bound in their contract to furnish the materials, and if so they will be liable over to the company for the damages which they necessarily have to pay for the acts of the contractors; but this ultimate liability of the contractors does not relieve the corporation from the primary liability to pay the damages occasioned to individuals by the exercise of the chartered rights of the company, and in the mode which the charter provides.

We are of opinion that the company is liable for the damages occasioned by the acts of the contractors, which were authorized by the charter to be done by the company as to the persons who have thus sustained damages.

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VENDOR AND VENDEE.—IMPLIED WARRANTY.

When the statements of vendor respecting the quality of the goods sold, form the sole basis of a sale, they are ordinarily to be construed as a warranty.

[*Beal* vs. *Olmstead*, 24 Vt. R., 114.]

*Assumpsit* on the warranty of a quantity of hay.

On the trial it appeared that the plaintiff called to see said hay, and went with the defendant to the barn where the hay was, and the defendant offered to let the plaintiff pull off a board from the barn to examine the hay; the plaintiff replied that he could not tell by that, but that the defendant knew what use he wished to make of the hay, namely, to keep his oxen during spring and summer while at work on the railroad, and that the defendant knew whether the hay was such as would answer or not. Thereupon the defendant told the plaintiff that the hay was good hay, cut in good season, and was well cured, and put into the barn in good order. The negotiation was going on for several days, when the trade was completed; but it did not appear that anything further was said between the parties as to the quality of the hay. When the plaintiff came to get the hay, it was found to be worthless, and the plaintiff refused to take the same.

An altercation ensued between the defendant and plaintiff, when the plaintiff said, "Did you not tell me that the hay was good hay, cut early, and cut around the barn, and got in in good order?" to which the defendant replied, "I did, and say so now." It further appeared that the said hay was full of brakes, and not such hay as grew around the barn.

The court directed a verdict for defendant, to which the plaintiff excepted.

By the Court.—As to whether the defendant's assertions in regard to the quality of the hay were understood to form the basis of the contract, there could be but one opinion. The plaintiff declined to examine the hay, saying he could tell nothing about it. He expressly informed the defendant that he wanted it for a particular use, and that he must have such hay as would answer that use.

The defendant then proceeded to make a statement in regard to the hay, which brought the hay within the desideratum. And after the negotiation had continued some days, nothing more being said between the parties, in regard to the quality of the hay, the trade was closed, and the plaintiff paid for the hay. It is scarcely possible to suppose a case, where it is more absolutely certain that the defendant's statements formed the sole basis of the sale, than the present, and in such case the declaration is ordinarily to be regarded as a warranty.

As to how far statements made by the vendor, are to be regarded as an express warranty, every case must depend very much upon its own circumstances. And unless it is apparent, that defendant's statements, in regard to the quality of the hay, were understood by the parties at the time, as amounting to nothing more than recommendations of the goods, and were matters of opinion merely, and the plaintiff was still left to understand that he must examine and judge for himself; the case should be submitted to a jury, unless there is a fatal variance.

There is very much in the present case to show that defendant's statements ought to be regarded as a warranty.

1. They were understood by both parties as forming the basis of the contract of sale, there being no good opportunity to examine the goods, and none in fact attempted.

2. They were in regard to matters upon which the defendant was supposed and professed to have personal knowledge, and what he said he asserted positively, therefore he ought to expect to be bound by it.

3. The hay was bought for a particular use, and the defendant knew plaintiff would not buy an inferior article. The sale of the hay then for this particular use, ordinarily implies a warranty that it is fit for the use.

The mere assertion that hay is good hay, certainly implies something more than was found in this case; but good hay for the particular use, cut and cured well, in good season, is sufficiently definite, one would think.

CONTRACTING PARTIES.—DUTY OF DISCLOSURE.

A sale will not be set aside as fraudulent, simply because the buyer was at the time unable to make the payment agreed upon, and knew his inability, and did not intend to pay.
No man is under obligation to make known his circumstances when he is buying goods.

[*Smith* vs. *Smith*. Pennsylvania Supreme Court, 1853. Official report not yet published.*]

The plaintiffs sold and delivered certain goods to one Snodgrass; and the defendant, as sheriff, levied an execution against Snodgrass upon the goods. The plaintiffs brought this action to reclaim the goods, alleging that the purchase of them by Snodgrass was fraudulent, and vested no title in him. The fraud alleged consisted in this: that Snodgrass was, at the time of the purchase, insolvent, unable to pay for the goods, and did not intend to pay for them; and concealed these facts from the plaintiffs.

The court below charged the jury, in substance, that a purchase of goods vests a voidable title in the purchaser if, at the time of the purchase, he knew and did not reveal the fact that he was unable to pay, and did not intend to, even though he made use of no deceptive assertions, or false or fraudulent representations to induce the sale. Verdict and judgment were, it appears, for the plaintiffs, and defendant appealed.

Lowrie, J.—We may at the outset reject, as only apparent analogies, some classes of cases that are distinguishable from the one under consideration. We reject the strictness required in the evidence of fraudulent intent, in the criminal offence of false pretences, because a man is chargeable civilly, but not criminally, for the fraud of his agent, and also for the legitimate consequences of a dishonest representation, whether he intended to defraud or not. (1 Met., 1; 3 Barn. & H., 114; 14 Penn. State R., 142.) We set aside the principle that contracts will not be specifically enforced, if it would be unconscionable to ask it, for this is confined to executory contract. We reject those moral and legal doctrines that require the strictest honesty in all dealings, where one party stands in a relation of special influence or confidence towards the other; for between buyer and seller the law recognises no such relation.

Reduced to its fewest words, the instruction is, that an intention not to pay, and conscious and unrevealed insolvency, make a purchase fraudulent legally as well as morally. Is it so?

An intention not to pay is dishonest, but it is not fraudulent. (9 Watts, 34; 6 Wend., 81.) The law provides an action on the contract as the remedy for just such dishonesty. 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. Such intention by itself is disregarded by the law, for it can be set aside by the usual contract remedies.

Nor does insolvency make a sale voidable after delivery. (6 Wend.,

* This case we give from a MS. report, sent us by the Hon. W. H. Lowrie.

81; 2 Mason, 240.) If such were the law, there is no calculating the suspicions and disputes which it would nourish. If it were so, the law of stoppage *in transitu* would be effectually abolished by one of a much more sweeping character. Nor does insolvency, combined with an intention not to pay, for it is no more fraudulent in an insolvent, than in a perfectly solvent man, to have such an intention.

The buyer's knowledge of his insolvency would be quite as dangerous a test of fraud, for it might always be inferred from the fact of insolvency, and from the presumption that every man is acquainted with his own affairs. If the fact of buying implies an assertion of solvency, then every contract by a man in failing circumstances, can be made fraudulent; for to this implied assertion a jury might add a presumption that he had either investigated his affairs and knew his insolvency, or had not and knew his ignorance; and then might follow, just as logically, the inference of an intention not to pay. (14 State R., 142.) Thus all the elements of fraud contained in the proposition under consideration may be inferred from the mere fact of a subsequent failure. If this were the law, it would soon sweep away all the law of contracts as to persons failing, and a new law of fraud would take its place. On every failure we should have a general scramble among vendors to get back their goods, and suits without number to establish their rights by convicting the buyer of fraud.

As to the fact of not revealing his insolvency, some of the above considerations tend to answer it, and it is completely set aside by the principle that no man is under a legal obligation to make known his circumstances when he is buying goods, and no wise dealer would rely upon his representations if he did.

We do not forget the maxim, "*apices juris non sunt jura*," and think we do not strain the proposition in question by this analysis of it. 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.

We may get a perfectly clear view of this case by so defining the question as to avoid the danger of an irrelevant conclusion. 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? 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 the 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 active fraud. But, where people stand upon an equality, the law does not indulge them in reposing such special trust, by helping them out of a difficulty against which they took no pains to guard themselves. It enforces their contracts, not their expectations. It does not hinder people from making foolish bargains, though it does protect them against positive deceit. The state might in this matter enlarge its jurisdiction, but its protection is never extended, without contracting the limits of individual liberty.

Without extending this discussion, we may say that the rule is the same here as in the case of a disappointment in the quality of goods sold (9 Watts, 56; 7 State R., 297; 11 ib., 279), or of the false representation of the character of another (14 State R., 141; 6 ib., 316), or of any other false representation to induce a contract (3 Serg. & R., 20; 15 State R., 428).

The right of reclamation after delivery exists only where an action of deceit would lie. As a man cheated of his money may sue in assumpsit or deceit, so one cheated out of personal chattels may sue in trover, replevin, or deceit. The injury and the remedy correspond in substance. But there must have been actual artifice, intended and fitted to deceive, before a man can claim that he has been defrauded.

Judgment reversed.

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### CONTRACTING PARTIES.—DUTY OF DISCLOSURE.

Contracting parties are bound to disclose material facts known to each, but of which he supposes the other to be ignorant, only when they stand in some special relation of trust and confidence in relation to the subject matter of the contract.

But neither one will be protected if he does anything, though slight, to mislead or deceive the other.

[*Beach* vs. *Sheldon*; 14 Barbour's (N. Y. Supreme Ct.) R., 66.]

The plaintiff, in June, 1851, lost a flock of sheep. He made a good deal of search and inquiry for them, but without effect. In July, one Dixon informed the defendant, Hiram Sheldon, that he had taken up some sheep, describing those of plaintiff, and inquired if he knew who had lost any; to which Sheldon replied that "a man in Sennett, south of him, had lost some." In August, the other defendant, Isaac Sheldon, went to the plaintiff and talked about his sheep, and inquired whether he had found them. The plaintiff said he had not. Isaac then said "he supposed he never would find them," and offered to buy them. After some bartering, the plaintiff sold them to Isaac Sheldon, "wherever he could find them, and whoever had them," for ten dollars; and the agreement was reduced to writing. Soon afterwards both defendants went to Dixon's, and claimed and received the sheep.

The plaintiff now sought to set aside this sale on the ground that it was induced by false pretences; and to recover damages. The cause was first tried before a justice and a jury, and a judgment rendered for the plaintiff, which was reversed on appeal to the county court; and the plaintiff now appealed from the judgment of the county court.

JOHNSON, J.—Was the defendant, Isaac Sheldon, when he went to the plaintiff to purchase the sheep in question, guilty of a fraud which the law notices, and will redress, in withholding the fact within his knowledge, that the sheep had been found? That he was under a strong moral obligation to make the disclosure, none will deny, but the legal duty is not so clear. It was a gross moral wrong and fraud in him to withhold the information, and take advantage of the plaintiff's ignorance.

The rule in regard to disclosure, on the part of persons dealing with each other, seems to be substantially the same both in law and equity. Each party is bound to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, and equally within the reach of his observation; but this obligation to disclose material facts is confined to a party under some special obligation, by confidence reposed or otherwise, to communicate them truly and fairly. (2 Kent's Com., 482.)

It is obvious, in the present case, that the defendant, Isaac Sheldon, was under no special obligation to the plaintiff. The plaintiff reposed no confidence in him by reason of any legal relation existing between them. Had the plaintiff employed the defendant to find his sheep, then the law would have imposed the duty of disclosing the fact of their having been found. So, had the defendant taken up the sheep himself, he would have been agent or bailee of the plaintiff, and therefore under special obligation to communicate this material fact. But the defendant was a mere stranger, who had obtained the information casually, from a source equally open to the plaintiff, and was therefore under none other than a strong moral and christian obligation to disclose.

I have considered the case thus far upon the question of the duty of the purchaser to disclose, merely; and am clearly of the opinion that upon that ground the defendants are not liable. But there is another feature in the case which, in my judgment, stamps the character of fraud in a legal sense upon the transaction on the part of the purchaser, in characters too plain to be mistaken or evaded. While a party in whom no trust or confidence is reposed, and between whom and the other party no legal relation in regard to the subject of the purchase exists, need not disclose material facts within his knowledge, which he knows such other party to be ignorant of, he must do nothing whatever to deceive or mislead, or he will not be protected.

Here the defendant who negotiated the purchase, after ascertaining that the plaintiff had not been able to find his sheep, told him that he did not believe he ever would find them. The object of this was clearly to discourage the plaintiff from making further search or inquiry for his property; to induce him to sell it, for a mere nominal price, as property which might never be discovered, and to create the impression in the plaintiff's mind, that he, the purchaser, did not know where the sheep were, or that any one had taken them up. It was equivalent to saying,

"I have not found them, and do not know of any one who has, and am of opinion that you will not be able to find them."

The fact of their having been found, was a material circumstance affecting the price; and the attempt to mislead and create a false impression in regard to the situation of the property, was a fraud of which the law justly takes cognisance. The evidence was sufficient to authorize the jury to find that something was said or done by the vendee to mislead and create a false impression in the mind of the vendor. The jury doubtless found also that the defendants were acting in concert, throughout, in the matter, as they well might, from the evidence before them.

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DEBTOR AND CREDITOR.—VOID CONTRACTS.

A person may contract to labor for another during life, in consideration of receiving his support; but his creditors have the right to inquire into the intention with which such an arrangement is made, and it will be set aside if entered into to deprive them of his future earnings.

[*Tripp* vs. *Childs*; 14 Barbour's (N. Y. Supreme Ct.) R., 85.]

This was a bill filed by the creditors of Ebenezer Childs, with a view of setting aside an agreement entered into by Childs with his son, Lysander D. Childs, which was alleged to have been made with a view to protect the future earnings of the father in the practice of his profession, from his creditors. The facts are very fully stated in the opinion.

JOHNSON, J.—The only question of any considerable moment in this case, is whether the two agreements dated respectively on the 10th September, 1839, and the 3d of September, 1841, between Ebenezer Childs, and his son Lysander D. Childs, were entered into for the purpose of protecting the future earnings of the former in the practice of his profession from his creditors. If they were made for that purpose, they are fraudulent and void, and his earnings now in his possession, and under his control, nominally as the agent of his son, must be applied in satisfaction of his debts. This intent in the present case is to be deduced from the relation of the parties to each other, the nature of the contract, and the facts and circumstances attending its execution and performance. It is admitted, in the answers, that at the time of entering into these agreements, Ebenezer Childs was largely indebted to several persons, and that all his estate, both real and personal, had before that time been appropriated to the payment of his debts, leaving a considerable balance unsatisfied. Now, although it is true that a creditor has no claim to the future services of his debtor, or upon his skill or ability to labor, as urged by the defendant's counsel, and the law affords the creditor no means to compel the debtor to serve him in satisfaction of his demand, it is also true that upon the debtor's earnings—the fruits of his labor performed—the creditor has a just claim in law and conscience for the satisfaction of his demands. And any agreement entered into by the debtor, with a view to deprive his creditors of his future earnings, and enable him to retain and use them for his own benefit, will be declared void. Though the law will not compel a debtor to labor in order to satisfy a debt against him, he will not be

permitted by any contrivance or device to lay by and preserve the fruits of his skill or industry for the future use and support of himself and family, leaving his debts unsatisfied.

There can be no doubt that a person may enter into a contract to labor for another during his life, in consideration of his maintenance by such other. The consideration to uphold the agreement would be ample. But if there are creditors at the time, not only they, but subsequent ones, have a right to inquire into the object and intention of making such an agreement. Courts and juries are then to look into the circumstances attending the transaction, to ascertain the relation in which the parties stand to each other; whether the party employing has any need of such services in carrying on the business in which he is engaged; whether he exercises any care or supervision over the service rendered; whether the employer receives the earnings of the person employed, and pays him the stipulated wages, or leaves the employee to maintain and support himself out of his earnings, as others do who are engaged in similar occupations; and whether, in short, it is such a transaction as would be likely to take place in the ordinary course of business and dealings among men.

What is the case before us? Ebenezer Childs, the father, is a practising physician and surgeon, residing in this state, and engaged in the practice of his profession. Lysander D. Childs, residing in the city of Baltimore, is not a physician or surgeon, but is engaged in other pursuits. While the parties are thus situated, in 1839, they enter into a contract, by which the father agrees to prosecute faithfully his practice for the benefit of his son, and the son agrees to pay his father a certain sum per month for his services, and either party is at liberty to put an end to the contract by giving two weeks' notice.

In 1841, they enter into a new agreement, differing from the former in this respect, that the son agrees to support his father, instead of paying him a stipulated sum as compensation. There is no provision in this contract for terminating it at any time. And it commences by a recital that the father has been deprived of all his real and personal estate, except such as is exempt from levy and sale.

It must be apparent from the mere statement of the case, that the sole object of this extraordinary arrangement was to enable the father to secure his earnings for himself, and to prevent creditors from reaching them in satisfaction of their demands. No other object can reasonably be inferred. In the first place, the service was foreign to the son's business; he had no need or occasion to employ any person to do business in that capacity. In the next place, the son furnished the father with no business to do. The latter found it for himself. The object of the son seems to have been, not to make any profit from the services of the father, but to control the earnings of the parent, and thus provide a fund, out of which the parent might derive a subsistence, when he should be unable to follow the practice of his profession. However praiseworthy this may be considered, viewed in the light of filial duty merely, it cannot be permitted to stand when the paramount claims of creditors intervene. If such an arrangement as this, so bald and palpable in every aspect, can be sanctioned and upheld against the claims of creditors, there will be no end to schemes and contrivances on the part of debtors to secure their future

earnings and profits to themselves against a day of need. The arrangement interferes with the just rights and claims of the creditors, and whatever the parties may say or believe in regard to the honesty or purity of their motives, the law presumes that they intended the natural and necessary consequences of their acts, and declares such an arrangement fraudulent and void. Courts have no discretion, in such cases, to exercise. They must pronounce the judgment of the law in all cases, and debtors and creditors alike must conform to its unvarying standards.

My opinion therefore is, that the plaintiff is entitled to a decree authorizing him to collect and receive the amount of his judgment out of the earnings of Ebenezer Childs, which were in his hands at the time of filing this bill, or which had been paid out or invested for the pretended benefit of Lysander D. Childs, in real estate or otherwise, together with his costs of this suit.

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ACCORD AND SATISFACTION.—CONSIDERATION.

A promise by a debtor to give "*satisfactory security*" for the payment of a portion of his debt is a sufficient consideration for a release of the residue by his creditor.

[*Little* vs. *Hobbs*; 34 Me. R., 357.]

This suit was brought to recover a debt of about $3,500 due from the defendants. It appeared that the plaintiffs had, some time previously, stipulated in writing that they would discharge the debt upon payment to them of fifty per cent. of its amount, in four quarter-yearly payments, "*satisfactory security to be given.*" One question was, whether this agreement was binding upon the plaintiffs.

RICE, J.—It has been held by this court to be settled law, that the payment, in money, of a part, does not operate to extinguish the whole debt, although it may be received as payment in full. There must be some consideration for the part not paid. (*White* vs. *Jadan*, 27 Me. R., 370.) It is immaterial how small the consideration may be to make the contract binding, but if without any it is void. (*Bailey* vs. *Day*, 26 Me. R., 88.) The contract of April, 1850, not only stipulates for the payment of fifty per cent. of the debt, but also that "satisfactory security" should be given. To procure security would subject the defendants to an inconvenience to which they were not liable by the terms of the original contract between the parties. *That* would constitute a valuable consideration for the agreement to relinquish that portion of the debt which was agreed to be cancelled without payment. The contract was not, therefore, void for want of consideration, as the law stood prior to the Act of 1851, c. 113.

STOPPAGE IN TRANSITU.—RIGHTS OF VENDOR.

The question whether the final delivery which determines the right of stoppage has been effected is to be decided in each case, by ascertaining whether the parties contemplated any further and more absolute reduction into possession on the part of vendee.
The assignment of the bill of lading to a *bonâ fide* purchaser defeats the right of stoppage in transitu.

[*Chandler* vs. *Fulton*; Texas Supreme Ct., 1853. Official report not yet published.*]

Patrick & Co., of New York, sold to one Nicholson, of Bastrop, a bill of goods on a credit of twelve months, and shipped them in April, 1851, to Fulton & Hensley, commission merchants at Port Lavaca, and defendants below in this cause, with instructions to forward them to their destination. Fulton & Hensley received the goods in their warehouse, and wrote to Nicholson advising him of their arrival, asking orders, and stating that they would "*hold on to the goods until he should order them away.*" The following month, Nicholson being in failing circumstances, and unable to pay, assigned the bill of lading to Chandler, the plaintiff in this cause. Chandler sent for and demanded the goods of Fulton & Hensley, offering to pay their charge. They refused to receive the payment, or to deliver the goods without an order from the consignors, Patrick & Co.

Chandler brought this suit to recover the goods from Fulton & Hensley. Their defence was that they, as agents of Patrick & Co., had exercised the right of the latter of stopping the goods. Patrick & Co. were also admitted to defend; they claiming to be the real party in interest. They answered, justifying and adopting the acts of Fulton & Hensley in stopping the goods, on the ground they were not paid for, that Nicholson was insolvent, and that the assignment to Chandler was in fraud of their rights. The question was upon the right of stoppage under these circumstances.

There was a verdict and judgment for the defendants, and the plaintiff appealed.

WHEELER, J.—The defence rested on the right of stoppage in transitu, and the principal question in the case is, whether the right existed, and was rightly exercised, as between the parties. This involves the inquiry, *first*, whether the goods had reached their destination, and had come into possession of the vendee; and if not, *secondly*, whether the right of the consignors was defeated by the assignment of the bill of lading.

The law is well settled that where goods have been shipped upon credit, the unpaid vendor, in case of the vendee's insolvency, may stop the goods in transitu; that is, he may countermand the delivery and resume the possession of the goods before their arrival at the place of destination; and it appears to be considered that the term insolvency, when used with reference to this branch of the law, means a general

* J. J. Holt, Esq., sends us the report of this case.—ED.

inability to pay, evidenced by stoppage of payment. (Abbott on Shipping, p. 511, No. 5, Am. ed.; Smith's Mercantile Law, 501.)

Stoppage in transitu, as the terms might import, can only take place while the goods are on their way. If they arrive at their place of ultimate destination, and are come into possession of the vendee, there is an end of the vendor's right over them, and, therefore, in most of the cases on this subject the question has been, whether the goods had or had not arrived at the termination of their journey. The rule to be collected from all the cases (it has been said) is that they are in transitu so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. (*Lickbarrow* vs. *Mason*, 1 Sm. L. C., 415, n.; Abbott on Shipping, 520.)

The transitus of the goods, and consequently the right of stoppage, is determined by the delivery of the goods, or by circumstances which are equivalent to actual delivery. There are cases in which a constructive delivery will, and others in which it will not, destroy the right. The delivery to a carrier or packer to or for the use of the vendee, or to a wharfinger, is a constructive delivery to the vendee; but it is not sufficient to defeat this right even though the carrier be appointed by the vendee. It will continue until the place of delivery be, in fact, the end of the journey of the goods, and they have arrived to the possession of the vendee or under his direction. (2d Kent's Com., 543–4.)

These are the general principles which have been deduced by eminent jurists and elementary writers on this branch of the law from adjudicated cases. Questions of great nicety and difficulty frequently arise in their application. "In many of the cases" (says Kent), "where the vendor's right of stoppage *in transitu* has been defeated, the delivery was constructive only, and there has been much subtlety and refinement on the question as to the facts and circumstances which would amount to a delivery sufficient to take away the right. The point of inquiry is, whether the property is to be considered as still in transitu; for if it has once fairly arrived at its destination, so as to give the actual exercise of dominion and ownership over it, the right is gone. The cases in general on the subject of constructive delivery may be reconciled by the distinction, that if a delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to a carrier or agent for safe *custody or disposal on the part of the vendee*, and the middle man is by the agreement converted into a special agent for the buyer, the transit or the passage of the goods terminates, and with it the right of stoppage." (Ib. 544–5.)

Applying this test to the present case, the conclusion, I think, must be that the transit of the goods was not determined, and that there was not such a delivery to the vendee as to prevent the vendors from exercising the right of stoppage in transitu.

These goods, with others, were consigned to the care of Fulton & Hensley, with instructions by the consignors to use every dispatch in forwarding the goods to their respective destination. They looked to the vendee, Nicholson, to be reimbursed the freight and charges, and the

letters addressed to him in which they say that the goods are still in their warehouse "subject to his orders,"—that they had formerly written to him advising him of their arrival to his address, and asking instructions what further disposition to make of them, and adding that they will "hold on to the goods" until he "orders them away," were probably only intended to advise him of the arrival of his goods, that they would be forwarded upon payment of the dues, and to quicken his diligence in making payment, and enabling them to carry out the instructions of the consignors to use every dispatch in forwarding them. They undoubtedly assumed the character of agents for the vendee; but not by any new agreement which impressed on them a new character distinct from that of agents to forward the goods pursuant to the original contract. The evidence, it seems to me, does not warrant the conclusion that they were not the agents of the vendee to forward the goods, but his agents merely for safe custody and disposal by them, and this, as we have seen, is the test by which to ascertain whether the right of stoppage is determined.

The case, I take it, was simply this: Nicholson was in default of payment of freight and charges, and Fulton & Hensley did not choose to forward the goods unless upon payment and his order; and hence they retained them. "If the goods" (it has been held) "have arrived at the port of delivery, and are lodged in a public warehouse for default of payment of the duties, they are not deemed to have come to the possession of the vendee, so as to deprive the consignor of his right." (2 Kent's Com., 546, n. 9.) This is not that case, but it is not materially different in principle. If, by contract with the vendee, express or implied, the relation in which the defendants, Fulton & Hensley, stood before as mere instruments in the conveyance of the goods to the appointed place of destination was changed, and they became the agents of the vendee for a new and different purpose, it is clear that it was such a constructive possession on the part of the vendee as would determine the right of the consignors. And it has been held that such constructive possession may exist even where the goods are not in the hands of intermediate agents, not professedly acting for either party, if it appear that, in point of fact, they held them for the vendee, and that the transitus is regarded by the vendor or his agents as at an end.

The same rule, it is said, will prevail where the goods are still in the custody of the carrier by whom they have been forwarded, if it distinctly appears that he has expressly or by implication agreed to hold them as agent for the vendees, and not on behalf of the vendors, for the purpose of the transitus.

On the other hand, it is clearly settled that though the goods be delivered to an agent of the vendee, or to a person in his employ, and though placed on board his ship, or in his warehouse, still, if this be done with the view of forwarding them to the vendee himself, and the direction in which they have been moving, and are still to move, be the result of the original impulse impressed upon them at the beginning of the transitus, the power of the consignor to remove them into his possession will continue. And all bailments made in pursuance of the original design of the vendor, where that has been to bring the goods more absolutely to

the possession of the vendee, are, in fact, as to the completion of the transitus, bailments on the account, and to the agents, of the vendor; and this, although made to persons in the employment of the vendee. (*Buckley* vs. *Furnis*, 15 Wend., 137; *Coats* vs. *Barton*, 6 B. & C., 422.)

The conclusion to be drawn from these cases seems to be that, whether the final delivery has been effected which determines the right of stoppage in transitu, is to be decided according to the intention of the parties in each case, by examining whether they contemplated any further and more absolute reduction into possession on the part of the vendee. With what intention the goods were delivered to an agent of the vendee, or any bailment of the goods was made, is, of course, a question of fact to be decided by the jury upon the evidence in the case. (Ib.; Abbott on Shipping, 625.)

It is not necessary to a valid stoppage in transitu that a party by whom it is effected should have received a special authority to that effect. The authority of a general agent is sufficient (*Whitehead* vs. *Anderson*, 9 M. & W., 518); and it has been held that where the circumstances are such as to give a legal right, a stranger may exercise it, provided a subsequent ratification be given. (*Bell* vs. *Morse*, 5 Wharton, 187.)

The agency of Fulton & Hensley conferred on them by the consignors in this case was, doubtless, sufficient to authorize them to act on behalf of the latter. We conclude, therefore, that the right of stoppage in transitu existed, and was rightfully exercised, as between the vendor and vendee, or that the evidence was such as to authorize the jury so to find.

It remains to inquire whether the right of consignors was defeated by the assignment to the plaintiff of the bill of lading. A general assignment for the benefit of creditors, or a seizure by an execution creditor, or under process of foreign attachment against the consignee, will not affect the right of the consignor. The fact of an assignment for the benefit of creditors is, of itself, notice to the assignee of the insolvency of the consignee, and of the consequent liability of the goods to seizure by the consignor. (15 Wend., 137; 17 ib., 504; 8 Pick., 198.) Nor will a sale for a valuable consideration, unaccompanied by a transfer of the bill of lading, although quite sufficient to pass the property in the goods, affect the power of the consignor to stop them in transitu; the absence of the bill of lading being considered as constructive notice that the consignee has not paid for the goods, and that the consignor has not waived his right of resuming his lien for the purchase money. (1 Smith L. C., before cited; 16 Pick., 473; 2 ib., 399; 9 Mass., 65; 6 Taunt., 433.)

But it is well settled that the right to stop in transitu may be defeated by the vendee, by negotiating the bill of lading with a *bonâ fide* endorsee. (2 Kent's Com., 548–9; Abbott on Shipping, 5 Am. ed., 638, n.)

While, therefore, the goods remain unpaid for, and the transitus continues, the right of the vendor to stop them upon the occurrence of insolvency in the vendee may be defeated by a *bonâ fide* sale or mortgage of the goods for a valuable consideration, accompanied with a transfer of the bill of lading. All these requisites must, however, concur. (Ib. 16 Pick., 473.) And it is not to be understood that, in all cases, a sale

by the consignee, accompanied by an assignment of the bill of lading, even for a valuable consideration, will defeat the right of the consignor to stop the goods.

The validity of the assignment is not confined to these cases in which the assignee has no notice that the goods have not been absolutely paid for in money. If the assignee takes an assignment, *bonâ fide*, without notice of any such circumstances as would render the bill of lading not fairly and honestly assignable, he acquires a good title against the assignor. Goods are seldom actually paid for in money at the time of their shipment; in general, a bill of exchange is drawn for the price. If a person, knowing that such is the transaction, and that the bill of exchange has been accepted, takes an assignment of the bill of lading fairly and honestly, for a valuable consideration, before the money becomes payable, without any reason to know or apprehend that the consignee is likely to fail, and not pay the money in due time—the consignor cannot prevent the delivery of the goods. But, if a person assist in contravening the actual terms of the sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith; if, for instance, he knows that the consignee is in insolvent circumstances, that no bill has been accepted for the price, or that being accepted it is not likely to be paid, he will stand in the same situation with the consignee, and his interposition, under such circumstances, being in fraud of this right of the consignor, will not be available to defeat it. (Abbott on Shipping, 640.)

These references will suffice to show under what circumstances an assignment of the bill of lading, by way of sale or mortgage of the goods, will defeat the right of stoppage in transitu. It will have been seen that it is not absolutely necessary to the validity of the assignment that the assignee should be ignorant that the goods have not been paid for. If he takes the assignment *bonâ fide*, without a knowledge of any such circumstances as would render the bill of lading not fairly and honestly assignable, he acquires a good title as against the consignor. But if, on the other hand, he takes the assignment under such circumstances, or with notice of such facts as afford him reasonable grounds of belief that the vendee could not fairly and honestly make to him the assignment, he will be in no better condition than his assignor. It will be no answer to the assertion of right by the consignor that the assignee of his vendee did not actually intend the commission of a fraud; he must not have had reason to know or apprehend that the consignee will defraud the consignor of the price of the goods by making the assignment. Whether he had such knowledge is, of course, a question of fact.

In the present case the evidence fully establishes the insolvency of Nicholson, and it cannot, I think, be doubted that it was quite sufficient to warrant the jury in drawing the conclusion that his inability to pay for the goods was known to Chandler at the time of the assignment. On the facts in evidence, I see no reason to be dissatisfied with the verdict.

**Upon other grounds, however, the court reversed the decision below.**

TENDER.—ABSENCE OF INTENDED PAYEE.

If a party bound to make payment uses due diligence to make a tender, but through the payee's absence from home, is unable to find him or any agent authorized to receie payment for him, no forfeiture will be incurred through his failure to make a tender.

[*Southworth* vs. *Smith.* 7 Cushing (Mass.) R., 391.]

This case drew in question the effect of an attempt on the part of the demandant to make tender of payment to the tenant, which was defeated by the absence of the tenant from home. The demandant purchased a right in equity to redeem, and on the same day called at the tenant's house with the money required to redeem the estate, and was informed by the family that the tenant had gone to a neighboring state. Two days afterwards he went again with the witness, and was told that the tenant had not returned. He then offered to make the payment to any one authorized to receive it, and the money was exhibited and partially counted for the purpose, but was told there was no one authorized to receive it. He carried the money back with him, deposited it in the bank, and on the entry of the action, paid it into court for the tenant. The question was referred to the jury whether the tenant had designedly absented himself with a view to prevent a tender, and the jury found that he had. Such judgment was now to be rendered as the court considered proper.

BIGELOW, J.—Even if the tenant had been absent from home from necessity or other causes, with no intention to evade a tender, and in consequence of such absence, the demandant, by the use of due diligence, was unable to find the tenant, or any person authorized to act in his behalf, and was thereby prevented from making the tender seasonably, no forfeiture of the estate would be incurred. The demandant has shown a readiness and due effort on his part to perform the legal duty required of him, and a failure to accomplish it, through no fault on his part, but because the tenant had put it out of his power. *Lex non cogit ad vana seu impossibilia.* (*Borden* vs. *Borden*, 5 Mass. 67, 75. *Gilmore* vs. *Holts*, 4 Pick., 258, 264. *Pasker* vs. *Bartletts*, 5 Cush. 359.) It was urged as an objection, that the demandant had not done all that was necessary, because it did not appear that the money was counted or its amount accurately ascertained. But without this evidence, it is enough for the demandant to show, in the absence of the tenant, and of any agent authorized to receive the tender, his readiness to make it, without proving a precise and accurate count of the money. The same reason which excuses a tender is a sufficient answer to this objection.

Nor can it be reasonably contended, upon the evidence in this case, that it was the duty of the demandant to offer the money to any one, or to leave it where the tenant could control it. He was distinctly informed that the tenant was absent from the state, and that no one was authorized to receive the money in his behalf. We know of no principle of law, which requires a party, under such circumstances, to put a large sum of money out of his own hands, into the possession of an unauthor-

ized person, and thus unnecessarily incur the risk of its loss through accident or fraud.

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INSURANCE.—RECOVERY BY MORTGAGEE.

A mortgagee who has insured the mortgaged property at his own expense, and for his own benefit, is entitled (in case of loss within the policy before payment of the mortgage debt) to recover both the amount of his insurance and the mortgage debt.

[*King* vs *the State Mutual Fire Insurance Company.* 7 Cushing's (Mass.) R., 16.]

The defendants insured the plaintiff in the sum of $300 on his interest in a certain barn, which was destroyed by fire within the term of the policy. The plaintiff's interest in the premises was that of a mortgagee, but it was not so described in the contract of insurance. The mortgage debt was outstanding at the time of making the policy, at that of the loss, and at the demand of payment. The defendants offered to pay the plaintiff if he would assign to them his mortgage interest to the same amount, which he refused. They now admitted that they were liable, unless they had a right to demand as a preliminary condition of payment, an assignment of plaintiff's mortgage interest, or of such proportion thereof as the amount paid by them would bear to the whole mortgage debt. These facts appeared from a statement agreed upon by the parties, on which the cause was submitted.

SHAW, C. J.—The court are of opinion that the plaintiff having insured for his own benefit, and paid the premium out of his own funds, and the loss having occurred by the peril insured against, he has, *primâ facie*, a good right to recover; and having the same insurable interest at the time of the loss which he had at the time of the contract of insurance, he is entitled to recover a total loss. The court are further of opinion that if the defendants could have any claim, should the plaintiff recover his debt in full of the mortgagor, it must be purely equitable; that the defendants can have no claim until such money is recovered, if at all; and therefore, that they have no right to demand the partial transfer of the mortgage debt, by them required, as a condition to their liability to pay, pursuant to the terms of their policy. This consideration is perhaps decisive of the present case; but the question having been argued upon broader grounds, and some authorities cited to sustain the claim of the defendants, which may give rise to further litigation, we have thought it best to consider the other question now.

We are inclined to the opinion, both upon principle and authority, that when a mortgagee causes insurance to be effected for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part, but he has still a right to recover his whole debt of the mortgagor. And so, on the other hand, when the debt is

thus paid by the debtor, the money is not, in law or equity, the money of the insurer who has thus paid the loss, or money paid to his use.

The contract of insurance with the mortgagee, is not an insurance of the debt, or of the payment of the debt; that would be the insurance of the solvency of the debtor; of course, as a contract of indemnity, it is not broken by the non-payment of the debtor saved by its payment.

It is not, strictly speaking, an insurance of the property, in the sense of a liability of the property by fire, to any one, who may be the owner. It is rather a personal contract with the person having a proprietary interest in it, that the property shall sustain no loss by fire, within the time expressed by the policy. It is a personal contract which does not pass to an assignee of the property. (*Lynch* vs. *Dalzell*, 3 Bro. P. C. 497; *Columbia Ins. Co.* vs. *Lawrence*, 10 Pet. 507.) A mortgagee has a proprietary interest, a title as owner in the mortgaged property, not indeed absolute but defeasible; still, it is a proprietary interest in that property; and the insurer guarantees to him that the subject in which he has such interest shall not be destroyed or diminished by the peril insured against. There is no privity of contract or of estate, in fact or in law, between the insurer or the mortgagor; but each has a separate and independent contract with the mortgagee. On what ground then can the money thus paid by the insurer to the mortgagee be claimed by the mortgagor? But if he cannot, it seems, *à fortiori*, that the insurer cannot claim to charge his loss upon the mortgagor, which he would do, if he were entitled to an assignment of the mortgage debt, either in full or *pro tanto*.

The better to understand the precise case under consideration, it may be well to distinguish it from some, which may seem like it, but depend upon other principles.

If the mortgage debt is paid, and the mortgage discharged *before* the loss by fire, it may well be held that the mortgagee, the assured, cannot recover; not merely because the debt is paid, but because the mortgage is thereby redeemed and revested in the mortgagor; and the proprietary interest of the assured in the property insured, in respect to which alone he had any insurable interest, is determined, and it is a fixed rule of law, that to make a policy valid, and enable the assured to recover the loss, he must have an interest in the subject, when the contract is made, and when the loss occurs. He must have such an interest when the contract is made, otherwise it is a wager policy, and void; and when the fire occurs, otherwise he sustains no loss by any damage done by the fire to the thing insured, and he has no claim on the contract of indemnity. So if an owner insure his house, which is burnt within the time limited; if he has sold his house in the mean time, he has no legal claim to recover.

Another case, quite distinguishable, is, when the mortgagor causes insurance to be made on the mortgaged premises, payable to the mortgagee in case of loss. In that case, it is the mortgagor's interest in the subject which is insured, with an irrevocable power of attorney, in legal effect, an assignment, to the mortgagee, as an additional collateral security, to receive the avails of the loss, if one happens. In such case, it is very clear that, in case of loss, the insurers must pay the whole amount of the loss, without regard to the fact, that the debt has or has

not been paid. If the mortgage debt has not been paid, the money received will go to pay it *pro tanto*, and thus enure to the benefit of the mortgagor, by leaving so much less of his debt for him to pay. If the mortgage debt has been paid, then the loss, when received by the mortgagee, is received from a fund placed in his hands for a special purpose, which has been accomplished; it is the proceeds of an insurance of the interest of the mortgagor, by a contract with him, on a consideration made by him, and assigned to the mortgagee; and of course he receives it to the use of the mortgagor, and must account to him for it.

There is another case not uncommon in practice, where it is agreed at the time of the mortgage, that the mortgagee may cause the property to be insured at the expense of the mortgagor, and that the premium shall be added to the principal and interest as the debt to be paid on redemption. This is a valid contract; it is not obnoxious to the charge of usury; for though the sum thus paid enures incidentally to the benefit of the mortgagee, it goes ultimately to the mortgagor's benefit. Then if a loss occurs before the debt is paid, the sum payable to the mortgagee is the proceeds of a security furnished by the mortgagor, and then, by a general rule of law, applicable to the proceeds of all collateral security furnished by a debtor to his creditor, it goes in reduction of the debt. It is in effect a security furnished by the mortgagor; the money received under it is his money, and extinguishes his debt in the same manner as if paid by him.

In all these cases, the mortgagor pays the premium; the amount of insurance is a sum placed in the hands of the mortgagee, at the expense of the mortgagor, and as further collateral security for the debt, and of course the mortgagee is trustee for the mortgagor, first to apply the proceeds of that, as of all collateral securities, to the payment of his debt; but if the debt has been paid, or there is an overplus, he is trustee for the mortgagor. But this furnishes no defence to the insurer. The mortgagee has a title, a qualified title, to the whole mortgaged property; had a right to insure the whole insurable value in his own name; and whether, having recovered the whole, he has a right to retain it to his own use, or is bound to account for it to the mortgagor, it is wholly immaterial to the insurer. It depends on the contract or the relations subsisting between the mortgagor and the mortgagee, with which the insurer has no concern. (*De Forest* vs. *Fulton Ins. Co.*, 1 Hall, 84.)

But it is then intimated that the mortgagee is trustee for the mortgagor, and that on the ground of this fiduciary relation what he receives in that character he must account for. But in truth he is not such trustee. Nothing (an eminent judge has said) is so likely to mislead as a simile. In some very limited respects a mortgagor is a trustee; as when he has entered, and is in the receipt, of the rents and profits, he is liable to account therefor, and in that respect may be denominated a trustee. (*Clark* vs. *Sibley*, 13 Met., 210; *Cholmondeley* vs. *Clinton*, 2 Jac. & Walk. 183.)

Certainly, before entry for condition broken, the relation of mortgagee and mortgagor is that of contracting parties, and not that of trustee and *cestui que trust*.

But it is said, and in this certainly lies the strength of the argument,

that it would be inequitable for the mortgagee first to recover a total loss from the underwriters, and afterwards to recover the full amount of his debt from the mortgagor, to his own use. It would be, as it is said, to receive a double satisfaction. This is plausible, and requires consideration; let us examine it. Is it a double satisfaction for the same thing, the same debt or duty? The case supposed is this: A man makes a loan of money, and takes a bond and mortgage for security, say the loan is for ten years. He gets insurance on his own interest as mortgagee. At the expiration of seven years the buildings are burnt down; he claims and recovers a loss to the amount insured, being equal to the greater part of his debt. He afterwards receives the amount of his debt from the mortgagor. Has he received a double satisfation for one and the same debt? He surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it, but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee. But the mortgagee, when he claims of the underwriters, does not claim the same debt. He claims a sum of money, due to him upon a distinct and independent contract, that for a consideration paid by himself, upon a certain event, to wit, the burning of a particular house, they will pay him a sum of money expressed. Taking the risk or remoteness of the contingency into consideration (in other words, the computed chances of loss), the premium paid and the sum to be received are intended to be, and in theory of law are, precisely, equivalent. He then pays the whole consideration for a contract made without fraud or imposition; the terms are equal and precisely understood by both parties. It is in no sense the same debt. It is another and distinct debt, arising on a distinct contract, made with another party upon a separate and distinct consideration, paid by himself.

The argument opposed to this view seems to assume that it would be inequitable, because the creditor seems to be getting a large sum for a very small one. This may be true of any insurance. A man gets $1000 insured for $5, for one year, and the building is burnt within the year; he gets $1000 for $5. This is because, by experience and computation, it is found that the chances are only one in two hundred that the house will be burnt in any one year, and the premium is equal to the chance of loss. But suppose—for in order to test a principle we may put a strong case—suppose the debt has been running twenty years, and the premium is at five per cent. the creditor may pay a sum equal to the whole debt in premiums, and yet never receive a dollar of it from either of the other parties. Not from the underwriters, for the contingency has not happened, and there has been no loss by fire; nor from the debtor, because, not having authorized the insurance at his expense, he is not liable for the premium paid.

What then is there inequitable towards either party, in holding the creditor entitled to both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There

is nothing inequitable to the debtor, for he pays no more than he originally received in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full satisfactory equivalent.

It may then be said that upon these grounds, a wager policy might be held valid and a good ground of action. We suppose a wager policy is not held void because it is without consideration or unequal between the parties; but because it is contrary to public policy, and prohibited by positive law. But independently of considerations of public policy, if an insurance were made on a subject in which the assured has no pecuniary interest—although in other respects he may be deeply concerned in it, and on that ground be willing to pay a fair premium—made with the full knowledge of all the circumstances, by both parties, without coercion or fraud, we cannot perceive why it would not be valid as between the parties. But upon the strong objections, on grounds of public policy, to all gaming contracts, and especially to contracts which would create a temptation to destroy life or property, such policies, without interest, are justly held to be void.

On a view of the whole question, the court are of opinion that a mortgagee who gets insurance for himself, when the insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when in point of fact his only insurable interest is that of a mortgagee, in case of a loss by fire, before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use.

Judgment for plaintiff.

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### RECOUPMENT.—REAL ESTATE.

The history of the doctrine of recoupment, reviewed.
A partial failure of consideration as to real estate is the subject of recoupment, when the failure is in quantity or quality; otherwise when in title.

[*Wheat* vs. *Dobson*; 7 Ark. R.,* 699.]

This was an action of debt upon a written obligation to pay $200. Defendant pleaded a partial failure of consideration, which, as he alleged, was the sale and purchase of some lands, and of an improvement upon the public lands. The plaintiff demurred to this plea, and his demurrer was overruled. The appeal was from the decision supporting the plea.

Scott, J.—The main question presented is a new one in the history of this court in its present aspect, and is by no means free from difficulty. We think, however, it may be solved in the light of general principles and of the adjudged cases, as satisfactorily as any that can come up, although it is undeniably embarrassed by some highly respectable decisions.

When a defendant, in a suit upon a contract in a common law court,

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* This volume is not yet published. We quote from proof sheets received from the publishers.

comes in and asks to be permitted to interpose a defence founded upon a partial failure of its consideration, he certainly applies for a kind of relief that would have been refused him there peremptorily at one period in the history of these courts, and which at that period could have been obtained only in the equity courts; and it was during that period that the rule obtained as to this doctrine, which is now so often spoken of in our books as the "old rule." Hence the doctrine in question is in its nature and essence an equity doctrine, although now administered in the common law courts. And this no less so, although in truth and in fact it might have been originally a doctrine of the ancient common law, stifled by artificial technical rules, and driven for refuge into the equity courts. It is far more probable, however, from its essential properties and appropriate adaptation to a condition of advanced civilization, that it is a pure equity doctrine derived by these courts from the civil law. This probability is strengthened by the circumstance that no common law term expresses with exactness the true legal idea of this doctrine, while one derived from the civil law, in its present received signification, does so with great clearness. The almost obsolete word "*defalk*" falls far short; and although "*discount*" and "*mitigation of damages*" approach more nearly, still the one does not fully express the idea, and the other expresses somewhat more. The term, "*equitable off-set*," fails to present to the mind the essential, that the matter that is to be the foundation of the mitigation or the off-set, to be within the doctrine, must arise out of the transaction only on which the suit is founded. "*Recoupment*," however, as it is now understood, expresses all this, as it is the keeping back of something that is due, because there is an equitable reason to withhold it; and is now uniformly applied when a man brings an action for a breach of a contract between him and the defendant, and the latter can show that some stipulation in the same contract was made by the plaintiff, and by him violated; when the defendant may, if he choose, instead of suing in his turn, "*recoup*" his damages arising from the breach committed by the plaintiff, whether they be liquidated or not. And thus the law will cut off so much of the plaintiff's claims as the cross damages amount to, and in effect hold that cross claims arising out of the same transactions, shall compensate each other, and the balance only be recoverable by the plaintiff. (Toml. Law Dic. Recoup. *Ives* vs. *Van Epps*, 22 Wend. p. 156.)

With this understanding of the essence and nature of the doctrine of recoupment, we will proceed to trace rapidly its recognition and gradual development, in the common law courts, both in England and in this country, premising first, however, two particulars worthy to be kept in mind, as tending to aid materially in the elucidation of the subject.

1. This doctrine has not grown up in the common law courts, upon the ground that the express contract upon which the suit is brought is to be considered void, and that the recovery is allowed as upon a *quantum meruit* or *quantum valebat*, upon an implied contract; or that such express contract has been rescinded, and thus a return, or an offer to return, or its equivalent, must be required as a pre-requisite to the admission of the defence.

On the contrary, it has grown up under the auspices of quite another

and distinct principle of the common law, that has always been operative. and of late years has not only been a great favorite of the courts both of law and equity, but of the legislature, that of the law's abhorrence of multiplicity and circuity of actions, which can never legitimately tolerate a second litigation on the same matter, where a fair opportunity can be afforded by the first to do final and complete justice between the parties. (*McAlister* vs. *Reab*, 4 Wend., 483. *Caswell* v. *Loave*, 1 Taunt. 566.)

2. Recoupment differs from off-set in two essential particulars, that is to say, in being confined to matters arising out of, and connected with, the contract upon which the suit is brought, and in having no regard to whether or not such matters be liquidated or unliquidated.

There can be no doubt but that by the ancient common law it was a fixed principle, that if a contract was shown to be tainted with fraud, it could not be made the foundation of a recovery to any extent whatever. And it was also a principle equally well established, that if a party was injured by partial failure of the consideration for the contract, or by the non-fulfilment of any of its stipulations, or of a warranty touching its subject matter, the injured party could not defend himself in an action on the contract by proving these facts, but could obtain redress only by a cross action.

Nevertheless, it is equally well known that all these rigid rules of the common law courts have materially yielded, by a gradual process, to the influence of common justice, and common sense and convenience. The technical notion that the contract was entire, and that therefore it could not be apportioned and made a ground of recovery in any case where it was tainted with fraud, has long ago been abandoned as a universal rule, although in some cases it may be still insisted on; as, where the transaction presents ingredients so grossly offensive or so complicated and connected as to be incapable of clear and definite separation, on the ground that in such cases the parties have so much offended against good morals, or have so intricately woven a web of fraud, as to exonerate the courts of justice from the duty of unravelling the thread so as to separate the sound from the unsound. And it is in cases where fraud entered into, but did not equitably go to the entire prevention of, a recovery by the plaintiff, that we find the first cases of the defence in question in the common law courts of England. (*Ledger* vs. *Erver*, Peake's Cas. 206. *Fleming* vs. *Simpson*, 1 Camp. 40, n.) And the cases, both English and American, where the defence was allowed when the warranty was *mala fides*, and refused when the warranty was *bona fides*, rest upon the same foundation; the courts seeming for a while not to be willing to allow it except only in cases where fraud was an ingredient.

This distinction and consequent limitation upon the defence, although it had been before challenged and in several cases disallowed, was not effectually exploded in this country until the case of *McAlister* vs. *Reab*, (4 Wend., 483, affirmed 18 ib. 111), in which Judge Marcy reviewed the most prominent English and American authorities, and having shown the fallacy of the idea that the recoupment proceeded either upon the ground of set-off, or of the nullity of the original contract, and exhibited its true ground—the prevention of multiplicity and circuity of action—

refused emphatically to restrict its operation to those cases only in which fraud was an ingredient.

Where fraud has occurred in obtaining contracts, or in their performance, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defence by a party when sued upon such contract; and he shall not be driven to assert them either for protection, or as a ground of compensation, in a cross action. (*Frisbie* vs. *Hoffnagle*, 1 Johns., 50. *Becher* vs. *Vroman*, 13 ib., 302. *Spaulding* vs. *Vandercook*, 2 Wend., 731. *Barbon* vs. *Steward*, 3 ib., 236. *Peden* vs. *Moore*, 1 Stew. & P., 71. *Withers* vs. *Greene*, 9 How. 226. *Williams* vs. *Harris*, 2 How. (Miss.) R., 627. *Brewer* v. *Harris*, 2 Sm. & M., 85. *Harmon* vs. *Sanderson*, 6 ib. 41. *Ferguson* vs. *Oliver*, 8 ib., 336.)

But although we have found the defence in question admissible as to contracts respecting personal property, the case before us makes it necessary that we should go further and determine as to its validity in a court of law when real estate is the consideration of the contract.

Upon one branch of this latter inquiry, the authorities are so nearly uniform, and the reasoning by which they are sustained is so cogent, that there can be no great difficulty in arriving at a satisfactory conclusion. We mean that predicament of this question where the partial failure relates to title merely. In this class of cases, both upon principle and authority, no defect of title that does not amount to a total failure of consideration, can be set up as a defence to the suit for the purchase money. (*Greenleaf* vs. *Cooke*, 2 Wheat R., 13. *Peden* vs. *Moore*, 1 Stew. & P. R., 81. *Frisbie* vs. *Hoffnagle*, 11 John. R., 50. *Kemp* vs. *Lee*, 3 Pick. R., 952.) And perhaps it cannot even then, without eviction. (*Bumpus* vs. *Platner*, 1 John. Ch. R., 213.) The denial of defence in cases where there is but a partial defect of title, is predicated upon the exclusive and peculiar jurisdiction of equity over the title to real estate in causing it to be perfected, and upon the further consideration that the vendee in general sustains no injury by a partial defect of title so long as he retains possession; as also because it would be without the principle upon which recoupment is allowed at all in the common law courts, inasmuch as for want of that peculiar jurisdiction of the equity courts, to cause defective titles to be perfected, they could not do final and complete justice in the premises, and terminate all possible further litigation touching the contract. When, however, the partial failure of consideration arises not from a defect of title, but from a defect in the quantity or quality of the land sold, the authorities are not so harmonious. (2 Kent's Comm., 470. *Brewer* vs. *Harris*, 28 Med. & M., 84. *Ellis* vs. *Martin*, ib., 187. *Wilson* vs. *Jordan*, 3 Stew. & P., 72. *Dun* vs. *White*, 1 Ala. 645, 5 Cow. 195. *Bumpus* vs. *Platner*, 1 John Ch. R., 213.)

When the failure relates to title merely, so long as the vendee holds possession, he has a title growing up daily which by mere influx of time may ultimately ripen, and cannot therefore in his conscience say that he has received no advantage from the vendor under whom he came into the possession, and makes it difficult to say that the consideration has indeed totally failed.

And we have seen that partial failure of title as to land is not within the

principle of common law, under the auspices of which recoupment has been recognised and grown up, for want of that power in the common law courts to compel the perfection of title which alone exists in equity courts. When, however, the failure of consideration, either total or partial, relates to quantity or quality, efflux of time, however great, cannot repair it; and we therefore hold that as to real estate where the partial failure is in quantity or quality of the subject, recoupment is allowable just as it would be for any partial failure in the sale and purchase of personal property.

As the plea in the case before us does not set up a defect in the title of the subject, sold or purchased, it is within the rule that we have adopted for the allowance of recoupment in the law courts. The plea does not set up any want of title in the plaintiff to the improvement in question; on the contrary, it alleges that he was legally entitled to it, and in possession of it, by way of showing him to be without excuse for not passing over the possession of it, of which failure the defendant complains, because he has not received this part of the thing he purchased, and for which he executed the note sued on.

Finding no error in the record, the judgment must be affirmed.

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### MISTAKE.—OFFICIAL COMMISSION.

**The delivery of an official commission to a party, vests in him the authority of the office; and a misnomer of the party in the commission is not material.**
**If such an error be important, only the government can question the title of the officer, and his official acts are valid until he is removed.**

[*In re Seymour.* Supreme Court, Oregon Territory, June, 1853. Official report not yet published.*]

Judge *Matthew* P. Deady having been commissioned as *Mordaica* P. Deady, a question arose upon his right to a seat on the bench, as his presence was necessary to form a quorum. The following opinion was delivered upon the points raised:

Olney, J.—Judge Deady presents himself with a commission directed to "Mordaica P. Deady," and claims to be the intended recipient of that commission. He has been qualified before the Secretary of the territory as "M. P. Deady." To me his real name is unknown except by the commission. He holds the commission, and it is possible that it may have been wrongfully obtained. The legal presumption is, that it was delivered directly by the President to Judge Deady, and conveys to him directly the authority to act; if called John Doe, such delivery would be sufficient. I have no knowledge, even personally, that Mordaica is not the true name; have heard of no other. In the legislative and judicial records, in the public prints, and in conversation, he is known as M. P. Deady. He uses no Christian name, and the only departure from this is the single case in which he has been called Mordaica. The fact of his

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* This case is furnished to us in MS., by the Reporter of the court.

having the commission is to me judicial proof. Now I will admit that his name is "Matthew," and that the name "Mordaica" is a mistake. It is also not denied in argument that the commission was intended for the gentleman now on the bench. The person possesses the power, not the name. The name is evidence certainly, but not the only, not the strongest evidence. There is the evidence of the delivery of the commission, and there may be other grounds. Now if the name Mordaica be inserted by mistake, such mistake does not vitiate the commission, but the truth shall prevail. But even admitting that this mistake vitiates the commission, it does not follow that he cannot act. There is a distinction between officers acting under a commission, though voidable, and their acting wrongfully without title. If without any title to the office, he is wrong in all; but if in office by title or commission, he is, for the present at least, rightfully there. He has entered through the right door, and his acts while there are good. But if he has no right to the commission which he holds, through mistake or otherwise, the government, and the government only, can direct the appropriate process to issue, calling upon him to show by what authority he acts, when he will have full opportunity to answer, and must be heard, and until that proceeding be determined, he is in the office. Here the officer has received a commission, been sworn in, has entered upon the discharge of his duties, and is in short in office. His powers can only be questioned by government, and in the mode referred to. His associates must recognise his acts as valid. He is an officer *de facto*, and so remains until legally ousted. Any other doctrine would involve great difficulties. If official acts of an officer *de facto* could be treated as void, none would be safe. All judgments, all sales under execution, all titles to property acquired through judicial proceedings, would be uncertain. In this case, therefore, I consider Judge Deady an officer both *de facto* and *de jure*, and that there is a quorum present. My opinion rests on these three propositions:

I. The delivery of the commission, which the law presumes to have been made direct from the President to the party, passes the authority, and the name is not material.

II. If there be a mistake, and the truth is admitted or ascertained, the mistake is disregarded and the truth shall stand.

III. Whether rightfully or wrongfully, Judge Deady is actually in the office, and his acts are good and valid, and he will retain the office until his right is questioned by the government which appointed him, and a decision given against that right.

I may add that Judge Deady's views coincide with my own, though, from motives of delicacy, he has not taken a more active part in the decision.

WRITINGS.—PAROL EVIDENCE.

**Parol evidence is admissible to explain words in a writing so illegibly written that the court cannot determine their meaning.**

[*Jefferson Co.* vs. *Savory.* 2 Greene's (Iowa) R., 238.]

The plaintiff declared on a promissory note, made "on the ninth day of June, 1841." The note offered in evidence on the trial was, to use the language of the judge in the bill of exceptions, "so written that it would read equally well, either 'Jan.' or 'Jun.'; and, from the face of the note, the court could not say which it was." The note was objected to by the defendant on the ground of variance. The court permitted the plaintiff to show by parol evidence when, in fact, the note was made, and the plaintiff gave in evidence that it was made in January. The plaintiff further proposed to prove that the word was June, written by defendant in the usual manner of writing it; but the court refused to hear the evidence, or even to allow the note to go before the jury, until evidence should be adduced to the court, proving it was a June note. The note was rejected by the court, and the plaintiff non-suited.

WILLIAMS, C. J.—The bill of exceptions presents rather a peculiar state of facts. It is distinctly stated that the court were unable to decide whether the name of the month as written should read June or January. Resort was had to parol evidence, and having heard some testimony, with a view to establish the true date of the note, we are at a loss to understand why the plaintiff was not suffered to proceed to give evidence of the date as written in the note. The same rule which would warrant him in hearing part of the evidence, would admit it all; and, as the proposition was to prove that the word written in the note was June, we think the establishment of that fact would have been quite likely to dispel the doubt, and might have settled the question.

But we are of opinion that the court erred in refusing to let the note go to the jury for the purpose of ascertaining the date. The party objecting to the evidence, and asking the interposition of the rule of law which requires the proof offered to correspond with the allegations in the declaration, and who claimed the benefit of the objection, should have made out the existence of that variance, to the satisfaction of the court, from an examination of the instrument itself. Unless the variance was manifest, and satisfactorily apparent to the mind of the court, the note should have been suffered to pass through that ordeal instituted in our country for the adjustment of controverted facts upon the issues made up by the parties.

This, we think, is the safer and better rule in cases like this. Where the court cannot decide, the instrument should be allowed to go in evidence to the jury, submitting this question of fact, with all the other facts in the cause, to their verdict, under the instruction of the court as to the law.

**Judgment reversed.**

CONSTRUCTION.—DEED.

**An instrument in the form of a deed, but limited to take effect at the termination of grantor's natural life—held a deed, not a will.**

[*Williams* vs. *Ward.* Tennessee Supreme Ct., April Term, 1853. Official report not yet published.]

John Walls, the complainant's intestate, executed, acknowledged, and committed to registration, an instrument in the following words: "I, John Walls, of the county of Rutherford, state of Tennessee, in consideration of the natural love and affection I bear my children, Solomon, Ryland, Hiram, and Malinda Walls, have transferred and conveyed unto them the following slaves for life, namely: Green, Clem, Harry, Edward, and Nancy and her increase, to have and to hold said slaves unto the said children, their heirs and assigns—to take effect at the termination of my natural life. Witness my hand and seal, this 1st day of April, 1840.

"JOHN WALLS [L. S.]."

The defendant purchased the interest of some of the children, and at a division of the slaves, made after the death of Walls, the boy Green was assigned to defendant. The complainant, as administrator of Walls, now filed his bill claiming the boy Green upon the ground that the above instrument was a testamentary paper, and consequently, that this and the other slaves belonged to his intestate at the time of his death, and were subjected to the regular course of administration, the payment of debts, &c.

The court remarked that even if the instrument was to be regarded as a testamentary paper, the complainant could make no consistent claim under it. The ground of his claim was that Walls had made a will bequeathing his property to his children; and yet the complainant's right to recover as administrator, or even to administer at all, rested solely on the fact that Walls made no will, but died intestate. Beyond this objection to the recovery prayed in the bill, the court proceeded to discuss the substantial question involved in the case, viz. whether the instrument referred to should be construed as a deed or as a testamentary paper, and we give such portions of the opinion as relate to this question.

CARUTHERS, J.—It may be remarked that there are no creditors before the court, and in this suit we cannot know that any exist. We can only consider it as a contest between the personal representatives of Walls, and one claiming under his deed. The deed then must operate against the complainant, just as it would against his intestate, so far as the rights of those claiming under it are affected. There being no creditors or subsequent purchasers in this suit, proposing to contest the validity of this title, it is to be considered as a suit by the donor himself. He must be bound by the express words of his deed, and his administrator must be considered as standing in his shoes, and having no other rights than those possessed by his intestate at the time of his death. Then, as by

the express words of his deed, the title of the donees "is to take effect" at his death, he only "retaining the property of said slaves" during his life; what right or property was then left to pass to an administrator?

Very different questions might arise in favor of creditors or subsequent purchasers. Whether they could prevail against the title of defendant, derived under this deed, would depend upon circumstances which do not appear in this record, and upon which we give no opinion.

But the ground upon which this suit is placed by the complainant is, that the deed of his intestate can only be regarded as a testamentary paper, and therefore conveys no title as against creditors, but can only take effect after they are satisfied; that the children can only claim as legatees, and not as donees of the remainder.

This instrument is in form a deed, proved and registered as such, was so entertained by the maker, and its character can only be changed, if at all, by the construction of law. But we do not consider it a testamentary paper. This change cannot be made by Walls or complainant, if it could by others. It could not have been so intended by the maker. His object certainly was to make an absolute conveyance of the slaves, subject to a life estate in himself. The donees are "to have and to hold said slaves" unto them, "their heirs and assigns." Yet it is "to take effect at the termination of the donor's natural life," and he retains the property of said slaves during his life. Although such is not the literal import of these restrictive words, yet taken in connexion with the whole instrument, they can only mean, that the use of the slaves during his life is reserved. Any other construction would place it in his power to defeat the gift entirely, by giving, selling, or willing them to others.

He certainly intended to secure the property after his death to the designated objects of his bounty; and to make clear his intention, he acknowledged, and had the paper registered, according to the requisitions of the law on the subject of deeds of gift. No ground is left for creditors to complain, because the deed was made public by registration. "A deed of gift of slaves, to take effect after the death of the donor, is valid, and the delivery of possession is not essential to the validity of a gift, where the gift is evidenced by writing." (*Caine* vs. *Worley*, 2 Yerger, 582; *Caine* vs. *Jones*, 5 Yerg.)

The English law of former times to the contrary, in relation to personal property, by which the entire interest went with the life estate, because a remainder could not be created in personal property, has been long since changed, both there and here. (2 Kent's Com., 285.) The law being clear then, that a remainder may be limited on a life estate, or the use for life, in a deed conveying the remainder to another, is good and valid in law, the only difficulty arises from the application of the principle to a particular deed.

It is here argued that it does not apply to this case, because the gift is not to take *effect* till the death of the donor, and that he retains the *property*, as well as the *use* for life. Therefore it is contended, that no property is vested in the donees, and consequently the instrument cannot take effect as a will. We cannot concur in this construction. It is only a difference in words and not in ideas. The writer of the deed must be

taken to have meant, by the language used, to convey a present right to the remainder to his children. The right to the property was then given and vested, but not to take effect in possession, nor to be beneficially enjoyed until his death.

This is the plain common sense meaning of the instrument, and is not, we think, in conflict with any technical rule or law. The contrary construction would make the deed contradictory and absurd. By it the donor would be made to give a complete right to the property to the donees in the body of it, and then reserve the whole property to himself in a subsequent clause. This would make the latter clause void, according to the rule of law applying to the construction of deeds, which is, that where there is an irreconcilable conflict between a prior and a subsequent clause, the latter must fall, and the former stand. The maker of a deed will not be allowed to say, "I inserted a clause or condition, destructive to your supposed title, and you take nothing." (5 Yerg. 254; 4 Com. D., 329; Martin, N. C. R., 28; 2 Yerg., 584.)

The case of *Watkin* vs. *Dean* (10 Yerg., 321) is a fair illustration of the class of cases to which the doctrine contended for by complainant's counsel, applies. The principle there decided is, that an instrument, which does not purport to convey any property to which the maker was the owner at its date, or gives the one-half, or any other proportion, or all the property which he may own at his death, although in form a deed, is testamentary in its character, and can only operate to take effect as a will.

But in the case before us, the property was in possession, and described, and the donees in being, and named; the paper is in form a deed, intended to take effect as such, duly proved and registered. Nothing is relied upon to change its character, but the fact that no beneficial interest passed until the termination of a life. To carry the doctrine on the subject of converting papers not so intended, into wills by construction, would be tantamount to a negation of the right to create a remainder in property, to be enjoyed after the death of the donor. This right is well settled, and where it is exercised in good faith, should be favored, as it often tends to preserve property to children, which would otherwise be wasted by unthrifty parents, who are generally induced to make such settlements under some strong equity, as in the case now before us.

The decree must be reversed and the bill dismissed.

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### DEED.—CONSTRUCTION OF BOUNDARIES.

A grantor may by express terms exclude the bed of a river, or a highway, mentioned as a boundary. But if without language of exclusion, a line is described as *along* or *upon*, or as *running to*, the highway or river; or as *by*, or *running to the bank of*, the river, these expressions carry the grantee to the centre of the highway or river.

[*Walton* vs. *Tifft*. 14 Barbour's (N. Y. Supreme Court) R., 216.]

The plaintiffs sought to recover a portion of an island lying in the Hudson river, namely, all that portion of "lot No. 2," lying north of the

centre of the river. The plaintiffs claimed as heirs of one Walton. It was not denied that Walton was once seized of the whole of "lot No. 2," but the defendants relied on a deed by Walton to Alfred Pitcher, under whom they claimed. The deed itself had been lost; but a mortgage said to be upon the premises conveyed by it, was read in evidence by plaintiff to show the boundaries of the land conveyed. One of the bounds as stated in the mortgage was thus defined: "Running thence along the east bounds of No. 1, south, *to the north branch of Hudson river*, thence easterly, *along said river*, so as to include so much of the island as is situated within lot No. 2," &c.

The plaintiff's counsel requested the judge to submit to the jury, whether they had not shown title to the bed of the river. The judge refused to submit the question, and directed the jury to find for the defendant; judgment accordingly, and plaintiffs appealed.

WILLARD, P. J.—The jury were warranted in finding from the evidence, that the deed from Walton to Pitcher, under which title the defendant held, conveyed land bounded on the north by the main channel of the river; and if so, the judge was authorized, on that ground alone, to direct a verdict for the defendant. The plaintiffs did not ask to go to the jury on what were the actual contents of the deed to Pitcher, nor whether it was lost or not. But assuming that the deed described the premises exactly as they were described in the mortgage, of which an exemplification was produced by the plaintiffs, it carried the grantee to the centre of the main channel of the river. The plaintiffs maintain that this boundary merely includes the island to high-water mark, and thus leaves in the plaintiffs as heirs of Henry Walton that portion of the bed of the river, lying north of the centre of the main channel and high-water mark on the south side of the island. This is the point in dispute, and, as I understand the case, the only point.

At common law, a grant of land bounded upon the sea shore, or upon a stream or arm of the sea, where the tide ebbs and flows, conveys to the grantee only that part of the bank which is not covered by the water at the ordinary flood tide. It does not carry with it the lands under water, the islands in the stream, or the right of fishery. In order to pass these, the terms of the grant must be so clear and explicit as to leave no manner of doubt as to the intention of the grantor to part with these rights. But the rule is directly the reverse, as to those grants which are bounded on rivers and streams *above tide water*. In such cases, if the grant is bounded *on* the stream, or *along* the same, or *on the margin* thereof, or *on the bank* of the river, or when any other words of similar import are used, it legally extends to the middle or thread of the stream; and not only the bank but the bed of the river, and the islands therein, and the exclusive right of fishing, are conveyed to the grantee, unless they are expressly reserved, or the terms of the grant are such as to show a clear intention to exclude them from the general operation of the rule of law. (*Canal Commissioners* vs. *The People*, 5 Wend., 443; *Same* vs. *Kempshall*, 26 ib. 404; *Child* vs. *Starr*, 4 Hill, 369, 373; *Varick* vs. *Smith*, 9 Paige, 547; 5 Coke's Rep. 106; *Ex parte Jennings*, 6 Cow. 518.) The right of the riparian owner to the stream itself is not absolute, by the English common law. If the stream be navigable, the

grantee bounded on the river takes the legal ownership to the centre of the stream, subject, nevertheless, to the right of the public to use the waters thereof, as a public highway for the passage of boats or other water craft. (Hale de Jure Maris, 6 Cow. 539, note, and the cases before cited.) Such too is the common law of this state.

Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, one half the bed of the stream, if it be above tide, is concluded by construction of law. If the parties mean to exclude it, they should do so by express exception.

It has never been denied, in this state, that the grantor may so limit his grant as to exclude the bed of the river, or the highway, as either may happen to be referred to in the grant. (*Jackson* vs. *Hathaway*, 15 Johns., 454.) But if, without any language of exclusion, the line is described as along a highway, or upon a highway, or as running to a highway, or as by the river, or along the river, or upon the margin of the river, or to the bank of the river, it has been pretty uniformly held in this state, that these expressions carry the grantee to the centre of the highway in one case, and to the centre of the river in the other.

The case under consideration does not fall within any of these which restrict the boundary to the bank, and exclude the river. The west line of the lot runs north till it strikes the north bounds of the Hudson river, thence easterly along said river so as to include so much of the island as is situated in lot No. 2. Even the words, "*along the said river*," are primâ facie sufficient to indicate the centre of the stream as the line. The words, "*so as to include the island*," &c., were inserted, lest a doubt might be entertained as to which channel of the river would be meant by the words, "along the said river."

The word "*bounds*" of the river in this deed, does not indicate the bank or shore of the river, but the centre. By bounds is meant the legal imaginary line by which the different parcels of lands are divided. The plaintiff's counsel concedes that the west line does not stop at the north bounds, or bank of the river. If it did, it could not thence run along the said river, nor could it include the island which lies north of the main channel. (*Dovaston* vs. *Payne*, 2 Smith's Lead. Cases, Hare & Wallace's ed., 192, 193; Angel on Watercourses, 21.)

Judgment affirmed.

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PROMISSORY NOTES.—CONSTRUCTION OF ENDORSEMENTS.

**The endorsement upon a note of the words "*received, renewed*," may be construed to import a receipt of the interest due, and an agreement of renewal of the note.**

[*Lime Rock Bank* vs. *Mallett*. 34 Me. R., 547.]

*Assumpsit* upon a promissory note given by the defendant and others to the plaintiffs, and payable at 60 days.

There were upon the note seven endorsements similar to the following, though different in date:

"May 28, received, renewed."
"Sept. 28, " "

One question was upon their construction.

RICE, J.—The judge instructed the jury that the words of the endorsement, "received, renewed," might fairly be considered as meaning received the interest for a renewal; and "renewed" might be properly regarded as an agreement to consider the note to be the same as if made in the same terms anew from date. This would seem to be the only meaning that could legitimately be assigned to these words. The payment of interest in advance, though it has been held by this court not to be, of itself, sufficient evidence of an agreement to give further credit, is undoubtedly a good consideration for such an agreement. (*Bank* vs. *Abbott*, 28 Maine, 280; *Grafton Bank* vs. *Woodward*, 5 N. H., 99; *Bailey* vs. *Adams*, 10 N. H., 162; *Bank* vs. *Ela*, 11 N. H., 335.)

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NOTICE OF PROTEST.—TIME OF MAILING.

**Where notice of protest is properly sent by mail, it *may* be sent by the mail of the day of the dishonor. If not, it *must* be mailed in time for the mail of the next day; except that if there is none, or it closes at an unseasonably early hour, then notice must be mailed in season for the next possible mail.**

[*Lawson* vs. *The Farmers' Bank of Salem*. Ohio Supreme Ct., Jan., 1853. Official report not yet published.]

This was *assumpsit* against the plaintiffs in error as endorsers of a bill of exchange which had been protested for non-payment. The defence rested chiefly upon the ground of an alleged insufficiency of the notice of protest. The facts in relation to this part of the case were as follows:

The Bank of Salem discounted the bill in suit, and endorsed it to the Exchange Bank of Pittsburgh, in which city the acceptors lived, for collection. The bill was protested by the notary of the latter bank, on the 27th July, 1848. The Exchange Bank closed at three P.M., while the usual business hours closed at dusk, and opened at seven A.M. The mail from Pittsburgh to Salem closed on the 28th July at ten minutes past nine, and left Pittsburgh at ten o'clock. The notices of protest to the plaintiffs in error was sent under cover to the Farmer's Bank of Salem, by mail. The evidence did not show when it was mailed, but it was postmarked July *twenty-ninth*. The question raised was whether the notice ought not to have been mailed in season to go out by the mail of the day next after the dishonor, the 28th.

The court below charged that the notary was entitled to the *whole* of the day next after the dishonor, in which to deposit the notice in the office. Verdict and judgment being against the defendants, they brought this writ of error.

BARTLEY, CH. J.—Did the court err in the charge to the jury, that if the notice to the endorsers, of the demand and non-payment of the bill, was deposited in the post-office at Pittsburgh, at any time during the day after the day of dishonor, without regard to the time of departure of the mail for that day, it would be sufficient notice; and moreover, that

if it was found inconvenient to deposit the notice in the post-office in time for the mail of that day, it was in proper time if the notice was deposited in time to be sent off by the next mail of the day next after the day following the day of the dishonor of the bill? This involves a very important question of the law merchant, and it is surprising that there should remain any doubt or uncertainty at this late day, upon a question of such vital importance to the interests of commercial countries, respecting the duties and liabilities of holders and parties to dishonored paper. And it is a matter of no small moment, that a question which enters so largely, as does this, into the every-day business transactions of different commercial states and countries, should be settled, not only upon a certain and unvarying, but also upon a uniform basis.

The liability of the endorser is strictly conditional; dependent both upon due demand of payment upon the maker or acceptor, and also due and legal notice of the non-payment. The purpose and object of such demand and notice is to enable the endorser to look to his own interest, and take immediate measures for his indemnity. The demand and notice being conditions precedent to the endorser's liability, it is incumbent on the holder to make clear and satisfactory proof of them before he can recover. The plaintiffs in error in this case being accommodation endorsers, may well insist upon strict proof of due diligence in giving notice of the dishonor of the bill. The law does not require the utmost diligence in the holder, in giving notice of the dishonor of a bill or note. All that is requisite, is ordinary or reasonable diligence. And this is not only the rule and requirement of the law merchant, but a statutory provision of this state. But what amounts to due diligence, or reasonable notice, is, when the facts are ascertained, purely a question of law, settled with a view to practical convenience, and the usual course of business. The question was at one time strenuously contested, whether due diligence did not require, that where the parties reside in the same place, the notice of non-payment would be insufficient, unless given on the day of the dishonor of the bill; and where the parties reside in different places, unless sent by the mail of that day, or first possible or practicable mail after the default. (*Tindal* vs. *Brown*, 1 T. R., 167; *Darbishire* vs. *Parker*, 6 East, 3; Marius on Bills, 25.)

But the rule was established, and is supported by great weight of authority, that where parties reside in different places, and the post is the mode of conveyance adopted, although it was in no case necessary to send the notice by the post of the same day of the dishonor, or of the knowledge of the dishonor, the holder or other party being entitled to the whole of the day after the dishonor, or knowledge of the dishonor, to prepare his notice, yet that notice would be insufficient unless put into the post-office in time to go by the next mail after that day. (Chitty on Bills, 585; *Lennox* vs. *Roberts*, 2 Wheaton, 373; *Bank of Alexandria* vs. *Swan*, 9 Peters, 33; *The United States* vs. *Parker*, 4 Wash. R., 465; 12 Wheaton, 559; *Seventh Ward Bank* vs. *Hanrick*, 2 Story's R., 416; *Mitchell* vs. *Degrand*, 1 Mason, 180.)

The rule adopted by the Supreme Court of the United States, which is supported by the great weight of authority in England, and in those states in which the question appears to have been settled by reported ad-

judications, is subject to some qualification relaxing its rigor. If two mails leave the same day on the route to the place of the residence of the endorser, it is sufficient to deposit the notice in the post-office in time to go by either mail of that day, inasmuch as the fractions of the day are not counted. (*Whitewell* vs. *Johnson*, 17 Mass. R., 449, 454; *Howard* vs. *Ives*, 1 Hill N.Y.R., 263.) And for the reason that the mail of the day succeeding the day of the default may go out in some places soon after midnight, or at a very early hour in the morning, and is sometimes made up and closed the evening preceding, it has been adjudged that inasmuch as the holder is allowed till the day after the day of the default to send off the notice, reasonable diligence would not require him to deposit the notice in the post-office at an unseasonably early hour, or before a reasonable time can be had for depositing the notice in the post-office after early business hours of that day. The rule as qualified and settled by the late authorities, and which I take to be the correct one, is, that where the parties reside in the same place or city, the notice may be given on the day of default, but if given at any time before the expiration of the day thereafter, it will be sufficient; and when the parties reside in different places or states, the notice *may* be sent by the mail of the day of the default, but if not, it *must* be deposited in the office in time for the mail of the next day, provided the mail of that day be not made up and closed at an unseasonably early hour. If, however, the mail of that day be closed before a seasonable time after early business hours, or if there be no mail sent out on that day, then it must be deposited in time for the next possible post. (*Downs* vs. *Planter's Bank*, 1 Smedes & Marshall's R. 261; *Chick* vs. *Pillsbury*, 25 Maine R. 458; *Fullerton* vs. *The Bank of the U.S.*, 1 Pet. 605; *Eagle Bank* vs. *Chapin*, 3 Pick. 180; *Talbot* vs. *Clark*, 8 Pick. 51; *Carter* vs. *Burley*, 9 N. Hamp. 559; *Farmer's Bank of Maryland* vs. *Duvall*, 7 Gill and Johnson, 79; *Freeman's Bank* vs. *Perkins*, 18 Maine R. 292; *Mead* vs. *Engs*, 5 Cow. 303; *Sewall* vs. *Russell*, 3 Wend. 276; *Brown* vs. *Ferguson*, 4 Leigh. 37; *Dodge* vs. *Bank of Kentucky*, 2 Marshall, 610; *Hickman* vs. *Ryan*, 5 Littell, 24; *Hartford Bank* vs. *Steedman*, 3 Conn. R., 489; *Brenkor* vs. *Wightman*, 7 Watts & S. 264; *Townsly* vs. *Springer*, 1 La. 122; *Bank of Natchez* vs. *King*, 2 Rob. 243; *Brown* vs. *Turner*, 1 Ala. R. 752; *Lockwood* vs. *Crawford*, 18 Conn. 363; Bayley on Bills, 262; Story on Promissory Notes, sec. 325; Byles on Bills, 160.)

The discrepancies which have arisen on this subject, appear to have grown out of an inaccurate use, in some of the books on decisions, of the terms "his day," "an entire day," "a whole day," &c.; these phrases being at one time understood or taken literally, and at another time, to mean a space of time equal to a full day. If these phrases are to be taken to mean the duration of a full day instead of the day itself, in their general application, the effect would be to change and break down numerous well settled and useful rules. The law, as a general thing, does not have regard to the fractions of a day, and thus compel parties to resort to nice questions of the sufficiency of a certain number of hours or minutes, and to the taking of the parts of two different days to make up what may be considered in one sense a day, because equal in duration to one entire day. If this were the case, the endorser, after having been

notified, would often be unable to determine whether he had been notified in season or not, until he had learned the hour of the day when the default occurred; and the holder would have it in his power at times, of affecting injuriously the right of an endorser to an early notice, by delaying the presentment until a late hour in the day. Nothing more could have been intended by the use of the phrases than that each party should have a specified day upon which the act enjoined upon him should be performed. Applying the rule, therefore, which we have adopted as the correct one to this case, it was incumbent on the plaintiffs below, in order to be entitled to a recovery, to show that the notice of the dishonor of the bill was deposited in the post-office at Pittsburgh in time to be sent by the mail of the 28th of July. Ten minutes past nine o'clock in the morning was not an unseasonably early hour, or before a reasonable and convenient time after the commencement of early business hours of the day. The neglect, therefore, to send the notice by the mail of the next day after the day of default, operated to discharge the plaintiffs in error as endorsers, unless, from some other cause, notice has been dispensed with or rendered unnecessary.

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### THE LIABILITY OF RAILROAD DIRECTORS AND OFFICERS.

In England two verdicts have lately been rendered by coroner's juries against the chairmen of railway companies for manslaughter: one against the Hon. F. Scott, chairman of the South Western Railway company, for running a car over a laborer on the road, and another against Mr. Thompson, chairman of the York and North Midland Railway company, in consequence of the death of the engineer and stoker, caused by running the engine off the track.

Public opinion in respect to the liabilities of directors and other officers is as yet very vague and unsettled, and much further discussion of the subject is necessary. And an important aid in the investigation of these questions has been furnished by the late charge to the grand jury of Yorkshire, England, delivered by Justice Erle. In the course of his charge, the Judge observed in substance, that.

"If the directors of the railway company have knowingly used an unsafe engine, or prescribed some wrong regulation in regard to speed or otherwise, or if they have knowingly suffered the road to remain in a condition which rendered travelling unsafe, and death has thereby resulted, you will find a true bill against them. * * * *

If the directors contracted for proper embankments for their road and the contractors proved unfaithful, and constructed bad ones which were the proximate causes of a fatal accident, then the *contractors* are in fault, and chargeable with the consequences of their criminal negligence.

In regard to the decayed sleepers of the road,—the directors having appointed an inspector whose duty it was to supervise every portion of the road, are not liable for accidents resulting from such decayed sleepers if in providing for the examination of the sleepers due care and caution have been exercised by them.

# EDITORIAL NOTICES TO READERS.

## NOTICE TO EVERY LAWYER WHO RECEIVES THIS NUMBER OF THE MONTHLY LAW MAGAZINE.

We send this number of our periodical to every lawyer and jurist, so that by examination and perusal of the work, they may become better acquainted with its merits; and we hope all who receive it will, at once, remit three dollars as a subscription for the year. This is our desire, and the object for which the number is mailed; this we solicit as a favor, for we have no claim to demand it as a right, though we do think that we have the strongest claims to the patronage of the entire bar of this country.

We may add, that we have labored assiduously and successfully for the common benefit and advantage of the whole profession. We have published the name and address of every lawyer in the *Law Register*, thereby uniting in one society the profession scattered throughout the Union, and introducing each lawyer, not only to every other member of the great fraternity, but to merchants, and the business community generally. Perhaps it is not going too far to say, that the *Law Register*, together with the *Magazine*, tends much to create that general sympathy, moralization, and intelligence, making the bar such a conservative body, as is justly called by De Tocqueville, *the aristocracy of America.*

The *Monthly Law Magazine*, for 1854, will give to the practitioner, *a larger amount of available matter at an earlier day, in a more convenient shape, and at less expense, than he can elsewhere procure.* In conclusion, we ask every lawyer: *Will you subscribe to this periodical for a year?* Take it, not simply to promote our interest, but because we give that information which you should have at your command. We furnish you much more than the worth of your money; and, if you will try the *Magazine*, we shall never again ask a similar favor, if at the end of the year you are disappointed or displeased.

Those who did not take the work for 1853 (vol. 1), may examine it by calling on subscribers for that year. We shall be glad to send that volume also, to all who desire it, and can supply any number, the whole work from its commencement in January, 1853, being stereotyped. Subscribers may depend upon receiving the work regularly, the first of every month, as we shall avoid all irregularities in its issue.

If there are any who are not willing to subscribe for the year, we trust such will at least remit 25 cents as the price of the January number

alone. This is a favor we have a right to ask, for we cannot afford to give the numbers away, and do not desire that any should be sent back, as we are subjected to double postage on all returned. True, 25 cents is a small amount, but when multiplied by 20,000, our present edition, it amounts to *five thousand dollars.* We trust, therefore, no lawyer will so lightly value our good-will and friendship, as to fail either wilfully or through negligence, in contributing at least this small sum—his just proportion, in cancelling so large an account. The money may be inclosed in the envelope herewith sent.

*Terms of the Monthly Law Magazine, three dollars a year in advance.*

*The "Law Register for* 1854*" will be sent with the Monthly Law Magazine, from January,* 1854, *to December,* 1854, *inclusive, for four dollars* in advance:

*Or, the Monthly Law Magazine for* 1853 (*vol. I. complete*), *and for* 1854 (*vol. II.*), *for five dollars,* or both volumes *with the "Register for* 1854," for six dollars in advance.

*Money, either in gold or solvent bills, may be safely sent by mail, addressed to John Livingston,* 157 *Broadway, New York.*

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BRIEFS AND OPINIONS FOR LAWYERS.

Law Libraries in villages are generally small, and opportunities for consultation with books limited. As the Editor has connected with his office, two members of the bar, who transact much of his ordinary business, he finds ample time to prepare briefs upon questions of law, which he is willing to do for his professional brethren in the country for a reasonable compensation.

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PRESIDENT PIERCE AND HIS CABINET.

We have just had engraved, for the *Monthly Law Magazine,* fine steel portraits of President Pierce; William L. Marcy, Secretary of State; James Guthrie, Secretary of the Treasury; Jefferson Davis, Secretary of War; James C. Dobbin, Secretary of the Navy; Caleb Cushing, Attorney-General for the United States; James Campbell, Postmaster-General; and Robert McClelland, Secretary of the Interior. These plates have been made at a cost of about two hundred dollars each, by the first artists, from daguerreotypes taken expressly for the purpose. The portraits are therefore accurate and life-like representations; indeed, they are said to be superior to any ever before published in this country. Those who are familiar with the original of the portrait in this number,

will readily admit that it looks just like him. These plates alone will be worth to our subscribers much more than the subscription price of this periodical.

The lives of President Pierce and his Cabinet, by the Editor, fill upwards of one hundred closely printed octavo pages; and we shall, for want of space, be compelled to omit them from the *Law Magazine*. Those who desire to procure these memoirs, with the portraits, may remit five dollars for the work just published, entitled "*Portraits and Memoirs of Eminent American Lawyers and Statesmen now living, including President Pierce and his Cabinet*," and it will be sent, well and beautifully bound in cloth, full gilt, either by express or mail, free of postage, to any part of the United States. The work contains over 500 octavo pages of letter-press, and fifty fine steel engravings which possess the utmost finish that could be given to them by the first artists. The portraits alone have cost *ten thousand dollars.*

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TO LAWYERS IN THE COUNTRY WHO DESIRE TO PURCHASE LAW BOOKS.

THE Editor of the *Law Magazine* has frequently made purchases of law books for his friends residing in the country, to the amount of many thousand dollars. In reply to letters from others asking whether he is prepared to execute such orders, he will say that he is willing to give his services in the purchase of every description of books, free of charge, for subscribers, and at a very moderate commission for non-subscribers. His position and knowledge of the law-book trade, and familiar acquaintance with publishers, will enable him to buy for those who may send him their orders, at *a deduction of from ten to twenty per cent.* below retail prices. An experience of many years renders him capable of selecting with discrimination. Books, in large or small quantities, may now be sent with perfect safety, and at small expense, by the various express carriers, or by mail, to every town in the United States. His desire to benefit subscribers in every manner possible, induces him to offer his services in the execution of these orders; and, though he does not expect to derive any direct personal advantage therefrom, he hopes that his kind offices may add to the subscription list of this periodical, until it shall embrace the name of every intelligent practising lawyer in this republic. There is no work in the world, that contains so much law at so small a cost, as the *Law Magazine;* and did the profession perceive their own interests as clearly as they are supposed to see through their clients' cases, it would be taken, not by *one-half*, but by *the whole profession.*

LIVINGSTON'S LAW REGISTER FOR 1854.

EVERY person who will take the trouble carefully to read the following table of contents, will become convinced that the "LAW REGISTER FOR 1854" is a most invaluable work, worth much more than its price. It is not only an Official and Legal Directory, but a manual and form-book, embodying an array of practical information which renders it more valuable, as a work for daily reference, than any other published in this country. While its preparation by the Editor, with the aid of the Secretaries of the different states, and other state and county officers, has been a work of great labor, insuring such completeness, accuracy, and reliability as cannot be expected in most other works, it has involved an expense of many thousand dollars, which can only be met by the most liberal support of those to whom the book is offered. To members of the legal profession, and others, who, though not aware of the amount of this expense, feel more than an ordinary interest in the annual appearance of the work, it may not be improper to say, that more than five thousand copies must be sold, at two dollars each, before any profit can be realized thereon; and that unless this edition shall meet with the almost universal patronage of the bar, the editor will not feel warranted in ever again undertaking the publication of another edition. He, however, entertains little doubt but the "LAW REGISTER FOR 1854" will be generally purchased by lawyers, for it contains information which every one must possess, and is indispensable to all who transact business out of their own neighborhood. Moreover, if considered simply as an advertisement of the lawyer's profession and address, it must be of peculiar advantage. He trusts, therefore, no respectable practitioner will fail to supply himself with at least one copy of the work. Every one must perceive its utility, not only for constant reference, but as a most effective means for obtaining respectable business connexions, and establishing a correspondence with all points. But the work is no less useful to bankers, merchants, manufacturers, insurance companies—in short, to all who are in active business; because it contains, in a condensed form, such laws of the various states, as it is necessary for them to know in the prosecution of their affairs.

We beg to call the attention of the profession to this work, which is one of the most valuable books ever published. The book will be sent by mail to any part of the United States, free of postage, on receipt of two dollars by the Editor. We trust every lawyer in the country will procure a copy. The following is a brief statement of the

CONTENTS OF LAW REGISTER FOR 1854.

I. The name and post-office address of every practising lawyer in the

United States and the territories, with the street address of those in New York, Boston, Philadelphia, Baltimore, New Orleans, and other large cities.

II. The name and address of every law firm.

III. The name and address of every lawyer not in practice.

IV. The name and address of every judge and justice of all federal, state, and county courts, in the United States.

V. The exemption laws of each state, including household and homestead, with directions as to the course to be adopted to secure the benefit of the homestead exemption laws, *full and complete, down to the present time.*

VI. The laws of every state relative to the collection of debts, showing in what cases attachments may issue,—when a debtor may be arrested and imprisoned,—and how soon judgment can generally be obtained, and money collected by law, in the various states.

VII. The laws relative to conveyances of real property in every state, giving full information for drawing, executing, acknowledging, or proving, and recording deeds, with all statutory laws relative thereto, *down to the present time.*

VIII. The rights and privileges of married women in every state.

IX. The laws relative to the drawing, execution, and probate of wills.

X. The legal interest and penalties for usury, in every state.

XI. Full directions for taking and certifying depositions for every state, with all necessary forms for captions and certificates to depositions. *This will be found very useful to all. It is believed there are but few lawyers or commissioners who can execute, in legal form, a commission for taking testimony for other states.*

XII. Legal forms in each state for certificates of acknowledgment of the execution of papers by husband and wife, *when known to the acknowledging officer*, and the same when *the identity of the party is proved:* also the *legal forms of certificates where the execution of the deed is proved by a subscribing witness. This information is indispensable to all Lawyers and Commissioners, as but few are familiar with the present forms, those in several states having been wholly changed within the last year. Our forms are correct up to this time, having been carefully examined by eminent Judges in every state, and made to comply with the statute laws.*

XIII. A history of the several state courts of each state, with their organization, jurisdiction, and terms, with a full list of their Judges and officers.

XIV. The military bounty land law of 1850; the laws relative to the rights of pre-emption to public lands, with the regulations, instructions, and forms necessary to enable pre-emptors to avail themselves of the advantages of the laws.

XV. The patent laws and regulations, with instructions and forms for applications for patents.

XVI. Naturalization laws, with forms; custom-house regulations; the laws of copyright, &c., &c.

XVII. A complete list of banks in the United States, with the names of their officers, discount days, amount of capital, number and value of

shares, dividends, and the time of their commencing, with the rules and regulations observed by most of them in the transaction of business.

XVIII. A complete list of all railroad companies in the United States, with the amount of capital, and the names of the officers of each.

XIX. A complete list of packets and steamers, inland, foreign and coastwise, with the agents, time of sailing, place of arrival and departure, and destination of each.

XX. Rates of postage on letters and printed matter in the United States, and all foreign countries.

XXI. CORPORATION OF THE CITY OF NEW YORK, giving the name and residence of the Mayor, Aldermen, Councilmen, and other city officers.

XXII. A complete list of foreign consuls and agents of foreign governments resident in the city of New York, with the office address of each.

XXIII. A full list of fire insurance companies, life insurance companies, and marine insurance companies, with the officers and capitals of each.

XXIV. A complete list of societies and institutions, literary, moral, benevolent, and religious, in the city of New York, with the officers and locality of each.

XXV. Full and complete lists of the executive and judiciary of the general government, including the chief officers and clerks in the several departments, collectors of customs, postmasters in the principal cities; army and navy pension agents, Indian superintendents and agents; the Senate and House of Representatives; army and navy officers, &c., &c.

XXVI. A full and complete list of all foreign ministers and consuls of the United States, with their fees and salaries; also, a list of ministers and consuls of foreign countries, resident in the United States.

XXVII. Places and times of holding the United States district courts; and a full list of the judges, attorneys, marshals, and clerks, with their residences and salaries, or fees.

XXVIII. A list of the justices and officers of the United States supreme court, with their residences and salaries; and the times and places of holding the United States circuit courts.

XXIX. A full and complete list of every country and shire town, in the United States, prepared and corrected down to the present time, *expressly for this work, by the secretaries of the several states.*

XXX. A table showing the capitals of states, governors' salaries, and expiration of terms of office; the time of meeting of state legislatures, and holding general elections.

XXXI. The executive government of every state, for the year 1854; a full and complete list of the justices, judges, clerks and officers of the several state courts in the various states, with the terms of court; a complete list of the state and county officers in each state, such as sheriffs, county clerks, surrogates, county judges, prothonotaries, notaries, registers of deeds, commissioners of deeds, recorders, prosecuting attorneys, county attorneys, tax collectors, judges of probate, town-clerks, county surveyors, members of the state legislatures of the several states,

&c., &c., with their residences, salaries, or fees, and the expiration of their terms of office. *This information having been furnished and corrected expressly for the Law Register for* 1854, *by the Secretaries of State of the various states*, is full and correct down to the present time, and must be of great use and service to every executive, legislative, or judicial officer, as well as to all lawyers and business men.

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NOTICE TO ALL PERSONS HAVING UNADJUSTED CLAIMS AGAINST THE BRITISH GOVERNMENT.

We invite the attention of persons having claims to be adjusted under the mixed commission which has been instituted by the governments of Great Britain and the United States, to the following notification.

The Editor will send a brother lawyer to London about the first of March next, on business relating to unclaimed estates belonging to heirs in this country, and is willing to take charge of any matter of this kind. It will be seen that every claim must be presented on or before the 15th of March, 1854.

The Judge Advocate of the United States for the American claimants is Col. J. A. Thomas, who is now in London.

NOTIFICATION.

*Foreign Office, Sept.* 18, 1853.

With reference to the notification which appeared in the *Gazette* of the 23d ult., that a convention had been concluded between her Majesty and the United States of America, for the settlement of all outstanding claims by means of a mixed commission, and that commissioners were about to meet for the purpose of carrying out the stipulations of such convention;

Notice is hereby given, that the commissioners held their first meeting on the 15th instant, and that all persons, subjects of her Majesty, who may have claims to prefer upon the government of the United States, arising out of transactions of a date subsequent to the 24th of December, 1814, and prior to the 26th July, 1853 (the date of the exchange of the ratifications of the convention), should forthwith transmit the particulars of the same to her Majesty's principal Secretary of State for Foreign Affairs, together with the requisite evidence or information in support thereof, for the purpose of being submitted to the commissioners.

Notice is also hereby given, that in conformity with the following stipulation of the third article of the convention—

"Every claim shall be presented to the commissioners within six months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the commissioners, or of the arbitrator or umpire, in the event of the commissioners differing in opinion thereupon; and then and in any such case the period for presenting the claim may be extended to any time not exceeding three months longer;"

every claim which may not be presented to the commissioners before the 15th of March, 1854, will be inadmissible, unless reasons for delay be established to the satisfaction of the commissioners, or of the arbitrator or umpire; and that every claim which shall not be presented to the commissioners before the 15th of June, 1854, will, in conformity with the 5th article of the convention, be considered and treated as finally settled, barred, and thenceforth inadmissible.

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### MUNICIPAL SUBSCRIPTIONS TO THE STOCK OF RAILROAD COMPANIES.

In our next (February) number we shall publish the opinions, in full, of the five justices of the Supreme Court of Pennsylvania, in *Sharpless and others* vs. *The Mayor, &c., of Philadelphia.* It is the most important case that has been decided for many years relative to the power of the legislature of a state to authorize municipal corporations to subscribe to the stock of railroads. There was a majority of *one* in affirmance of the power. The opinions, which have been kindly furnished and revised for our use, by the Judges themselves, show such great research and ability as to justify publication in our pages, notwithstanding their length. The transcendent talent displayed in this case, by the Judiciary of Pennsylvania, reminds us of the decisions of the late Chief Justice Gibson in his best days, and will prove no small monument to their erudition.

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### CALIFORNIA SUBSCRIBERS.

We should be very ungrateful not to thank the bench and bar of this golden state for their patronage. *With scarcely a single exception, they are our subscribers;* and we now send over five hundred copies to California alone.

Even some of the *Priests* have favored us with their subscriptions. We may add that we have received a letter from *J. M. de Jesus Gonzalez*, who complains that we placed him in our *Law Register* as a member of the bar at *Santa Barbara*, and that he is, in consequence, annoyed by receiving accounts to collect and other business from various parts of the world. In accordance with his desire we now make the correction by saying, that *Gonzalez*, though in early youth a lawyer, has for half a century been a father in the church. It is probable he looks with no favor upon our profession in California.

# LIVINGSTON'S
## MONTHLY
# LAW MAGAZINE.

CONTENTS OF No. II., Vol. II., FEBRUARY, 1854.

NOTICE TO SUBSCRIBERS AND POSTMASTERS.

We have frequent complaints of over-charges made by postmasters, for postage on the Law Magazine; and we therefore give notice that we have the authority of the Assistant Postmaster-General for saying that the postage on this work is only *one cent* a number, if paid quarterly in advance. We shall in our next publish an authoritative letter from Washington, which will put the matter at rest. But we may now state what is the law. The postage on any periodical is *one cent* for the *first three ounces*, and *one cent* for every additional ounce:—a deduction of *one half* is to be made from these rates, when paid quarterly in advance. Now, as numbers of the *Monthly Law Magazine* average *four* ounces in weight, the postage is *two cents* a number if paid monthly; or *one cent* if paid quarterly. Any greater charge is illegal, and subjects the officer demanding it to removal and prosecution.

ORIGINAL ARTICLES.

THE HOUSEHOLD AND HOMESTEAD EXEMPTION LAWS OF THE DIFFERENT STATES.

LAWS RELATING TO THE EXECUTION OF WILLS IN THE DIFFERENT STATES.



## CONDENSED REPORTS OF RECENT CASES.

LIVINGSTON'S
MONTHLY
LAW MAGAZINE.

VOL. II. FEBRUARY, 1854. No. II.

## HOUSEHOLD AND HOMESTEAD EXEMPTION LAWS OF THE DIFFERENT STATES.

THE following is a statement of the property exempt from execution under the laws of the different states:

ALABAMA.—The following articles are exempt from execution: two bedsteads, beds, and furniture; three cows and calves; one work horse, mule, or pair of oxen; twenty hogs; twenty sheep; five hundred weight of meat; one hundred bushels of corn; all meal at any time on hand; two plows; two sets of plow gears; one table; one pot; one oven; two water vessels; one dozen cups and saucers; one set of knives and forks; one dozen plates; one coffee pot; two dishes; two pairs of cotton cords; two spinning-wheels; one churn; three chairs; two axes and two hoes; one horse or ox cart; one gun; all books and family portraits, and all tools or implements of trade. The rent due the landlord, not exceeding one year, must be tendered to him before the goods and chattels lying on the household property can be taken.

*Homestead.*—Forty acres of land, not exceeding four hundred dollars in value, are exempt, provided that they are not within the corporate limits of any town or city.

ARKANSAS.—The articles belonging to any one not the head of a family, which are exempt from execution are—wearing apparel, except watches, and the necessary tools and implements of a mechanic while carrying on his trade. Those belonging to a married man, with a family, which are exempt are—one horse, mule, or yoke of oxen; one cow and calf; one plow, one axe, one hoe, and one set of plow gears, if the debtor is a farmer; spinning-wheels and cards; one loom and apparatus necessary for manufacturing cloth in a private family, spun yarn, thread, and cloth manufactured for family use; hemp, flax, cotton and wool not exceeding twenty-five pounds; all wearing apparel of the family; two beds with bedding; also any other household and kitchen furniture, necessary for the family, agreeably to an inventory of it, to be returned on oath by the officer with the execution. Also there is exempt the necessary tools and implements of a me-

chanic carrying on his trade; all military equipments required by law; and such provisions as are on hand for family use.

California.—*Homestead.*—A quantity of land, with dwelling-house and its appurtenances, not exceeding five thousand dollars in value, to be selected by the owner, is exempt from execution for any debt contracted after July 1, 1851, or at any time out of the state. This exemption, however, does not extend to mechanics' or vendors' lien, or any lawfully obtained mortgage, nor to liability for taxes. But no mortgage sale or alienation by a married man is valid without the signature of the wife, acknowledged by her apart from her husband, except it be to secure the payment of the purchase money.

If the plaintiff require, appraisers may be appointed to value the homestead. If the lot is two thousand five hundred square yards, or less, and with improvements is valued at more than five thousand dollars, either the excess or the whole may be sold; in the latter case no bid can be received for less than five thousand dollars, and the amount exempt must be paid to the defendant. If the lot exceed two thousand five hundred square yards, and five thousand dollars in value, the appraisers must set off land, including the dwelling-house, to the value of five thousand dollars. The defendant may also designate such personal property as is exempt by law. Upon the death of the head of the family, the same benefits accrue to his wife and children.

Connecticut.—The following articles are exempt: wearing apparel, bedding, and necessary household furniture; arms and military equipments; implements of the debtor's trade; one cow, ten sheep, two swine, and the pork produced from two swine, or two swine and two hundred pounds of pork; twenty-five bushels charcoal; other coal two tons; wheat flour, two hundred pounds; wood, two cords; hay, two tons; beef, two hundred pounds; fish, two hundred pounds; potatoes and turnips, five bushels each; Indian corn or rye, ten bushels each, and the meal or flour manufactured therefrom; wool or flax, twenty pounds each, or the yarn or cloth made therefrom; one stove and its pipe, the property of a man with a family; the horse, saddle and bridle, to the value of one hundred dollars, of any practicing physician or surgeon; any part of a burying-ground designated as the burial-place of any particular person or family; and one pew ordinarily occupied by the debtor's family.

Delaware.—The following goods, the property of white citizens, are exempt from attachment or execution. The necessary wearing apparel of the debtor, his wife and children; bed and bedding for every two persons in the family; one iron stove used for warming the dwelling; fuel for family use to the amount of five dollars; bibles and school-books used in the family; one cow, one swine, and one ton of hay; the library, tools, and implements of the debtor necessary for carrying on his profession or trade, to the value of fifty dollars; other necessary household furniture, to the value of twenty-five dollars; rights of burial and tombs in use. It is provided, however, that all

the articles exempted shall not exceed one hundred dollars in value, and that if, at the time of the execution of the process, the debtor is not in possession of all or any of the specified articles, other property to that value shall be exempt, except in case of taxes due in any county or in the city of Wilmington. These exemptions do not affect a debt or contract incurred or formed prior to July 4th, 1851, or a judgment recovered in trespass, or an execution issued in Kent county. (*Rev. Code*, ch. m., § 2.)

FLORIDA.—Necessary wearing apparel, bedding and kitchen furniture are exempt. The following articles are also exempt, except for violation of the criminal law: The horse, saddle, vehicle, and harness, to the value of one hundred dollars, of every clergyman; the horse, saddle, bridle, medicine, professional books, and instruments of every surgeon, midwife, or physician; tools necessary in the debtor's trade or profession; the horse and gun, to the value of one hundred dollars, belonging to any farmer actually cultivating five or more acres of land within the state; the boat and gun of every fisherman, pilot, or resident upon any island or coast of the state; and the boat and flat of any ferryman are also exempt to the value of two hundred dollars. (*Thomps. Dig.*, pp. 356.) Every actual housekeeper with a family may claim as exempt such portion of his property as may be necessary for the support of himself and family to the value of one hundred dollars, waiving all right to all other exceptions; provided, however, that the defendant is not a non-resident, nor about removing from the state, nor removing his property, nor fraudulently disposing of the same to avoid the payment of his debts. And the defendant must make and sign a fair and full statement of all his property, verified by affidavit, which must accompany the return of the process.

*Homestead.*—A farmer owning forty acres of land, of which he cultivates ten, can hold the same exempt, except for violation of the criminal law, or for fines or taxes, provided the property does not exceed two hundred dollars in value. Every owner of a dwelling-house in a city, town, or village, provided he actually reside in the house, and that it does not exceed three hundred dollars in value, may hold it free from execution, attachment, or distress, except for violation of the criminal law, or for fines or taxes. (*Pamp. Acts*, 1851 and 1852.)

GEORGIA.—The following-named articles are exempt from execution. The equipments of military men, and the horses and wearing apparel of troopers; two beds and bedding; a spinning-wheel and two pairs of cards; a loom; common tools of the debtor's trade; ordinary cooking utensils; thirty dollars worth of provisions, and the family bible; a cow and a calf; one horse or mule to the value of fifty dollars; and ten swine. The same privileges are extended to widows and their families during the widowhood.

*Homestead.*—Every white citizen of the state, being the head of the family, may own fifty acres of land, exempt, except from execution for the purchase money of the land, for the payment of which the land shall be bound. But the land thus exempt must include the dwelling-

house and improvements of the original tract, the value of the whole not to exceed two hundred dollars.

Illinois.—Wearing apparel necessary for use is exempt, as also the following articles when owned by the head of the family: necessary beds and bedding; cooking utensils; household furniture to the value of fifteen dollars; one pair of cards; two spinning-wheels; one weaving loom and appendages; one stove and its pipe, put up for use in his dwelling; one milch cow and calf; two sheep, and the fleeces taken from them, or the fleeces of two sheep for each member of the family, provided they have not been purchased by any debtor owning sheep, together with the yarn and cloth that may be manufactured from the fleeces; and sixty dollars' worth of property suited to the condition of, and to be selected by, the debtor; three months' provision and fuel for the family, and necessary food for stock exempted from execution (*Rev. Stat.*, p. 306); any lot not exceeding ten acres, appropriated for, and used as, a burying-ground, and recorded as such in the recorder's office of the county, shall be exempt from taxation; and when sold in lots for burying the dead, the lots shall be exempt from execution or attachment, provided that no person shall hold more than one-eighth of an acre so exempt. (*Rev. Stat.*, p. 572.)

Upon the death or desertion of the head of the family, the family shall be entitled to the like exemption.

*Homestead.*—The lot of land and the buildings attached, to the value of one thousand dollars, owned and occupied as a residence by a householder having a family, are exempt from forced sale for contracts made after July 4th, 1851. Upon the death of the householder, the exemption continues for the benefit of his family until the youngest child becomes of age, and until the widow dies. No release of the exemption is valid unless in writing, subscribed by the householder, and acknowledged as is a conveyance of real estate. This exemption, however, does not prevent the sale of land for taxes or debts incurred for the purchase or improvement of the land, or incurred prior to the recording of notice of exemption.

If the creditor or officer holding the execution think the property claimed is worth more than one thousand dollars, the officer shall summon six qualified jurors of his county to appraise the premises upon oath. If, in their opinion, the property can be divided without injury to the interests of the parties, they may set off land, including the house, to the value of one thousand dollars, and the residue shall be sold by the officer. But if otherwise, they shall make and sign an appraisal of the property, and deliver it to the officer, who shall give a copy of it to the execution debtor, or to some one of the family of suitable age to understand its nature, with a notice attached, that unless the debtor pays to the officer the excess over one thousand dollars, or the amount of the execution within sixty days, the premises will be sold. If he fails to do so, the officer may sell the premises, paying from the proceeds one thousand dollars to the execution debtor, which shall be exempt from execution for one year thereafter, and applying the balance on the execution. But no sale can be made unless over

one thousand dollars are offered; otherwise the officer may return the execution unsatisfied.

INDIANA.—Property, real or personal, to the value of three hundred dollars, owned by any resident householder, is exempt from execution for debt incurred since July 4th, 1852, mechanics', laborers', and vendors' liens excepted. The articles for exemption may be selected by the debtor from his general effects. Their value is ascertained by appraisers, one chosen by the plaintiff or his attorney, one by the debtor, and a third, if necessary, by these two. In case either party fails to select an appraiser, one is chosen by the officer. The appraisers shall make a schedule of the property selected by the debtor, which, verified by affidavit, must form part of the return. If the debtor select real and personal property exceeding three hundred dollars in value, he may pay the excess within sixty days. If he fails to do so, the real property is sold, and so much of the proceeds paid to the debtor as, with the value of the personal property selected by him, amounts to three hundred dollars. Whenever real property selected for exemption is susceptible of division without material injury, it is to be so divided as to exempt the principal dwelling-house of the debtor.

IOWA.—All wearing apparel kept for actual use, and suitable to the condition of the defendant, with the trunks or other receptacles in which it is contained, even though the debtor is a non-resident; one musket or rifle; the tools, instruments, and books used in the practice of any business or profession; the horse, harness, and wagon used by a physician, clergyman, or public officer, or by the use of which a farmer or laborer gains a subsistence; all libraries, family bibles, portraits, and paintings; a pew occupied by the debtor or his family in any house of public worship; and an interest in a public or private burying-ground, not to exceed one acre for any one defendant.

If the debtor be the head of a family, there is a further exemption of one cow and calf, one horse, unless exempted as above, fifty sheep and the wool therefrom; five hogs, and all pigs less than six months old; the food necessary for the subsistence of the animals exempt for sixty days; flax raised by the defendant, and the manufactures therefrom; all cloth manufactured by the defendant not exceeding one hundred yards; household and kitchen furniture to the value of one hundred dollars; all spinning-wheels and looms and other instruments of domestic labor kept for actual use; a bedstead and bedding for every two in the family, and the necessary provisions and fuel for the use of the family for six months.

The earnings of the debtor by his own personal services or those of his family, at any time within ninety days next preceding the levy, are also exempt.

*Homestead.*—The homestead of every family is exempt from judicial sale, except for a mechanic's lien, or for debt contracted prior to the purchase of the homestead, or to July 4th, 1849, or for debt created by written contract, signed by parties having full power to convey the homestead, in which it is expressly stipulated that the homestead shall

be liable for such debt. In no case excepting a mechanic's lien, can a homestead be sold until all other property of the defendant is exhausted. A widow or widower, though without children, shall be deemed the head of the family while continuing to dwell in the house used as a homestead previous to the death of the husband or wife. If the owner is married, a conveyance of the homestead is invalid unless husband and wife join in the deed. If within a town, the homestead must not exceed half an acre in extent; if not, it is limited to forty acres; but in either case, if its value is less than five hundred dollars, it may be enlarged until its value reaches that limit.

The homestead must embrace only one dwelling-house used as such by the owner, and the buildings properly appurtenant. It may also embrace the owner's workshop. When the debtor does not choose his homestead, his wife may do so for him. and if neither, then the sheriff.

KENTUCKY.—The following are exempt: One working beast, or yoke of oxen; one work-horse; one plow with its gear; one axe, one hoe; two cows and calves; two bedsteads, beds, and bedding; wearing apparel; one loom, spinning-wheels and cards; all the spun yarn, cloth, and carpeting manufactured by the family, and necessary for its use; one pot, oven, coffee-pot, tea-pot, table knives and forks, cups and saucers, plates, and chairs, six each, the chairs not to exceed eight dollars in value; cooking-stove, and other cooking utensils, to the value in all of twenty-five dollars; ten sheep; provisions sufficient for the support of the family for one year; one saddle and bridle, with their appendages, and the family bible.

A defendant may surrender any of the articles specifically exempted, and retain others of equal value; the value to be determined by two disinterested householders selected by the officer. (*Code of* 1852.)

LOUISIANA.—The clothes, bed, and bedding of the debtor and his family; his arms and accouterments, and the necessary implements of his trade, are exempt. Nor can the sheriff seize the agricultural tools and working cattle apart from the land to which they are attached; nor the rights of personal servitude, of use and habitation; of usufruct to the estate of a minor, the income of dotal property. Household furniture to the amount of two hundred and fifty dollars, necessary for housekeeping, and owned by any one being a housekeeper, or having a family for which he or she provides; the family library, portraits, and pictures; the working tools, instruments, and apparatus necessary to the exercise of the debtor's trade or profession, are exempt, except from execution on a demand for the purchase money; wages and compensation due for services earned within thirty-one days preceding the issuing of any seizure, attachment, or garnishment against a debtor, to any amount sufficient for the necessary support of any person having a family for which he provides, are exempt, except on an execution for alimony furnished to the debtor or his family, or for rent of the premises occupied by them at the time.

*Homestead.*—The lot and building thereon to the value of one thous-

and dollars, and occupied as a residence, and *bona fide* owned by a debtor having a family, is exempt, except from sale for taxes or for the purchase money, or for debt contracted prior to the recording of the exemption. But no debtor is entitled to this exemption whose wife owns in her own right, and is in the actual enjoyment of, property exceeding $1,000 in value.

MAINE.—There is exempt the wearing apparel of the debtor and his family; one bedstead, bed, and necessary bedding for every two persons in the family, and other household furniture to the value of fifty dollars; the tools of any debtor necessary for his trade or occupation; bibles and school-books in actual use in the family, and one copy of the state statutes; stoves used exclusively for warming buildings; one cow and one heifer till she becomes three years old; two swine, one of which shall not weigh more than one hundred pounds (*Rev. Stat.*, ch. 114, § 38); (and when the debtor owns a cow and a heifer more than three years old, or two swine, each weighing more than one hundred pounds, he may elect the cow or the heifer, or either of the swine, to be exempted); ten sheep and the wool from them; thirty hundred weight of hay for the cow, and two tons for the sheep, and a sufficient quantity for the heifer, proportioned to its age; the produce of farms while standing and growing and until harvested, and sufficient corn and grain for the sustenance of the debtor and his family, not exceeding thirty bushels; one pew in any meeting-house where he and his family statedly worship; all potatoes raised or purchased for the consumption of himself and family; fire-wood, not exceeding twelve cords, conveyed to his house for his use; one boat, not exceeding two tons' burden, being owned wholly by an inhabitant of the state, and usually employed in the fishing business; one cart, to the value of twenty-five dollars; one harrow, five dollars; one plow, ten dollars; one cooking-stove, thirty-five dollars; anthracite coal, five tons; bituminous coal, fifty bushels; and all charcoal on hand; one pair of bulls, steers, or oxen, together with hay enough to keep them through the winter; one ox-yoke, with bows, ring, and staple, to the value of three dollars; two chairs, three dollars each; one ox-shed, ten dollars (*Act of* 1847, ch. 32, § 1 and 2); one or two horses instead of oxen, to the value of one hundred dollars (*Act of* 1849, ch. 133); one barrel of flour, and ten dollars' worth of lumber, wood, or bark (*Rev. Stat.*, ch. 23, § 7); also, a lot of land not exceeding half an acre, used solely as a burying-ground, an authenticated description of which must be recorded in the office of the registry of deeds, for the county where the land is situated.

*Homestead.*—The head of any family, or any householder wishing to exempt his homestead, consisting of a lot of land with dwelling-house and out-buildings thereon, may file a certificate signed by himself which shall declare his wish and describe his homestead, with the register of deeds for the county wherein his homestead lies; and so much of the property as does not exceed five hundred dollars in value shall be forever exempt from liability for any debt contracted after recording of the certificate. The widow and minor children of any person deceased who held property thus exempt, may continue to hold the premises

exempt during the minority of the children, or while the widow remains unmarried.

When such exempt property is claimed by a creditor to exceed five hundred dollars in value, it may be seized on execution, and appraisers sworn to set off part of the property at the debtor's selection, or in default thereof, at the officer's, to the value of five hundred dollars, and the remainder will be applied to satisfy the execution according to the valuation of the appraisers.

Maryland.—Real estate acquired by marriage is not liable to execution, during the life of the wife, for the debts of the husband. (Regarding the property of the wife, see *Acts of* 1842, ch. 293; 1853, ch. 245.) Wages of any laborer or other employe in the hands of the employer are exempt from attachment to the amount of ten dollars. (*Act of* 1852, ch. 340, *attachment.*) Slaves of the wife (acquired either before or after marriage), and her earnings, not exceeding one thousand dollars, may be held for her own use, and exempted from liability for the debts of the husband; corn for necessary maintenance; bedding, gun, axe, pot, and laborer's necessary tools, and such household implements, ammunition, etc., requisite for subsistence, are also exempt. (*Acts of* 1715, ch. 40, § 5; 1813, ch. 135, etc.)

Massachusetts.—The following articles are exempt from execution: the necessary wearing apparel of the debtor and his family; one bedstead, bed, and the necessary bedding for every two persons in the family; one iron stove in use in the dwelling-house, and fuel to the value of ten dollars, designed for the use of the family; other necessary household furniture to the value of fifty dollars; the bibles and school-books used in the family; one cow, six sheep, not exceeding thirty dollars in value; one swine, and two tons of hay; the tools and implements of the debtor necessary for carrying on his trade or business, and not exceeding fifty dollars in value; the uniform, arms, and accoutterments required by law, belonging to a member of the militia; ammunition and provisions intended for the use of the family, not exceeding fifty dollars in value, and rights of burial and tombs while in use as repositories of the dead.

*Homestead.*—There are also exempt from execution the lot and buildings thereon occupied as a residence and owned by the debtor, or the buildings so occupied and owned situated on land in the rightful possession of the debtor, by lease or otherwise. But the debtor must be a householder and have a family, to obtain the benefit of this exemption, and property is only exempt to the value of $500. Such exemption can only be released by a deed for good consideration, acknowledged and recorded as in the case of conveyances of real estate. The exemption will continue after the death of the householder for the benefit of the widow and children, if some of them continue to occupy it, until the youngest child is twenty-one, and until the death of the widow. To entitle property to such exemption, the owner must have set forth his intention to hold the same as a homestead in his deed of purchase, or must declare his intention in writing, and have it recorded,

duly sealed and acknowledged, in the registry of deeds in the county wherein the land lies. Such property, however, is not exempt from levy for taxes, or for a debt contracted for the purchase, or for the ground-rent of the lot whereon the buildings are situated, or for any debt contracted previously to the recording of the intention to hold the property as a homestead. Nor does such exemption effect any mortgage or other lien on the property. No conveyance of exempt property by a married man is valid unless the wife joins in the conveyance.

If a judgment creditor requires an execution to be levied on property which the debtor claims as exempt, and the officer thinks that the property exceeds five hundred dollars in value, then appraisers are to be appointed, as in case of the levy of executions on real estate. If, in their judgment, the premises exceed in value five hundred dollars, and can be divided without injury, they shall set off to the judgment debtor as much of the premises, including the house, as appear to them to be of the value of five hundred dollars, and the remainder of the property shall be dealt with as other real property not exempt from execution. But if they think it can not be conveniently divided, they shall make and deliver to the officer their appraisal, and the sheriff or his deputy shall deliver a copy to the judgment debtor or to the lawful occupant of the homestead. If the judgment debtor does not then, within sixty days, pay on the execution the excess of the value of the premises above the sum of five hundred dollars, the creditor may require the premises to be sold by the sheriff, and from the proceeds the officer must pay to the debtor the sum of five hundred dollars, to be exempt from execution for one year thereafter, and apply the balance upon the execution. But the premises shall not be sold unless more than five hundred dollars are bid. If so large a bid can not be obtained, the execution may be returned unsatisfied for want of property.

Michigan.—The following property is exempt, not exceeding $500 in value in the whole: All spinning-wheels and weaving looms, with the apparatus; stoves kept for use in any dwelling-house; a seat or pew occupied by any person or family in a house of public worship; all cemeteries, tombs, and rights of burial, while used as repositories for the dead; the arms and accouterments required by law; the wearing apparel of the family; the library and school-books to the value of one hundred and fifty dollars; and all family pictures. To householders there are also exempted ten sheep, with their fleeces, and the yarn or cloth manufactured therefrom; two cows, five swine, and provisions and fuel for the comfortable subsistence of the householder and his family for six months; also, household goods, furniture, and utensils, to the value of two hundred and fifty dollars; hay, grain, etc., enough to keep properly for six months the animals which are exempt from execution. Any chattel-mortgage, bill of sale, or lien, created on exempt property, except what is specified in the next section, is void, unless signed by the wife. The tools, implements, materials, stock, apparatus, team, harness, or other things to enable any person to carry on his profession or trade are exempt. This property, however, with the exception of mechanical tools and implements of husbandry, are not exempt from execution on a

demand for the purchase money. By the constitution, such personal property as is designated by law shall be exempted to the amount of not less than five hundred dollars, from execution for any debts contracted after 1 Jan., 1851.

*Homestead.*—Any quantity of land not exceeding forty acres, if not included in any recorded town-plot, city, or village, or one lot if within any such, with the house and its appurtenances thereon, owned and occupied by a resident of the state, and the whole not exceeding fifteen hundred dollars in value, is exempt from execution. This exemption, however, does not extend to any mortgage on the homestead lawfully obtained; but no mortgage or other alienation of the homestead by the owner, if a married man, is valid without the signature of his wife, except the mortgage is given to secure the payment of purchase money. Such a homestead is exempt after the death of the owner during the minority of his children; and if he has no children, but leaves a widow, it shall be exempt, and the rents and profits thereon shall accrue to her during her widowhood, unless she is the owner of a homestead in her own right. But the children or widow must actually occupy the homestead to gain the benefit of the exemption.

Where a levy is made upon the lands and tenements of a householder whose homestead has not been selected or set apart, the householder may notify the officer of what he regards as his homestead, with a description thereof, and only the remainder shall be subject to sale. If the plaintiff is dissatisfied with the quantity set apart, the officer making the levy shall have the homestead surveyed, beginning at a point designated by the owner, and shall set off in a compact form, including the dwelling-house and its appurtenances, the amount of land constituting by law a homestead as specified above; the expense of the survey shall be charged and collected on the execution. After the survey has been made, the officer may sell the property levied on and not included in the homestead, as he would any other real estate. Any person owning and occupying a house situated on land not his own, and claiming it as his homestead, shall be entitled to exemption. No real estate is exempt from sale for taxes.

Mississippi.—The following articles are exempted from execution: The agricultural implements of one male laborer; the tools of a mechanic necessary for his trade; the books of a student necessary for the completion of his education; the wearing apparel of each person; one bed and bedding; one plow-horse, not exceeding one hundred dollars in value; one cow and calf belonging to a housekeeper, and the arms and accouterments of any person of the enrolled militia of the state.

Goods on lease-hold premises are not liable to execution until the rent in arrear, not exceeding one year, is tendered.

Missouri.—There is exempt from execution, wearing apparel of all persons; the tools and implements of a mechanic while carrying on his trade, and the following articles, if the property of a householder: Ten hogs, ten sheep, two cows and calves, and working animals to the value of sixty-five dollars; one plow and set of plow-gears; one axe and one

[illegible] or any other property, real or personal, not exceeding in value one hundred and fifty dollars, chosen by the debtor, if he is the head of a family. Also, the spinning-wheels and cards, one loom, and apparatus necessary for manufacturing cloth in a private family; all the spun yarn, thread, and cloth manufactured for family use; flax, hemp, and wool, twenty-five pounds each; the wearing apparel of the family; two beds, with the usual bedding, and other necessary household and kitchen furniture, not exceeding twenty five dollars in value; lawyers, physicians, and ministers may select books necessary to their profession in place of other property, at their option, and physicians also may select their medicines.

The property of the wife is exempt from execution against the husband if the debt was a security debt, or was contracted before marriage, or before the wife came into possession, or if it was a fine, or for costs in any criminal case against the husband. The husband's property is exempt from all liabilities contracted by the wife before marriage.

New Hampshire.—The following articles are exempt from execution: Necessary wearing apparel of the debtor and his family; comfortable bedsteads, beds, and bedding for the family; household furniture to the value of twenty dollars; bibles and school-books in use in the family; one cow, and one and a half tons of hay; one hog and one pig, and the pork of the same when slaughtered; tools of the debtor's occupation, to the value of twenty dollars; six sheep, and their fleeces; one cooking-stove and its necessary appendages; provisions and fuel to the value of twenty dollars; the interest in one pew in any meeting-house in which the debtor or his family usually worship, and in one lot or right of burial in any cemetery. Also the uniform, arms, or equipments of every officer and private in the militia. (*Compiled Statutes*, ch. 195, § 2.)

*Homestead.*—The homestead belonging to the head of any family is exempt from any execution founded on any cause of action which has accrued since January 1st, 1852. The homestead, which must not exceed in value five hundred dollars, is not assets in the hands of any executor or administrator, for the payment of debts, or subject to the laws of distribution or devise so long as the widow or minor children shall occupy the same; and no release or waver of this exemption is valid unless made by deed executed by the husband and wife with all the forms required by law for the conveyance of real estate; or if the wife be dead, and there be minor children, then by deed executed by the husband with the consent of the judge of probate in the county in which the land is situate, indorsed on the deed. The exemption extends to any interest not exceeding five hundred dollars in value which the debtor may have in a homestead or in a building occupied by him as a homestead, though standing on land owned by another.

The sheriff, holding an execution about to be levied on lands and tenements, is required, on application of the debtor or his wife, to cause a homestead not exceeding five hundred dollars in value, to be set off from the lands and tenements of the debtor, in the following manner: Three sworn appraisers, disinterested and discreet persons, residents in the county, are chosen; one by the officer one by the creditor, and one by

the debtor, who proceed to set off a homestead by metes and bounds, and their set-off and assignment is returned by the officer for record in court. The court out of which the writ of execution or attachment is sued, may, upon good cause shown, order a re appraisement and reassignment, by the same or other appraisers, under instructions from the court, and the reappraisement is returned and recorded in the same manner as the first. When the homestead of any head of a family, in the opinion of the appraisers, can not be divided without injury and inconvenience, they shall make and sign an appraisement of the whole property. This appraisal is delivered by the officer to the execution debtor, or to some member of his family old enough to understand it, with a notice attached, that unless the execution debtor shall, within sixty days, pay to the officer the surplus value over five hundred dollars, the premises will be sold. If the surplus is not paid, the officer, observing all the forms required, makes a sale of the premises, and out of the proceeds pays to the execution debtor, if his wife gives her written consent to such payment, the sum of five hundred dollars. If the wife does not consent to such payment, the officer must deposit the amount in some savings institution to the joint credit of husband and wife, and to be withdrawn only by their joint order, or by the order of the survivor in case of the death of either. The amount is exempt for one year from the date of payment or deposit. The balance of proceeds of sale is applied on the execution. No sale can, however, be made, unless more than five hundred dollars is bid; if less, the execution may be returned unsatisfied. The provisions of the exemption act do not extend to any judgment rendered on any note or mortgage executed by the debtor and his wife, nor any claim for labor less than one hundred dollars, nor do they impair the lien by mortgage of the vendor, for the purchase money of the homestead, or any statutory lien of a mechanic or other person, for debt contracted for, and in aid of, the erection of the buildings, nor do they protect it from the paymant of taxes legally assessed. No mortgage of a homestead by a husband is valid without the consent of the wife, unless it be at the time of the purchase, and to secure payment of the purchase money.

New Jersey.—The following articles, the property of the head of a family, are exempt from execution upon judgment founded on contracts made before the 14th March, 1851: One cow; one bed and bedding; one cradle; one stove; one half cord of fire wood; one half ton of stove coal; one spinning-wheel; one table; six chairs; one hog; one hundred pounds of flour; one iron cooking-pot; knives, forks, plates, and spoons, one dozen each; half dozen bowls; two pails; one barrel; one coffee-pot; one tub; one frying-pan; the necessary tools of a tradesman to the value of ten dollars; and all necessary wearing apparel. The following property is exempt (except for the non-payment of taxes, and the purchase money of the property) from execution upon judgment founded on contracts made since 14th March, 1851: Household goods, chattels, tradesman's tools, to the value of two hundred dollars, and all wearing apparel, the property of a debtor having a family, and residing within the state. Such property is exempt as well after, as before the death of

the debtor, for the use of the family. If an officer can not find sufficient property beside that exempt, to satisfy the execution, a judge of the court of Common Pleas is to appoint three disinterested persons to appraise the goods, without reference to what they would bring at public sale, and if their value exceed two hundred dollars, the debtor may select such as he may choose to this amount, and the remainder are sold. A widow or administrator of a deceased debtor may select the same amount, under similar provisions.

New York.—The following articles, the property of a householder, are exempt: The spinning-wheels, weaving-looms, and stoves kept for use in any dwelling-house; the school-books used by the family, and the family bible and pictures; books; a part of the family library not exceeding fifty dollars in value; a seat or pew occupied by the householder or his family in any place of public worship; sheep, to the number of ten, with their fleeces, and the yarn or cloth manufactured from them; one cow, two swine, and necessary food for them; necessary pork, beef, fish, flour, and vegetables provided for family use, and fuel necessary for the use of the family for sixty days; necessary wearing apparel, beds, bedsteads, and bedding; arms and accouterments required by law; necessary cooking utensils; chairs, knives and forks, plates, tea-cups, and spoons, to the number of six each; a table; sugar-dish, milk-pot, tea-pot; crane and appendages; pair of andirons; shovel and tongs; and the tools and implements of any mechanic necessary to the carrying on of his trade, not exceeding twenty-five dollars in value. In addition to these articles, necessary household furniture; working-tools, and a team not exceeding one hundred and fifty dollars in value, and owned by a householder, or by any one having a family for which he provides, are exempted from execution, except on a demand for the purchase money of the articles exempted by law. Land used as a family or private burial-ground, not exceeding one fourth of an acre in extent, is exempted, but the exemption does not extend to any building except a vault or other place of deposit for the dead. Nor does this exemption hold good unless, before the sale on execution, the owner has certified and acknowledged, in the manner required for the acknowledgment of deeds, a description of the property, and procured the same to be recorded in the office of the clerk of the county wherein the land is situated; the same to be recorded in the same books and in the same manner as deeds should be recorded.

*Homestead.*—The lot, and buildings thereon, to the value of one thousand dollars, occupied as a residence, and owned by the debtor, is exempt from execution. The exemption continues after the death of the householder, for the benefit of the widow and family, until the youngest child becomes twenty-one years of age, and until the death of the widow. But some, or one, of the family must occupy the homestead in order to render it exempt. No release of the exemption is valid unless made in writing, subscribed by the householder, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged. To entitle property to the exemption, the conveyance must show the design of the householder to hold it as a homestead, or a notice of his intention, containing a full description of the property, must be executed

and acknowledged by the owner, and recorded in the office of the clerk of the county wherein the homestead is situated, in a book provided for that purpose, and known as the "Homestead Exemption Book." No property is by the provisions rendered exempt from sale for non-payment of taxes or assessments, or for a debt contracted for the purchase money of the premises, or contracted prior to the recording of the deed or notice as above required.

If the sheriff holding the execution thinks that the premises claimed as exempt are worth more than one thousand dollars, he shall summon six qualified jurors of his county, who shall, upon oath to be administered to them by the sheriff, appraise the premises; and if, in their opinion, the premises may be divided without injury to the interests of the parties, they shall set off as much of the premises, including the dwelling-house, as they value at one thousand dollars, and the residue may be sold by the sheriff. In case the premises exceed one thousand dollars in value, but can not be divided, they shall deliver an appraisal of the value of the property to the sheriff, who delivers a copy to the execution debtor, or to some of his family of suitable age to understand it, with a notice attached, that unless the execution debtor pays to the sheriff, within sixty days, the surplus over and above one thousand dollars, the premises will be sold. In case the surplus is not paid within sixty days, the sheriff may sell the property, pay to the execution debtor one thousand dollars of the proceeds, which shall be exempt from execution for one year thereafter, and apply the balance to the execution. Unless upward of one thousand dollars is bid, no sale shall be made, and in such case the sheriff may return the execution unsatisfied for want of property. The costs and charges of thus selling a homestead are to be included in the costs upon the execution.

North Carolina.—In this state there is exempt from execution, wearing apparel; working tools; arms for muster; one bed and furniture; one spinning-wheel, cards, and one loom; one bible and testament, one hymn-book, one prayer-book, and all necessary school-books, the property of the defendant. The following articles, belonging to any housekeeper, are also exempt: one cow and calf, and one loom; one bible and testament; one hymn-book; one testament; ten bushels of corn or wheat; fifty pounds of bacon, beef, or pork, or one barrel of fish; all farming tools necessary for one laborer; one bedstead, bed, and bedding for every two members of the family, and such other property, to the value of fifty dollars, as may be selected by three disinterested freeholders, appointed by any justice of the peace in the county, upon application made by the defendants.

Ohio.—Every person, the head of a family, can hold exempt from execution the wearing apparel of the family; the bedsteads, beds, and bedding necessary for use; one stove and pipe, used for cooking, or warming the dwelling; fuel actually provided for use sufficient for sixty days' consumption; one cow; or household furniture, if the debtor own no cow, to the value of fifteen dollars; two swine, or the pork therefrom; or if the debtor own no swine, furniture to the value of six dollars; six

sheep, the wool shorn therefrom, and the cloth and articles manufactured from the wool; or, in lieu of sheep, furniture to the value of ten dollars; and sufficient food for the exempt animals owned by the debtor, for sixty days; also, the bibles, hymn-books, psalm-books, testaments, and school-books used in the family, and all family pictures; also, any amount of provisions actually prepared and designed for the sustenance of the family, to the value of forty dollars, to be selected by the debtor; and articles of household or kitchen furniture necessary for himself or family, to the value of thirty dollars; also, the tools and implements selected by the debtor, to the value of fifty dollars, and necessary in carrying on his trade or business. All questions arising as to the number of beds necessary for the family, the amount of fuel necessary for sixty days, the quantity of food for the support of the animals exempt, etc., are determined by two disinterested freeholders selected by the officer holding the execution. These also appraise the property claimed by the debtor as exempt. Burial-grounds, so recorded in the recorder's office of the county in which they are situated, or which have been used as such for fifteen years, are exempt from execution. So, also, are a notary's seal and his registers and official documents.

*Homestead.*—The family homestead is exempt from sale on execution, provided it does not exceed five hundred dollars in value.

The officer holding the execution, on application of the debtor or his wife, must, if he intend levying on real estate, including the homestead, cause sworn appraisers to set off by metes and bounds to the debtor, a homestead not exceeding five hundred dollars in value. This appraisement is returned on the execution, and recorded in the office of the county clerk. Upon good cause shown by either party, the court out of which the writ issued, will order a reappraisement and assignment of the homestead. If no application is made during the lifetime of the debtor, his widow may make one at any time before the sale.

On petition of executors or administrators to sell the lands of any decedent to pay his debts, if the deceased has left a widow or minor child or children unmarried, and composing a part of his family at the time of his death, the appraisers shall set apart a homestead, and the homestead shall remain exempt so long as any unmarried minor child resides thereon, although the widow may have previously died, and although the parent from whom the homestead descended may have left neither wife nor husband surviving. Every widow or widower having an unmarried child or children residing with him or her, and married persons living together as husband and wife, though without children, are entitled to the privileges of homestead exemption, as also are persons owning dwellings occupied by themselves as homesteads, though built upon land owned by another.

When, in the opinion of the appraisers, it would materially injure the property of the debtor to separate the homestead, the plaintiff in execution receives in lieu of the proceeds of the sale such a sum annually, above forty dollars, as the appraisers shall decide upon as a reasonable rent; and he continues to receive this rent in quarterly payments until the debt, interest, and costs are paid. The payments are to be made quarterly, and if within ten days after the payment becomes due the de-

fendant does not pay the same, the officer proceeds to sell the homestead, observing the same process provided in other cases for the sale of real property. But the homestead can not be sold for less than its appraised value. The plaintiff, when in receipt of rent, may cause a reappraisement as often as once in two years, and the rent shall be paid according to the new appraisement; if between any two appraisements the value of the homestead has not increased one hundred dollars, the costs of the appraisement must be paid by the plaintiff.

The statute of exemption does not affect any lien upon the homestead for the purchase money, or the lien of any mechanic or other person for labor performed, or materials furnished for the erection of the dwelling, or any claim for the non-payment of taxes. No sale of any real estate under a mortgage not executed by the wife of the debtor, if he have one, can affect the right of the debtor's wife or family to have a homestead assigned them under the provisions of the statute.

Pennsylvania.—In this state, property to the value of three hundred dollars, over and above all the wearing apparel of the defendant and his family, and all bibles and school-books used in the family, are exempt. The debtor must elect to retain either real or personal estate of the value mentioned. Bonds, mortgages, or other contracts for the purchase money of real estate, are excepted from the operation of the statute.

If the debtor, when real estate is seized, fails to make his election to retain real estate, he is not entitled to three hundred dollars from the proceeds of the sale. The claim to personal estate, in order to avail the defendant, must be made before the sale; and if he neglect to enter his claim, he thereby waives all benefits to be derived from the statute. If the debtor waives his right to the exemption by agreement with one execution debtor, it is a waiver as to all other creditors. The widow or children of a deceased debtor may retain property belonging to his estate, to the value of three hundred dollars, and the executor or administrator can not sell the same, but must suffer it to remain for the use of the widow and family, unless the claim be founded on a lien for the purchase money of real estate.

Rhode Island.—The household furniture and family stores of a housekeeper, providing the whole, including beds and bedding, does not exceed two hundred dollars in value, are not liable to attachment on any writ or warrant. The wearing apparel of a housekeeper and of his family; one cow; one hog; his working tools, to the value of fifty dollars, are exempt. The working tools, to the value of fifty dollars, and the necessary wearing apparel of any debt, are not liable to distress or attachment.

South Carolina.—In this state the following property is exempt from execution: To each family, two bedsteads, beds, and bedding; one spinning-wheel, and two pairs of cards; one loom; one cow and calf; ordinary cooking utensils; and provisions to the value of ten dollars. If the debtor be a farmer, the necessary farming implements; if a mechanic, the tools of his trade.

*Homestead.*—A dwelling-house, with the appurtenant buildings, and fifty acres of land, and one horse, and provisions to the value of twenty-five dollars, are exempt, provided the real estate is without the limits of a city or town corporate, and does not exceed five hundred dollars in value.

Where the debtor owns more than fifty acres of land, three commissioners are appointed, whose duty it is to set off fifty acres, including the dwelling, in the manner most favorable to the family of the debtor, the remainder of the estate remaining liable. If the fifty acres exceed five hundred dollars in value, by the estimate of the majority of the commissioners, they proceed to reduce it in extent, until its value reaches that limit. Such commissioners are appointed by the clerk of the court on the application of either plaintiff or defendant.

A record is kept by the clerk of each county court, containing the appointments and the returns of the commissioners.

TENNESSEE.—The following articles are absolutely exempt from attachment, or any process, civil or criminal, and it is a misdemeanor in any officer to levy upon them: One cow and calf; one bedstead, and bed containing not more than twenty-five pounds of feathers; two sheets; two blankets, and one counterpane. When the family of the debtor consists of more than six children, an additional feather bed and an additional cow and calf are exempt for every three children. The following are also exempt from execution: six knives and forks; six plates; one dish; one pot; one Dutch oven; one spinning-wheel; one pair of cotton cards; one chopping-axe; five sheep; ten swine; all fowls and poultry; family bible and hymn-book; one loom; five hundred bundles of oats; five hundred bundles of fodder; ten bushels of wheat; one stack of hay; one man's saddle and one side saddle; one bridle; ox-cart, yoke, ring, staple, and log-chain; one farm-horse, mule, or yoke of oxen; six hundred pounds of pork or bacon; twenty barrels, or one hundred bushels, of corn; one plow and plowing-gear; one hoe; one iron wedge; one set of mechanics' tools, necessary for one workman at any trade; and the arms and equipments of the militia.

In case of the death of the head of a family, the above property is exempt in the hands of his widow; or, if she did not survive him, in those of his representatives, for the benefit of his children.

*Homestead.*—Before any person can be entitled to the benefit of the homestead exemption act, he must declare his intention of claiming the homestead, by having a declaration and notice of such intention signed, sealed, and witnessed, and duly registered in the register's office in the county wherein the homestead is situated; and the exemption of the homestead dates from and after this registration. The homestead of every housekeeper, or head of a family residing within the state, to the value of five hundred dollars, and consisting of a dwelling-house and out-buildings, and the land appurtenant thereto, occupied as a homestead by the head of the family, shall be exempt from attachment and execution, where the cause of action accrued after the first of January, 1853.

The homestead must be set out of the real estate levied on, by three disinterested freeholders, and only the remainder sold. If the home-

stead can not be set apart, the whole must be sold, and five hundred dollars of the proceeds paid to the clerk of the court from which the judgment issued, to be used by him only for the purchase of another homestead. The surplus proceeds of the sale are applied on the execution. The widow of a housekeeper, or in the event of a divorce resulting from the husband's misconduct, the wife is entitled to all the benefits of the exemption; so, also, are children during their minority. To become entitled to the benefits of the exemption, the person claiming them must permanently reside on the homestead. The homestead, when owned by a married man, can only be aliened on mortgage by joint deed of husband and wife, except for payment of the purchase money. The homestead is subject to sale for all state, county, or corporation taxes, legally assessed thereon.

The person to whom a homestead is set apart, must, within one year after the delivery of the certified description of the real estate set apart by the freeholders, have the same registered in the register's office of the county wherein the land may be, in order to obtain a valid title thereto.

TEXAS.—There is exempt from execution, household and kitchen furniture, to the value of two hundred dollars; farming implements, to the value of fifty dollars; the tools, apparatus, and books appertaining to the trade or profession of any citizen; five milch cows; one yoke of oxen, or one horse; twenty swine; and provisions for one year.

*Homestead.*—The homestead of a family, when without the limits of a city, town, or village, must not contain more than two hundred acres of land; when within such limits, it must not exceed two thousand dollars in value. The homestead can not be seized in execution, nor can it be alienated, when owned by a married man, without the consent of the wife.

VERMONT.—In this state, there is exempt from execution, such suitable apparel, bedding, tools, arms, and household furniture as may be necessary for supporting life; one cow; the best swine, or the pork of two; ten sheep, and one year's product of the same, whether in wool, yarn, or cloth; forage sufficient for one cow and ten sheep through one winter; ten cords of firewood; ten bushels of grain; twenty bushels of potatoes; such military arms and accouterments as required by law; all growing crops; the bibles and other books used in the family; all gravestones lettered; three swarms of bees, their hives, and the produce in honey; and two hundred pounds of sugar.

*Homestead.*—The homestead of every housekeeper or head of a family, residing within the state, consisting of a dwelling-house, out-buildings, and the lands appurtenant thereto, occupied by the housekeeper as a homestead, and the yearly products thereof, the whole not to exceed five hundred dollars in value, are exempt from attachment or execution, in all cases where the cause of action occurred subsequent to the first day of December, 1850, excepting when the cause of action occurred previous to, or at the time of, the purchase of the homestead, or the action be brought to enforce the payment of taxes legally assessed.

Whenever the real estate of a housekeeper or the head of a family is

levied upon, such portion as he may occupy as a homestead, or may elect to regard as such, to the value of five hundred dollars, is set out to him by the appraisers on the execution, upon their oaths, and the remainder only is set off to the execution creditor.

Whenever the personal estate of any housekeeper or head of a family shall be attached, or taken in execution, and the debtor shall claim, and the creditor deny, that the same, or any part thereof, is the annual produce of the homestead, the officer holding such attachment on execution shall cause the same to be ascertained and set out to such debtor by appraisers to be appointed and sworn as in the case of a levy upon lands. A statement of the proceeding must form part of the return upon the attachment or execution. The expenses of setting off a homestead, or the yearly products of one, are charged upon the execution.

If a housekeeper or head of a family decease, leaving a widow, his homestead wholly passes to his widow and children, if any there be, in direct course of descent, not subject to the payment of the debts of the deceased, unless made specially chargeable thereon, and, if necessary, the probate court appoints a commission to set out to the widow, or widow and children, the homestead.

The homestead can not be alienated or mortgaged by the owner, if a married man, except by joint deed of husband himself and wife, executed and acknowledged in the manner prescribed for the conveyance of lands of married women, excepting that at the time of the purchase of the homestead, and to secure the payment of the purchase money, the husband may execute a mortgage without the consent of his wife. The time when the deed to the owner of a homestead is left in the town clerk's office for record, is deemed the time of purchase for all purposes mentioned in the homestead exemption act. The costs and expenses of setting out a homestead, or its yearly products, as provided by law, are charged in the officer's bill of fees upon the writ or execution.

Virginia.—No growing crop of any kind, not severed, shall be liable to distress or levy, except Indian corn, which may be taken at any time after the fifteenth of October in any year. If the debtor be a father or a husband, the following articles are exempt: One bed and bedding; six chairs; one table, and the necessary kitchen furniture; one loom and its appurtenances; one spinning-wheel and one pair of cards; one axe; five barrels of corn; five bushels of wheat, or one barrel of flour; two hundred pounds of bacon or pork; and forage or hay to the value of five dollars. Slaves can not be levied on without their owner's consent, if there be other property not exempt sufficient to satisfy the execution.

Wisconsin.—The following articles are exempt from attachment or sale on any final process. The family bible, family pictures, school-books, or library; a seat or pew in any house of public worship; and places of sepulture; all wearing apparel of the debtor and his family; all bedsteads, beds, and bedding used by the family; all cooking utensils, and other household furniture, to the value of two hundred dollars; two cows; ten swine; one yoke of oxen, and a horse, or, in lieu of them, a span of horses; ten sheep, and the wool therefrom, either as raw mate-

rial, or manufactured into yarn or cloth; necessary food for the support of the stock mentioned, for one year, whether provided or growing, as the debtor may choose; one wagon, cart, or dray; one sleigh; one plow; one drag; and other farming utensils, including tackle for teams, to the value of fifty dollars. Provisions and fuel necessary for one year's consumption; the tools and implements, or stock in trade, of any mechanic, miner, and other person, used and kept for the purpose of carrying on his trade or business, to the value of two hundred dollars; the library and implements of any professional man, to the value of two hundred dollars; all of which articles are to be chosen by the debtor or his agent or representative. Money arising from insurance on property exempt, which has been destroyed by fire, can not be seized on execution.

*Homestead.*—A homestead consisting of not over forty acres of land, used for agricultural purposes, with a dwelling-house thereon, and its appurtenances, to be selected by the owner, and not included in any town-plot, city, or village; or instead, land not exceeding one fourth of an acre, within a town-plot, city, or village, with a dwelling-house thereon, and its appurtenances, owned and occupied by any resident of the state, is not subject to forced sale. This exemption does not affect mechanics' or laborers' liens, or extend to any mortgage lawfully obtained. A mortgage or other alienation of a homestead by the owner, if a married man, is not valid unless the wife join in the deed.

When the owner of a homestead dies, leaving infant children, it is exempt from the payment of his debts; and no administrator or executor has a right to the possession of an estate so exempt, or to the rents and profits of the same.

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## THE EXECUTION OF WILLS.

The laws of our several states give very precise directions respecting the modes by which the wishes of men respecting the disposal of their property after their death, must be authenticated in order to be effectual. In their leading features the systems adopted in different jurisdictions have much in common, while they differ somewhat in their details.

What is commonly known as a will, is a written instrument, executed with peculiar formalities, and purporting to direct the mode in which the estate of the party executing it shall be disposed of after his decease.

The party executing it is the testator. The instrument should contain an assertion that it is the testator's will, and should embody a clear and intelligible statement of the wishes which he desires to have carried into effect. It must be authenticated by the testator's signature. This is usually placed, and in some states is required to be, at the foot of the will, as a subscription. The testator should subscribe his name personally. But as it is a rule of law that a party may sign a paper by causing his own name to be written by another person in his presence, and by his express direction, as effectually as if he himself

performed the manual task of writing, a signature so affixed is in most states a sufficient signature to a will. The signature should be affixed in the presence of witnesses, or if this is not done, it is necessary that the testator should declare or acknowledge, in the presence of witnesses, two or three, or even more in number, as may be required by the laws of the state, that the instrument is his last will. These witnesses must *attest* the execution of the will in the presence of the testator. They do this by subscribing a short paragraph, written at the foot of the will, to the following effect:

FORM OF ATTESTATION.

"Signed, published, and declared by the said (*name of testator*), as his last will and testament, in the presence of us, who, at the request of the said (name of testator), and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses."

_____ _____
_____ _____ } Witnesses' names.
_____ _____

This form of attestation may be used in any state, except that where a will is required to be under seal, the opening clause should be "signed, *sealed*, published," etc., and excepting also that it is generally desirable that the witnesses state their places of residence.

The witnesses selected should be such as in age, character, intelligence, and other respects, are competent to testify to the facts which they attest, and others which may lie within their knowledge, before the court to which the proof of wills is intrusted. It is particularly important that no person, nor, indeed, the husband or wife of any person, to whom property is given in the will, should be relied upon as a witness.

It is substantially in this mode that the instrument known as a will is to be executed; but there are certain emergencies in which, in many jurisdictions, wills may be made orally, within limits prescribed as to the amount or nature of the property bequeathed, or the personal character of the testator. Such wills are technically known as *nuncupative*. In making a nuncupative will the testator states his wishes to friends within hearing, announcing them as constituting his last will and testament, and they are reduced to writing, from recollection, by those to whom they were intrusted. The privilege of making these wills is in general restricted to cases of emergency, forbidding the execution of a written will.

The following is a concise summary of the statutory provisions on the subject peculiar to each state. The reader will understand that the will should be executed according to the general principles above stated, except so far as modified by the special directions now given.

ALABAMA.—Three witnesses are required. Nuncupative wills may be established when the testator, in his last illness states his will to persons around him.

ARKANSAS.—The testator's signature must be placed at the *foot* of the will. If the testator's name is written for him by another, such person must write his own name as witness, also stating that he signed the testator's name in his presence and at his request. The testator must, at the time of signing the will, or of acknowledging the signature, as the case may be, declare the instrument to be his last will and testament. Two witnesses are required, and their signatures must be placed at the foot of the will, and affixed by the testator's request. If, however, the whole will and the signature to it be written by the testator's own hand, witnesses are not required, as the will may be proved by the unimpeachable testimony of three or more disinterested witnesses to the handwriting and signature. But no such will can be pleaded in bar of a will attested in due form.

CALIFORNIA.—Two witnesses are required to the written will. Married women may make a will, but to insure its validity the written consent of the husband must be annexed, unless authority to make a will was granted to the wife by ante-nuptial contract. The consent of the husband must be attested by witnesses, just as a will is required to be attested.

Nuncupative wills are valid within the following limits. The estate must not exceed five hundred dollars. The will must be proved by two witnesses present when it was made; and it must be proved that when the testator pronounced it, he, in effect, called on some one to witness that it was his will. It must have been made during the last sickness of the testator, and at his dwelling-house, or where he had been residing ten days or more, except in the case of a person taken sick and dying away from home. But these provisions do not prevent soldiers in actual service, or mariners on shipboard, from disposing of personal property by nuncupative will.

CONNECTICUT: also, FLORIDA, MAINE, MASSACHUSETTS, RHODE ISLAND, SOUTH CAROLINA.—It is sufficient to say of these states, that three witnesses to a will are required.

DELAWARE: also, ILLINOIS, INDIANA, KENTUCKY, MICHIGAN, MISSOURI, NEW JERSEY, TENNESSEE, WISCONSIN.—Two witnesses to a will are sufficient. In other respects, the execution should be according to our general directions above given.

GEORGIA.—If the will is to pass real property, three witnesses are required; if personal only, two are sufficient.

IOWA.—Two witnesses are sufficient. Property not exceeding three hundred dollars in value, may be bequeathed by nuncupative will, if proved by two witnesses. Soldiers in actual service, and mariners at sea, may also dispose of personal property by nuncupative will.

LOUISIANA.—In this state, wills are either *nuncupative*, *mystic*, or *olographic*. The nuncupative, or open will, may be made in two ways:

by public acts, or by act under private signatures. If in the first, the will must be taken down by a notary public, in the presence of witnesses, at the dictation of the testator—must be read over to him, also in the presence of witnesses—and must be signed by him—all at one time, and without interruption. The witnesses must be three in number if residents of the place where the will is to be executed; if otherwise, five. They must sign the will as witnesses, or if they can not all write, one at least must sign for them all. If the second mode is adopted, the testator may write the will or cause it to be written in the presence of witnesses, or may present it to them already prepared, declaring it to be his last will. But in either case the will must be read to the witnesses in presence of the testator, either by one of the witnesses or by the testator himself. The number of witnesses required is five if residents of the place, seven, if not. The will must be signed by the testator if he is able, and by the witnesses, or if all can not write, by two at least, and the others must affix their marks.

The mystic, or secret testament, must be signed by testator, and presented, sealed up in an envelop or otherwise, to a notary and seven witnesses, and acknowledged to them by the testator to be his will, written by himself or at his dictation, and signed by him. The testator, the notary, and the witnesses, or at least two of them, must sign an attestation called the act of superscription, indorsed by the notary upon the will or envelope.

The olographic will must be written, dated, and signed wholly by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the state.

Women, children under sixteen, slaves, persons insane, deaf, dumb, or blind, or who are declared by the criminal laws incapable of exercising civil functions, are incompetent as witnesses. Heirs and legatees may witness the mystic, but not the nuncupative will.

MARYLAND.—Three witnesses are required. A married woman may bequeath her property or a part of it to her husband, or to any one person. But the consent of the husband must be subscribed to the will, it must be made sixty days before the wife's death, and she must be examined by the witnesses apart from her husband, as if the instrument were a deed.

MISSISSIPPI.—Three witnesses are required, except when the will is wholly written and signed by the testator. None are then necessary.

NEW HAMPSHIRE.—Wills must be under *seal*, and attested by three witnesses.

NEW YORK.—The testator's signature must be at the foot of the will, and he must declare to the witnesses at the time of the attestation, that the instrument is his last will and testament. Two witnesses are necessary, and they are required, under penalty, to write their respective places of residence opposite their signatures.

North Carolina.—The will must be attested by two witnesses, except that a will may be established without such attestation if found among the testator's papers, written in a hand generally recognized as his by his acquaintances, and proved to be genuine by the testimony of three witnesses, and if it contains the testator's name subscribed to it or inscribed in some part of it.

Ohio.—The signature of the testator must be at the foot of the will, and it must be attested by two witnesses.

A nuncupative will is valid in respect to personal estate, if it is proved that the testator was of sound mind and under no restraint, that he made the will during his last sickness, and called on some one to witness that it was his will, and if the will is reduced to writing and attested by two witnesses within ten days after it was declared.

Pennsylvania.—Wills must be in writing, and proved by two witnesses. Unless the extremity of a last sickness prevents, the testator's signature must be affixed, and this at the end of the will.

Texas.—Two witnesses, above fourteen years of age, must attest wills not wholly written in testator's own hand.

In Texas, no person can deprive his descendants of more than one fourth of his property by will.

Vermont.—Wills must be attested by three witnesses subscribing in the presence of the testator *and of each other.*

Virginia.—Two witnesses are requisite, unless the will is wholly written by the testator.

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## SUNBURY AND ERIE RAILROAD SUBSCRIPTION.

The grand jury of Philadelphia having desired to take some action to prevent the subscription by the county commissioners of $2,000,000 to the Sunbury and Erie Railroad, asked the opinion of the district attorney as to their power in the premises. Mr. Reed replies in his opinion that the grand jury had better not take any immediate action. Judge Thompson, who was appealed to, remarked that—

"The matter charged here is, that the county commissioners are about to do something contrary to law. This does not bring them within the province of a criminal court, which is a court of punishment, and not of restraint, except in case of nuisance, etc. The offense must actually have been committed before it interferes. The fear of the grand jury is, that an offense is about to be committed. It is for the court to see that individuals innocent of crime are not harassed or injured by any action of the grand jury.

# CONDENSED REPORTS OF RECENT CASES.

## MUNICIPAL SUBSCRIPTIONS TO RAILROAD CORPORATIONS.

1st. In determining whether an act of the legislature is constitutional, we must look to the body of the constitution itself for the reasons. The general principles of justice, liberty, and right, not contained nor expressed in that instrument, are no proper elements to base a judicial decision upon.

2d. If such an act be a written general grant of legislative power; that is, if being a law, and if it be not forbidden expressly or impliedly, either by the state or federal constitution, it is valid.

3d. To make it void, it must be clearly not an exercise of legislative authority, or else be forbidden so plainly as to leave the case free from all doubt.

4th. An act of Assembly authorizing subscriptions by a city to the stock of a railroad corporation, is not forbidden in article first, section thirteenth of the state constitution; that section not being a restriction upon the legislative authority of the two houses, but a bestowal of privilege upon the separate branches.

5th. Such act does not impair the obligation of any existing contracts, nor does it attempt an impossibility by creating a contract; but merely authorizes the corporations to make one, if they shall see proper.

6th. This is not such an injury to plaintiff's lands, goods, or person, that they are entitled to judicial remedy for it, agreeably to section eleven, article nine. It is no injury at all, except on the gratuitous assumption that it is forbidden in some other part of the constitution.

7th. It does not violate the right of acquiring, possessing, or protecting property secured by section first, article nine. The right of property is not so absolute but that it may be taxed for public benefit.

8th. This is not a taking of private property for public use without compensation, contrary to section tenth, article nine. When property is not seized and directly appropriated to public use, though subjected in the hands of the owner to greater burdens than before it is not taken.

9th. It can not be said that the plaintiffs will be deprived of their property in violation of section eleventh, article nine. The settled meaning of the word "deprive," as there used, is the same as that of "taken" in section ten.

10th. An act of Assembly to authorize the taking of private property for private use would be unconstitutional, because it would not be legislation, but a mere decree between private parties; but this is no taking in any sense, for any purposes or for any uses.

11th. Plaintiffs have no ground for complaint against the acts of Assembly now in question because they authorize the creation of a public debt, of which they may be required hereafter to pay a part in the shape of taxes, for by taxation alone can any harm ever come to them.

12th. If it be within the scope of our legislative powers, with consent of the local authorities, to permit assessments of local taxes, for the purpose of assisting the corporation to build railroads, bearing to tax payers the relation which these roads do, then the laws complained of are unobjectionable.

13th. Taxation is a legislative right and duty which must be exercised by the General Assembly through the medium of laws passed by them under their authority.

14th. The power of the Assembly with reference to taxation is limited by their own discretion. For its abuse, members are accountable to nobody but their own constituents.

15th. By taxation is meant a certain mode of raising revenue, for public purposes, in which the community that pays it have an interest. The right of the state to lay taxes has no greater extent than this.

16th. The act of a legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, although public, is one in which the people, from whom they are exacted, have no interest, would not be law, but a sentence commanding a judicial payment of a certain sum by one portion or class of people to another—the power to make such a law is not legislative but judicial, and was not given to the Assembly by the general grant of legislative authority.

17th. But to make a tax law unconstitutional, when thus granted, it must be apparent that the community taxed can have no possible interest in the purpose to which their money is to be applied. This is more especially true if it be a local tax. Local authorities have themselves levied taxes in pursuance of an act of Assembly.

18th. If, therefore, making a railroad be a mere private affair, or if the people of Philadelphia have manifestly no interest in the railroads which run to and toward the city from Easton and from Wheeling, then the laws are unconstitutional.

19th. But if railroads are not private affairs, are but public improvements, then it is the right and duty of the state to advance commerce and promote the welfare of the people, by making them, or causing them to be made, at the public expense.

20th. If the state declines to make desirable or public improvements, she may permit it to be done by companies. The fact that it is made by a private corporation does not take away its character as a public work.

21st. The right of the company by which it is made to be compensated for the expense of constructing it, by taking tolls for its use, though it gives the corporation an interest in it, does not extinguish the interest of the public, nor make the work private, because, to say nothing of other advantages, though the public may pay toll, still they can travel on it much cheaper than without it.

22d. The state may, therefore, rightfully aid in the execution of such public works by delegating to corporations the right of eminent domain, as she always does, or by the execution of the taxing power, as she does very often.

23d. The right of local authorities to tax a portion of a city for local improvement is as clear a right as to lay a general tax for any public purpose whatever.

24th. If the state having constitutional power can create a state debt by a subscription in behalf of the whole people to the stock of private corporations engaged in making public works, it follows from what has been before said that she may authorize a city or district to do the same thing, provided such city or district has a special interest in the work to be so aided.

25th. There is not a case in which we can determine as matter of law that the city has no interest in the proposed railroads. That this is true as matter of fact has not even been asserted in argument: only a little more than intimated.

26th. If the legislature and the councils decide that the city has an interest large enough to justify these subscriptions we can not gainsay this without declaring all interest to be flatly impossible, and to do that would be absurd.

27th. Finally, if the authorities of the city, in accordance with their charter, and with certain laws supplementary thereto, are about to create a public debt for public purposes, in which the city has an interest, it will be as valid and binding as if it had been legally contracted to accomplish any other public purpose for the benefit of the city. Opinion of all the judges.

***Sharples et al* vs. *The Mayor, etc., of Philadelphia.** Supreme Court of Pennsylvania at Pittsburg, Sept., 1853.**

In 1852, the legislature of Pennsylvania passed an act authorizing the corporate authorities of Philadelphia city to subscribe for shares of the stock of the Philadelphia, Easton, and Water Gap Railroad Company; to raise the money to pay for the stock by a loan on the credit of the city; and to make provision for payment of the principal and interest of the loan, as in other cases of loans to the city. Soon afterward, another act was passed, authorizing a similar subscription to the stock of the Hempfield Railroad Company. *Neither of these railroads passed through Philadelphia city.* One terminus of the Philadelphia, Easton, and Water Gap Railroad appears to have been near the northern boundary of the city, yet without it; but the Hempfield road was distant at its nearest point about three hundred miles from Philadelphia.

By ordinances of the city councils, the mayor was authorized to subscribe for 10,000 shares in the stock of each of these railroads. The plaintiffs, who were residents of the city, and owners of property and tax payers therein, filed this bill, praying an injunction to restrain the mayor from carrying these ordinances into effect.

None of the facts were disputed, nor was any question raised upon the construction of the acts of Assembly, or of the ordinances. The simple question was, whether it was within the power of the legislature to authorize the city authorities to make subscriptions to the stock of a company, and to resort to taxation, if necessary, as a means of paying therefor. Upon this question the members of the court delivered the following opinions:

Black, C. J.—The sole question is, whether the legislature can pass a valid act giving to a municipal corporation the power of subscribing to the stock of a railroad company. This is beyond all comparison the most important cause that has ever been in this court since the formation of the government. The fate of many most important public improvements hangs on our decision. If all municipal subscriptions are void, railroads which are necessary to give the state those advantages, to which every thing else entitles her, must stand unfinished for years to come, and large sums already expended on them must be lost. Not less than [illegible]urteen millions of these stocks have been taken by boroughs,

* The official report of this great case is [illegible]t published. These opinions have been revised for this periodical by the judges themselves.

counties, and cities within this commonwealth. They have uniformly been paid for either with bonds handed over directly to the railroad companies, or else with the proceeds of similar bonds sold to individuals who have advanced the money. It may well be supposed that a large amount of them are in the hands of innocent holders, who have paid for them in good faith. We can not award the injunction asked for, without declaring that all such bonds are as destitute of legal validity as so much blank parchment. Besides the deadly blow it would give to our improvements, and the disastrous effect of it on the private fortunes of many honest men, at home and abroad, it would seriously wound the credit and character of the state, and do much to lessen the influence of our institutions on the public mind of the world.

The reverse of this picture is not less appalling. It is even more so, as some view it. If the power exists, it will continue to be exerted, and generally it will be used under the influence of those who are personally interested, and who do not see or care for the ultimate injury it may bring upon the people at large. Men feel acutely what affect themselves as individuals, and are but slightly influenced by public considerations. What each person wins by his own enterprise, is all his own; the public losses are shared by thousands. The selfish passion is intensified by the prospect of immediate gain; private speculation becomes ardent, energetic, and bold, while public spirit—cold and timid at the best—grows feebler still when the danger is remote. Under these circumstances it is easy to see where this ultra-enterprising spirit will end. It carried the state to the verge of financial ruin; it has produced revulsions of trade and currency in every commercial country; it is tending now, and here, to the bankruptcy of cities and counties. In England, no investments have been more disastrous than railway stocks, unless those of the South Sea Bubble be an exception. In this country they have not generally been profitable. The dividends of the largest works in the neighboring states, north and south of us, have disappointed the stockholders. Not one of the completed railroads in this state has uniformly paid interest on its cost. If only a few of the roads projected in Pennsylvania should be as unfortunate as all the finished ones, such a burden would be imposed on certain parts of the state, as the industry of no people has ever endured without being crushed. Still, this plan of improving the country, if unchecked by this court, will probably go on until it results in some startling calamity to rouse the masses of the people.

But all these considerations are entitled to no influence here. We are to deal with this strictly as a judicial question. However clear our convictions may be that the system is pernicious and dangerous, we can not put it down by usurping authority which does not belong to us. That would be to commit a greater wrong than any which we could possibly repair by it. So on the other hand, the loss to the bond-holders, the ruin of the railroad companies, the injury to the commerce, and even the stain on the character of the state, are considerations which can not be weighed for a moment in any scale of ours against the constitutional rights of the parties before us. We will therefore address ourselves to the serious business of ascertaining whether the laws in question do violate the constitution or not.

It is important, first of all, to settle the rule of interpretation. This can be best done by a slight reference to the origin of our political system. In the beginning the people held in their own hands all the power of an absolute government. The transcendent powers of parliament devolved on them by the revolution. (1 *Bald.*, 320; 8 *Wheat.*, 584; 2 *Pet*, 655.) Antecedent to the adoption of the federal constitution, the power of the states was supreme and unlimited. (3 *Serg. & R.*, 68.) If the people of Pennsylvania had given all the authority which they themselves possessed, to a single person, they would have created a despotism as absolute in its control of life, liberty, and property, as that of the Russian autocrat. But they delegated a portion of it to the United States, specifying what they gave, and withholding the rest. The powers not given to the government of the Union were bestowed on the government of the state, with certain limitations and exceptions, expressly set down in the state constitution. The federal constitution confers powers particularly enumerated; that of the state contains a general grant of all powers not excepted. The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict against those who stand upon the exceptions, and liberal in favor of the government itself. The Federal Government can do nothing but what is authorized expressly, or by clear implication; the state may do whatever is not prohibited.

The powers bestowed on the state government were distributed by the constitution to the three great departments—the legislative, the executive, and the judicial. The power to make laws was granted in section 1 of Art. 1, by the following words: "*The legislative power of this Commonwealth shall be vested in a General Assembly*, which shall consist of a Senate and House of Representatives." It is plain that the force of these general words, if there had been nothing elsewhere to qualify them, would have given to the Assembly an unlimited power to make all such laws as they might think proper. They would have had the whole omnipotence of the British parliament. But the absolute power of the people themselves had been previously limited by the federal constitution, and they could not bestow on the legislative authority which had already been given to Congress. The judicial and executive powers were, also, lodged elsewhere, and the legislative department was forbidden to trench upon the others by an implication as clear as words could make it. The jurisdiction of the Assembly was still further confined by that part of the constitution called the "Declaration of Rights," which, in twenty-five sections, carefully enumerates the reserved rights of the people, and closes by declaring that "every thing in this article is *excepted out of the general powers* of the government, and shall remain forever inviolate." The General Assembly can not, therefore, pass any law to conflict with the rightful authority of Congress; nor perform a judicial or executive function; nor violate the popular privileges reserved by the Declaration of Rights, nor change the organic structure of the government, nor exercise any other power prohibited in the constitution. If it does any of these things, the judiciary claims, and in clear cases has always exercised, the right to declare such acts void.

But beyond that there lies a vast field of power, granted to the legislature by the general words of the constitution, and not reserved, prohibited, or given away to others. Of this field the General Assembly is entitled to the full and uncontrolled possession. Their use of it can be limited only by their own discretion. The reservation of some powers does not imply a restriction on the exercises of others which are not reserved. On the contrary, it is a universal rule of construction, founded on the clearest reason, that general words in any instrument or statute are strengthened by exceptions and weakened by enumeration. To me it is as plain that the General Assembly may exercise all powers which are properly legislative, and which are not taken away by our own or by the federal constitution, as it is that the people have all the rights which are expressly reserved.

We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void, if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we can not do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever in our opinion ought to have been put there by its framers. The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument; we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely.

The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best, a great deal must be trusted to the discretion of those who administer it. In ours the people have given larger powers to the legislature, and relied for the faithful execution of them on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary.

There is nothing more easy than to imagine a thousand tyrannical things which the legislature may do if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. But to take away the power from the legislature because they may abuse it, and give to the judges the right of controlling it, would not be advancing a single step, since the judges can be *imagined* to be as corrupt and as wicked as legislators. It has been said of the ablest judge

that ever sat on this bench, and one whose purity of character was as perfect as any who ever has lived, or ever will live, that his opinions on such subjects are not to be relied on. If this be so, then transferring the seat of authority from the legislature to the courts would be putting our interests in the hands of a set of very fallible men, instead of the respectable body which now holds it. What is worse still, the judges are almost entirely irresponsible, and heretofore they have been altogether so, while the members of the legislature who would do the imaginary things referred to, "would be scourged into retirement by their indignant masters."

I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments, based on general principles outside of the constitution, must be addressed to the people, and not to us.

A proposition which results as plainly as this does, from the reason of the thing, can scarcely need the aid of authority. But, if the doctrine I am denying could be allowed to prevail, it would decide this case in favor of the plaintiffs without looking into the constitution at all. This consideration, together with the great ability and earnestness with which it was pressed upon us by the counsel, entitles it to the fullest refutation we can give.

It is true that expressions favoring it have incidentally fallen from several eminent judges: from Judge Patterson (2 *Dall.*, 304), from Judge Chase (1 *Cond. Rep.*, 173), from Judge Spalding, of Ohio (20 *Ohio Rep.*, 609), and from Chief Justice Parker, of Massachusetts (2 *Pick.*, 165). The first is contained in a charge delivered in the circuit court. But the whole case has several times been said by this court to have been totally misapprehended (16 *S. & R.*, 179; 3 *W.*, 295). It was not followed by those who sat in the same court afterward. The others were mere *obiter dicta.*

On the other side the weight of authority is overwhelming. I am not aware that any state court has ever yet held a law to be invalid except where it was clearly forbidden. Certainly no case of a different character has been cited at the bar. In the many cases which affirm the validity of state laws, this principle is uniformly recognized, either tacitly or expressly. The Supreme Court of the United States has adhered to it on every occasion when it has been questioned there. In *Satterle* vs. *Mathewson* (2d *Peters*, 380), an act of the Pennsylvanian legislature was censured as unwise and unjust; but because it came within no express prohibition of the constitution, it was held to be binding on the parties interested; and in *Fletcher* vs. *Peck* (6 *Cranch*, 87), it was declared, that while the legislature was within the constitution, even corruption did not make its acts void. In *Calder* vs. *Bull* (3 *Dall.*, 386), Mr. Justice Irdell said: "If a state legislature shall pass a law within the general scope of their constitutional powers, the court can not pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard, the ablest and the purest men have differed upon the subject, and all the court, in such an event, could say, would be that the legislature (possessed of an equal

right of opinion) had passed an act which, in the opinion of the judges, was contrary to abstract principles of right." Judge Washington, in *Golden* vs. *Rice* (3 *W. C. C. R.*,), decides that the state legislatures may make such laws as they think fit, unless inconsistent with the powers exclusively vested in the government of the United States, or forbidden by some articles of the federal or state constitution. Judge Baldwin, in *Bennet* vs. *Boggs* (1 *Bald.*, 74), has expressed so clearly what I think is the true view of the subject, that I can not do better than transcribe his words. "We may think," says he, "the powers conferred by the constitution of this state too great, or dangerous to the rights of the people, and that limitations are necessary; but we can not affix them, or act on cases arising under state laws, as if boundaries had been affixed by the constitution previously. We can not declare a legislative act void, because it conflicts with our opinions of policy, expediency, or justice. We are not the guardians of the rights of the people of the state, unless they are secured by some constitutional provisions, which come within our judicial cognizance. The remedy for unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people, in their sovereign capacity, can correct the evil; but courts can not assume their rights." Chief Justice Marshall, in the *Providence Bank Case*, says: "The wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against excessive taxation, as well as against unwise legislation generally." When we come home and look into the precedents established by this court, we find them uniformly and distinctly denying the right to go beyond the constitution. In *Norris* vs. *Clymer*, Chief Justice Gibson, with characteristic directness of expression, declares that "the constitution allows to the legislature every power which it does not positively prohibit." It was laid down in *Commonwealth* vs. *McCloskey* (2 *Rawle*, 374), that if the legislature pass a law within the scope of their constitutional power, the judicial tribunals have no right to pronounce it void. The *Commonwealth* vs. *McWilliams* (1 *Jones*, 61) decided that express prohibition, or necessary implication, is essential to oust the jurisdiction of the legislature. In the very last case that came before us (*Hartman* vs. *the Commonwealth*, 5th *Harris*), it was decided that the Assembly had jurisdiction of all cases in which its legislation was not prohibited; that the law then in question was valid, because there was no syllable in the constitution to forbid it; and that if a law, unjust in its operation, and nevertheless not forbidden by the constitution, should be enacted, the remedy lay, not in an appeal to the judiciary, but to the people, who must apply the corrective themselves, since they had not intrusted the power to us.

There is another rule which must govern us in cases like this; namely, that we can declare an act of Assembly void, only when it violates the constitution, *clearly*, *palpably*, *plainly*, and in such manner as to leave *no doubt* or hesitation on our minds. This principle is asserted by judges of every grade, both in the federal and in the state courts, and by some of them it is expressed with much solemnity of language (6 *Cranch*, 87; 4 *Dall.*, 14; 3 *S. R.*, 178; 12 *S. & R.*, 339; 4 *Binny*, 123).

A citation of all the authorities which establish it would include nearly every case in which a question of constitutional law has arisen. I believe it has the singular advantage of not being opposed even by a *dictum*.

We are to inquire, then, whether there is any thing in the constitution which expressly, or by clear implication forbids the legislature to authorize subscriptions by a city to the capital stock of a company incorporate for the purpose of making a railroad. It is admitted that there is nothing in the constitution of the United States by which this power is taken away from the legislatures of the states, unless it be a single provision, which is also found in that of Pennsylvania. (Art. 9. Sect. 17.) I shall consider every part of the constitution relied on as prohibitory of these laws by the counsel who have addressed us either in this cause or in the others which involve the same question.

In section 13, of article 1st, it is provided: "That each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member, but not a second time for the same cause, and shall have *all other powers necessary for a branch of the legislature of a free state.*" The argument deduced from this is, that the legislature can make no law which is inconsistent with the freedom of the state, that is, with the just rights and liberties of the people. But it is very manifestly meant, not to limit the powers of the General Assembly, but to confer certain parliamentary privileges on the separate branches, so that each house, when in session, could, without the concurrence of the other, properly protect itself against indecency, disorder, corruption, or other misbehavior of members or strangers. The word *free* is to be understood of the state in her corporate capacity, and in the sense of independent or sovereign, and not of her individual citizens. If it can not be construed as a restraint of legislative power, it renders the declaration of rights useless, and reduces all the provisions for that purpose to a single phrase. Why should particular exceptions be inserted if every thing were covered by this most comprehensive restriction?

It is objected that these laws create a contract for the people of the city; and as the legislature can not *impair* a contract, neither can they make one between the parties, who do not themselves assent to it. It must be remembered that the prohibition to pass any law impairing the obligation of contracts can avail nothing unless the case comes exactly within it. The Supreme Court of the United States, in *Satterle* vs. *Mathewson* (2 *Peters*, 414), held that an act which was retrospective in its operation, and took away vested rights, was nevertheless not void under that section in the federal constitution, because it did not literally impair the obligation of a pre-existing contract. I do not say, however, that a contract between two individuals, or between two corporations, can be made by the legislature. That would not be legislation. Besides, it would be impossible, in the nature of things, for the essence of a contract is the agreement of the parties. But here is no contract made or attempted to be made by the legislature, but only an authority given to the respective corporations to make one between themselves if they see proper. This authority to make contracts for and in

the name of the people, is given in a greater or less degree to all public corporations. It is necessary to their existence. All other corporate functions would be nugatory without it. It is constantly exercised by the supervisors of townships, by county commissioners, and by the proper officers of boroughs, districts, and cities. Such contracts can seldom be made with the unanimous approbation of the people, but it has never been thought that a person may not be bound without his consent to perform his share of a *public* obligation. The contracts which affect a man, as an individual, must be made by himself, but those which affect him only as a member of the community in which he lives, and only in the same way that his fellow-citizens are affected, must be made by the authorities which the law has set over him and them.

The eleventh section of the Declaration of Rights provides "that all courts shall be open, and every man for an injury done him in his *lands, goods*, person, or reputation, shall have redress by due course of law, and right and justice administered without sale, denial, or delay." This was clearly intended to insure the constant and regular administration of justice between man and man. To say that it is violated by refusing a judicial remedy for bad legislation, would be straining it sadly. Certainly, a contract such as that the defendants propose to make, however it may injure the plaintiffs, is not an injury for which they are entitled to redress if it be lawful to make it. To say that it is not lawful, and therefore injurious, is merely begging the question.

The first section of the same article enumerates among the natural rights of men, that of "acquiring, possessing, and protecting property." Undoubtedly, this is a right which the legislature can not take away. Our constitution makes property as sacred as life; but no man's right to his property can be so absolute as to exempt it from the fair share of the public burdens, lawfully and constitutionally imposed. Of course, we will not assume that the burden here apprehended is unlawful and unconstitutional, merely that we may make it conflict with this section; to do so would be reasoning in a vicious circle.

It is further argued that these laws authorize the taking of private property for public use, without just compensation, contrary to section ten of the Declaration of Rights. It is certain that the plaintiff can expect no compensation in the proper sense of that word, as here used. It is also true that if the railroad stocks which the city authorities are about to purchase shall depreciate, or fail at any time to produce dividends equal to the interest on the bonds, the property of the citizens may be taxed to make up the difference. But property is not taken when it is merely subjected on a future contingency to the liability of being taxed higher than it is at present. The word *take* is one of the commonest and plainest in the language, and can not easily be misunderstood either by a lawyer or layman. As used in the constitution, it has universally, in this state and elsewhere, been interpreted to mean a taking altogether; a seizure; a direct appropriation or dispossession of the owner. (6 *Wharton*, 46; 1 *W. & S.*, 225; 6 *W. & S.*, 116; 1 *Barr.*, 314; 1 *Pick.*, 418; 7 *Pick.*, 344.) We should disregard its popular, as well as legal signification, if we should declare it to be *taken* when it is

merely depreciated in value, or incumbered, or incidentally injured. Least of all is it taking, to tax it. (3 *Comstock*, 419.) Inasmuch as compensation is made by the constitution a necessary concomitant of all taking for public use; if we say that taxation and taking are the same, we are reduced to the absurdity of deciding that no tax can be levied for the most important purpose of the state, without an immediate redistribution of it among the people who pay it.

The 11th section of Art. 9, declares that the "citizen can not be *deprived* of his life, liberty, or *property*, unless by the judgment of his peers, or the law of the land." The word "*deprived*" in this section, has received the same construction as the word "*taken*" in section 10, and for reasons equally clear and strong. It can not be said that a citizen is deprived of his property when he is left in the undisturbed possession of it, whatever taxation may be imposed on it.

It is said that this is a taking of *private* property for *private* use. If this be so, it is palpably unconstitutional. Perhaps there is nothing in the books which shows the tenacity with which this court has adhered to the letter of the constitution, in determining the extent of legislative power, more plainly than the doubt which was once entertained (10th *W.*, 863), whether the want of an express inhibition did not permit the Assembly to take one man's property and give it to another. The constitution *does* prohibit it. It is not within the general grant of legislative power. It would be a gross usurpation of judicial authority, and would violate the very words of section 11, Art. 9. The legislature could not make such a rescript (for it would not be a law), any more than they could order an innocent man to be put to death without trial. But do the acts of Assembly before us *take* private property for private use, or permit it to be done by the city authorities? I think I have shown that it is no taking at all.

The only substantial wrong complained of in the bill is, that a public debt is about to be created for a purpose which the plaintiffs are unwilling to join in promoting; and that the debt may, and most probably will, involve the necessity of a tax, of which they must pay their share. Except for their liability to this tax, they would have no standing in court. This is the head and front of the offending against them. But if it be imposed in pursuance of a law passed by the supreme legislative authority of the state, and not in conflict with the constitution, it must be borne. This brings us to inquire what is the extent of the right to lay taxes.

The taxing power, being a legislative duty, is, of course, intrusted to the General Assembly. And it is given to them without any restriction whatever. They are to use it according to their discretion, and if they abuse it, and if public opinion is not just or enlightened enough to correct their errors, there is no remedy. I use the language of Chief Justice Marshall (4th *Wheat.*, 316), when I say that it may be exercised to any extent to which the government may choose to carry it, and that no limit has been assigned to it, because the exigencies of the government can not be limited.

But I do not mean to assert that every act which the legislature may choose to call a tax law, is constitutional. The whole of a public bur-

den can not be thrown on a single individual, under pretense of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An act of Assembly commanding or authorizing them to be done would not be a law, but an attempt to pronounce a judicial sentence, order, or decree. It is the theory of a republican government, that taxes shall be laid equally, in proportion to the nature of property, and when collected, shall be applied only to purposes in which the tax-payers shall have an equal interest.

But this is impossible, even in the simplest state of society, and becomes more and more difficult in proportion as a higher civilization diversifies the characters, circumstances, and the pursuits of the people. "A just and perfect system of taxation," says Chancellor Kent, "is yet a desideratum in civil government." (2d *Com.*, 332.) No county or municipal tax ever came up to the theory, and the taxes now levied by the state are a grievous violation of it. The improvements made by the commonwealth added largely to the fortunes of some, to others they did no service, and some were injured by them. Still, all are now compelled to pay for them. It is not, therefore, every inequality of burden or benefit, not every disproportion between the sum which a citizen pays, and the interest which he, as an individual, has in the purpose to which it is applied, that can make a tax-law void. I am of opinion with the Supreme Court of Kentucky (9th *B. Monroe*, 345), that a tax law must be considered valid, unless it be for a purpose in which the community taxed has palpably no interest; where it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at the first blush.

Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional, for all the reasons which forbid the legislature to usurp any other power not granted to them.

We now come to what has been apparently considered a most formidable point in the cause. The proceeds of the bonds which the city is authorized to issue are to be paid to two *private* corporations. A railroad company does undoubtedly fall within that legal division of the subject. Public corporations are cities, counties, and townships, which are erected for political purposes. Their charter may be granted or repealed without the consent of the members, and their affairs are managed by public officers. Private corporations are all whose stock is owned by individuals, and whose charters are irrepealable, according to the doctrines of the Dartmouth College case (4th *Wheat.*, 518),

such as banking, insurance, canal, railroad, bridge and turnpike companies. But though a railroad company be a private corporation, it may have a public use; and it is the use, purpose, and object of a company which determine the obligation of the community taxed for its assistance. A railroad is a public highway for the public benefit, and the right of a corporation to exact a uniform, reasonable, stipulated toll from those who pass over it, does not make its main uses private ones. The public has an interest in such a road, when it belongs to a corporation, as clearly as they would have if it were free, or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind, and this advantage the public has over and above those of rapidity, comfort, convenience in course of trade, opening of markets, and other means of rewarding labors and promoting wealth. In *Bonaparte* vs. *The Camden and Amboy Railroad Company* (1st *Baldwin*, 223), although the charter of the defendants had more features in it of a close monopoly for the mere private emolument of the stockholders, than any other similar company in the country, yet the road was held to be a public work, and the plaintiff's land taken to build it on was decided to have been taken for public use.

It is a grave error to suppose that the duty of a state stops with the establishment of those institutions which are necessary to the existence of government, such as those for the administration of justice, the preservation of the peace, and the protection of the country from foreign enemies. Schools, colleges, and institutions for the promotion of the arts and sciences, which are not absolutely necessary, but highly useful, are also entitled to a public patronage, enforced by law. To aid, encourage, and stimulate commerce, domestic and foreign, is a duty of the sovereign, as plain and as universally recognized as any other. It is on this principle that the mint and post-office are in the hands of the government, for they are but aids to commerce. For the same reason we maintain a navy, to keep open the highway of nations. It was a commercial restriction which caused the revolution, and injuries to our trade which produced the subsequent war against England, with all its expense of money and blood. Canals, bridges, roads, and other artificial means of passage and transportation from one part of the country to the other, have been made by the sovereign power, and at the public expense, in every civilized state of ancient and modern times. I need not say how much of this has been done in Pennsylvania; but if the works erected by the commonwealth for the promotion of her commerce are not public improvements, then every law relating to them is void, every citizen may repudiate his share of the state debt, if he pleases, and defend his property by force against a collector of state taxes.

It being the duty of the state to make such public improvement, if she happen to be unable or unwilling to perform it herself, to the full extent desired, she may accept the voluntary assistance of an individual, or a number of individuals associated together, and incorporated into a company. The company may be private, but the work they are to do is a public duty; and along with the public duty there is delegated a sufficient share of the sovereign power to perform it. The right of

eminent domain is always given to such corporations. But the right of eminent domain can not be used for private purposes, and therefore if a railroad, canal, or turnpike, when made by a corporation, is a mere private enterprise, like the building of a tavern, store, mill, or blacksmith shop, there never was a constitutional charter given to such an improvement company, and every taking of the land or materials under any of them was a flagrant trespass.

If the making of a railroad is a public duty, which the state may either do entirely at the public expense, or cause to be done entirely by a private corporation, it follows that such a work may be made partly by the state and partly by a corporation, and the people may be taxed for a share of it as rightfully as for the whole. The corporation may be aided by an exertion of the taxing power, as well as with the right of eminent domain. Accordingly, we find that from the earliest times the commonwealth has subscribed to the stock of such corporations, and paid over the money to them, in pursuance of laws which no one ever doubted to be constitutional. Many millions of the state debt have been created in that way.

Now, if the legislature may create a debt, and lay taxes on the whole people to pay for such subscriptions, may they not with more justness and greater propriety, and with as clear a constitutional right, allow a particular portion of the people to tax themselves, to promote in a similar manner a public work in which they have a special interest? I think it will surely not be pretended that all taxes are unconstitutional, which are not laid by the state directly, which are not general, or which do not go into the state treasury. If this could be maintained, it would make our general road law unconstitutional from beginning to end. Counties and townships have always had the right given to them, and the duty cast upon them, of erecting their own public buildings, and making their own roads. Local taxes for local purposes, and general taxes only for purposes which concern the whole state, are a vital principle in our political system, and there is no feature in it which has attracted more unqualified admiration from those who understand it best. Its justice is too obvious to need explanation. I can not conceive of a reason for doubting that what the state may do in aid of a work of general utility, may be done by a county, or a city, for a similar work, which is especially useful to such county or city, provided the state refuses to do it herself, and permits it to be done by their local authorities.

The city's charter was granted by the legislature. It may be enlarged. The same power which gave them the privileges which they have may give them others. It can not be so enlarged as to enable the corporate authorities to embark the city in a private business, or to make the people pay for a thing in which they have no interest. But within these limits there is nothing to prevent an indefinite extension of their corporate powers.

But it is insisted that the right of a city or county to aid in the construction of public works must be confined to those works which are within the locality whose people are to be taxed for them. The Water Gap Company stops its road north of Vine street, outside of the city

limits, and the Hempfield road has its eastern terminus at Greensburgh, three hundred and forty-six miles west of Philadelphia. I have already said that it is the *interest* of the city which determines the right to tax her people. That interest does not necessarily depend on the mere location of the road. Therefore the location can not be an infallible criterion. If the city can not have an interest in a road which stops in the Northern Liberties, then Dock Ward can have no interest in one which terminates in upper Delaware Ward, and all the subdivisions of the city, which it does not actually enter, may be exempted on the same score. A railroad may run through a county without doing its inhabitants the least service. May such a county assist to make it, while a city, which it supplies with bread, and whose trade is doubled by it, must not do so, merely because it ends outside of an imaginary line, that limits the corporate jurisdiction? It seems very plain that a city may have exactly the same interest in a road which terminates outside of her borders, as if the depôt were within them, and a great deal more than if it passed quite through; if she has an interest in any part, she has probably an equal interest in every part. Railroads are generally made to connect important points with each other. The want of a link at one place breaks the desired connection as much as at another. Philadelphia has now a road to Greensburgh. The Hempfield Company proposes to carry it on to Wheeling. I do not see that the city is not as much interested in the Hempfield road, as she would be in making an independent road, starting at the corner of Schuylkill Fifth and Chestnut streets, and running, by way of Greensburgh, the whole distance to Wheeling.

But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers and by the legislature. For us, it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest, perceptible by every mind at the first blush. All beyond that is a question of expediency, not of law, much less of constitutional law. We should certainly be exercising a novel jurisdiction if we should listen to an appeal from the councils on a point of local policy, and we should be giving a novel judgment too, if we should decide a statute to be unconstitutional, because the corporate authorities of a city, in acting under it, mistook the true interests of their constituents.

We must take it for granted that the councils and the mayor have fairly represented the majority of their constituents. It may operate with great hardship on the minority, but in this country it is private affairs alone, and not public, that are exempt from the domination of majorities. It may be considered that the power of piling up these enormous public burdens, either on the whole people or on a portion of them, ought not to exist in any department of a free government, and if our fathers had foreseen the fatal degeneracy of their sons, it can scarcely be doubted that some restriction on it would have been imposed. But we, the judges, can not supply the omission.

I will conclude with a recapitulation of the points and principles which I think settle the cause.

1. In determining whether an act of the legislature is constitutional or not, we must look to the body of the constitution itself for reasons. The general principles of justice, liberty, and right not contained or expressed in that instrument, are no proper elements of a judicial decision upon it.

2. If such an act be within the general grant of legislative power, that is, if it be in its character and essence a law, and if it be not forbidden expressly or impliedly, either by the state or federal constitution, it is valid.

3. To make it void, it must be clearly not an exercise of legislative authority, or else be forbidden so plainly as to leave the case free from all doubt.

4. An act of Assembly authorizing a subscription by a city to the stock of a railroad corporation is not forbidden by Art. 1, Sec. 13 of [illegible] Constitution; that section not being a restriction upon the legislative authority of the two houses, but a disowal of privileges upon the separate branches.

5. Such an act does not impair the obligations of any existing contract, nor does it attempt the impossibility of creating a contract, but merely authorizes two corporations to make one if they shall see proper.

6. This is not such an injury to the plaintiffs lands, goods, or persons, that they are entitled to a judicial remedy for it, agreeably to Sec. 11 of Art. 9. It is no injury at all, except on the gratuitous assumption, that it is forbidden in some other part of the constitution.

7. It does not violate the right of acquiring, possessing, and protecting property, secured by Sec. 1 of Art. 9. The right of property is not so absolute but that it may be taxed for the public benefit.

8. This is not a taking of private property for public use without compensation, contrary to Sec. 10 of Art. 9. When property is not seized, and directly appropriated to public use, though it be subjected in the hands of the owner to greater burdens than it was before, it is not *taken*.

9. It can not be said that the plaintiffs will be deprived of their property, in violation of Sec. 11, Art. 9. The settled meaning of the word *deprive*, as there used, is the same as that of the word *take* in Section 10.

10. An act of Assembly to authorize the taking of private property for *private* use would be unconstitutional, because it would not be legislation, but a mere decree between private parties. But this is no *taking* in any sense, for any purpose or for any uses.

11. The plaintiffs have no ground of complaint against the acts of Assembly now in question, except because they authorize the creation of a public debt, of which they may be required hereafter to pay a part, in the shape of taxes. By taxation alone can any harm ever come to them.

12. If it be within the scope of legislative power, with the consent of the local authorities, to permit the assessment of a local tax, for the purpose of assisting a corporation to build a railroad bearing to the taxpayers the relation which these railroads do, then the laws complained of are unobjectionable.

13. Taxation is a legislative right and duty, which must be exercised by the General Assembly, or under the authority of laws passed by them.

14. The power of the Assembly, with reference to taxation, is limited only by their own discretion. For the absence of it, members are accountable to nobody but their constituents.

15. By taxation is meant a certain mode of raising revenue for a public purpose, in which the community that pays it has an interest. The right of a state to lay taxes has no greater extent than this.

16. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or a class of the people to another. The power to make such order is not legislative, but judicial, and was not given to the Assembly by the general grant of legislative authority.

17. But to make a tax law unconstitutional on this ground, it must be apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied. And this is more especially true, if it be a local tax, and if the local authorities have themselves laid the tax in pursuance of an act of Assembly.

18. If, therefore, the making of a railroad be a mere private affair, or if the people of Philadelphia have manifestly no interest in the railroads which run to and toward the city from Easton and from Wheeling, then these laws are unconstitutional.

19. But railroads are not private affairs. They are public improvements, and it is the right and duty of the state to advance the commerce and promote the welfare of the people, by making, or causing them to be made, at the public expense.

20. If the state declines to make desirable or public improvement, she may permit it to be done by a company, and the fact that it is made by a private corporation does not take away its character as a public work.

21. The right of the company by which it is made, to be compensated for the expense of constructing it, by tolls for its use, though it gives the corporation an interest in it, does not extinguish the interest of the public, nor make the work a private one; because, to say nothing of the advantages, the public can pay the toll, and still carry and travel on it very much cheaper than without it.

22. The state may, therefore, rightfully aid in the execution of such public works, by delegating to the corporation the right of eminent domain, as she always does, or by an exertion of the taxing power, as she has done very often.

23. The right of the legislature, with the consent of the local authorities, to tax a particular city for a local improvement, is as clear as the right to lay a general tax for any public purpose whatsoever.

24. The state having the constitutional power to create a state debt by a subscription on behalf of the whole people to the stock of a private corporation, engaged in making a public work, it follows from what has

[illegible] that the State may authorize a city or district to do the same thing, provided such city or district has a special interest in the work to be so aided.

[illegible] case in which we can determine as a matter of law that the city has no interest in the proposed railroad. That this is true as a matter of fact, has not even been asserted in the argument.

The legislature and the councils have decided that the city has an interest large enough to justify the subscription; we can not gainsay this, without declaring all interest to be flatly impossible, and to do that would be absurd.

Finally: The authorities of the city, in accordance with the charter, and with certain laws supplementary thereto, are about to create a public debt for a public purpose, in which the city has an interest. It will be as valid and binding as if it had been legally contracted, to accomplish any other public purpose for the benefit of the city.

If the judgment we are about to give should be wrong, it will be our fault; for we have been well assisted. Three causes, involving the same question, were heard in immediate succession, and were argued with an ability fully proportioned to the immense magnitude of the interests, public and private, which were at stake. I do not propose to shift any part of the responsibility upon our predecessors, or upon the judges in other states, who have heretofore decided the question, and therefore I have examined it, as if it were a case of the first impression; but it would be wrong to close without saying that the conclusion here reached is sustained by the highest tribunals in Virginia (8th *Leigh*, 120), New York (24th *Wendell*, 65), Connecticut (15th *Conn.*, 75), Tennessee (9th *Hemph.*, 252), Kentucky (9th *B. Monroe*, 256), Illinois (5th *Gilman*, 405), and Ohio (*unreported*).

These cases are entitled to our highest respect. In most of them, and especially the later ones, the subject is very ably discussed, and they are a manifest triumph of reason and law over a strong conviction in the minds of the judges that the system they sustain was impolitic, dangerous, and immoral. Besides these, we have a case in our own books (1st *Jones*, 61), which can not be distinguished from this, and which ought to have something more than respect. We owe it the deference due to a declaration of the law, made by ourselves, on the faith of which the people in this and other states have invested millions of money. It is in vain to say that the case in 1st *Jones*, 61, was not a decision on this question.

It has always been so regarded. It was so treated by all the counsel, who argued the case on both sides. Equally, and even more impossible, would be the attempt to show that the case in *Brightly* had anything to do with it. There was then no act of the Assembly permitting the subscription. No lawyer doubts that a borough can only subscribe to a railroad, when expressly authorized by law to do so. This was all that this court decided, and if there was any thing more in the opinion of the common pleas, it was the mere dictum of the judge of an inferior court.

I am of opinion that the motion for a special injunction ought to be refused.

LEWIS J.—The legislature, so far as they have power to do so, have authorized the city of Philadelphia to subscribe to the capital stock of these railroad companies; and the question for decision involves the constitutional power of the legislature to authorize these subscriptions, without the consent of a minority of those whose persons and property will become liable to seizure, in satisfaction of the debts to be contracted thereby.

The grave character of this question, and the magnitude of the interests to be affected by its solution, secure for it the most careful deliberation. The incalculable advantages of railroad improvements, in facilitating the commerce and thus developing the resources and increasing the prosperity of the country, present strong inducements to sustain these subscriptions, if a warrant can be found for them in the constitution. The course of decision in several of the most considerable states of the Union, and the immense sums of money invested by innocent holders on the faith of them, are circumstances well calculated to shake the firmest mind in its progress to any conclusion which shall invalidate contracts thus made. On the other hand, we can not fail to anticipate the ruinous load of debt which may be laid upon the inhabitants within municipal corporations, without any adequate means of prevention or payment—the heavy and perpetual taxes which may be imposed to meet the interest of these debts, stripping the rich of their possessions and the poor of their liberty; and thus reducing all classes, the farmer, the mechanic, the merchant, and the laborer, and their widows and children, to beggary and want. These disastrous results, followed by the disgraceful but inevitable catastrophe of REPUDIATION, will be aggravated by the consideration that they were not *common* burdens, imposed upon the *whole people* of the *commonwealth* by their representatives for the *common benefit*, but have been laid upon *particular sections* of the community, without the *consent of the minority*, for objects not exclusively beneficial to them, and by a body *which can not be made to feel their power as constituents, when thus separated from their fellow-citizens, and singled out as objects of exclusive oppression*. By thus separating them from the mass of their fellow-citizens of the state, and putting their property and liberty under the power of corporate authorities, or even under that of a majority of the inhabitants of such districts as the legislature may choose to select, they are deprived of the great security against oppression which is always to be found in an appeal to the *common sympathies* and *common justice* of the *whole people* of the commonwealth. The sovereignty resides in the *whole people of the state*, and not in the *people of particular districts*. The representatives, judges, and other officers of state, are servants of the *whole people of the state*, and not of particular districts, and they possess no more power than their masters have thought proper to intrust to them in the instrument establishing the government. The sovereignty is composed of the legislative, executive, and judicial powers. These powers are not assigned to any one man, nor to any single body of men, but are distributed among three co-ordinate departments, so that each may operate as a check against the encroachments of the others. It was truly said by Mr. Madison, in discussing before the people the principles of our federal constitution, that "no

political truth is of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," than that "the legislative, executive, and judicial departments ought to be separate and distinct." "The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Federalist*, No. 47. There is, therefore, no foundation whatever for the doctrine that the legislature of the state possesses *all the powers of sovereignty not expressly withheld from them.* This notion is occasionally asserted by men who are not careful to distinguish between our FREE and LIMITED governments, DERIVED FROM THE PEOPLE, and established by written constitutions, and those absolute despotisms of the old world which have their foundations in secret fraud or open force, with no limitations of power except the arbitrary will of usurping tyrants. There is no more reason for affirming the existence of despotic power in the legislature, than there is for asserting that it exists in the other departments. But we know that "power is continually stealing from the many to the few," and that "eternal vigilance is the price of liberty;" and, in the constant struggles of our most enlightened champions of freedom to confine the federal authorities within their assigned limits, and to preserve the rights of the states, they are continually maintaining the fundamental truth that "all powers not expressly granted to the federal government, or necessary to the exercise of powers thus granted, are reserved to the states respectively or to the people." As between the states and the federal government, we can not too earnestly teach that the latter is a government of limited powers, and that it has no powers but those granted by the states; while the states, as original sovereignties, have all the powers which they have not thus granted away. In this discussion public attention is generally withdrawn from the rights of the people themselves, when in conflict with the powers claimed by their own state governments. But when the question arises between the *state governments* and the *freemen who created them*, the principle applies with equal force that the *people*, as the original source of sovereignty, retain all the powers which they have not intrusted by their constitutions to their public servants. A state constitution is not a technical contract between different parties. There is but *one* party to it, *the people*. They have established it for their own benefit, and they may alter, reform, or abolish it at pleasure. It is their own voice, spoken for the promotion of their own happiness, and the preservation of their own rights. It must, therefore, receive that construction which shall best advance the object in view, and which shall tend most to preserve the rights of the people. 7 *W & S.*, 127. The eminent jurist who gave judicial currency to the doctrine that the legislature possess all the powers of sovereignty not expressly withheld from them by the constitution, performed for his country the service of proving its fallacy, by following the principle to its legitimate conclusion. It was not expressly declared that the legislature might be prevented from enforcing unconstitutional acts, therefore it was at one time thought by him, that the judiciary had no power to pronounce such acts void. *Eakin* vs. *Raub* (12 *S. & R.*, 372). It was not expressly said that the

legislature should not exercise judicial power, therefore it was at one time held that they might reverse or open the judgments of the courts, and grant new trials at pleasure, and without notice to the parties. *Braddee* vs. *Brownfield* (2 *W.* & *S.*, 271). It was only provided that private property should not be taken for *public* use without just compensation, therefore it was at one time supposed by him, that the legislature might take private property for *private* use without any compensation whatever! *Harvey* vs. *Thomas* (10 *W.*, 63). These alarming doctrines were but the legitimate result of the principles which he had adopted. But it is a satisfaction, although a melancholy one, to know that the great mind that yielded to them, did so only because he thought the judiciary "too weak to withstand the antagonism of the legislature;" *Greenough* vs. *Greenough* (1 *Jones*, 495); and that, upon better consideration, when age and experience had ripened his judgment, and impressed his mind more deeply with the power of truth to resist antagonism of every kind, he renounced the errors which arose from imaginary weakness. The integrity of judicial duty demands the acknowledgment here, that constitutional law was not the department of jurisprudence on which this great luminary of the bench shed his brightest and clearest rays. But whatever confidence may be reposed in his opinions on this branch of the law, it is acknowledged by those who knew him best and loved him most, that the expiring blaze was brighter and better than the dim light which had misled his earlier judgment. In *De Chastellaux* vs. *Fairchild* (3 *Harris*, 11), he declared it "the duty of the court to temporize no longer, but to resist temperately, though firmly, any invasion of its province, whether great or small." And accordingly the supposed right of the legislature to take private property for private use, without compensation, was utterly denied in *Norman* vs. *Heist* (5 *W.* & *S.*, 171). The authority of that body to exercise judicial power and to grant new trials was also denied, *Jones*, 94; 3 *Harris*, 18; 6 *Harris*, 112. And the constitutional duty of the judiciary to protect the people from all encroachments on their rights, whether by the legislature or by others, has, under these just and enlightened views of liberty, been temperately but firmly maintained, 5 *W.* & *S.*, 171; 5 *Barr*, 145; 6 *Barr*, 86; 9 *Barr*, 108; 4 Harris, 256. Abundant authority, derived from other sources than our own judicial decisions, might be cited to maintain the principles which have at last been thus recognized and fully established; but this is unnecessary. They are so interwoven with the structure of our government, and so identified with true liberty, that they can not be overthrown until our free institutions are themselves destroyed.

It is true that the present chief justice introduced into the case of the *Commonwealth* vs. *Hartman* (5 *Harris*, 113), what I conceive to be the erroneous doctrine of his predecessor in office, after the latter had himself openly renounced it. As my dissent from that doctrine has, through some omission, not been reported, I take leave to record it now, and to add that my ground for maintaining the constitutionality of the common school system, the point decided in that case, is to be found in the plain and positive command of the constitution, that "the legislature shall provide by law for their establishment throughout the state." The case

did not stand in need of the principle of unlimited or despotic power in the legislature, and its unnecessary introduction, under the peculiar circumstances, only shows the difficulty of eradicating error after it has been promulgated under the sanction of an influential name.

In a monarchical government, where one branch of the legislative department is invested also with the supreme appellate judicial power, it may be well enough to talk of the *omnipotence of parliament*, and of the powerless condition of the judiciary to oppose their usurpations. Where the theory of the government is, that all power is derived from the king, and that the people are only entitled to such rights as are graciously granted by his majesty—where they must either demand a grant of their liberties, sword in hand, as in the case of Magna Charta from King John, or sue for them in the more humble form of a petition, as in the case of the petition of right, reluctantly granted by Charles the First, it may be appropriate to the subjugated condition of the people, to admit that they have no rights except those which are thus secured by grant, reservation, or acknowledgment. But the power and theory of that government, so far as they affected us, were alike overthrown by our revolution. The principles openly asserted in the Declaration of Independence, and firmly established by that successful struggle, were directly the opposite of what prevailed before. It was there proclaimed that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these rights are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. The colonies were parties to this declaration of rights, 4 *Kent*, 12; but the same principles were also set forth in the "Declaration of Rights" embodied in the constitution of Pennsylvania. It was there declared 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; that they 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." This declaration was inserted in the 9th article; and it was further declared, at the close of that article, *that every thing in it "is excepted out of the general powers of government, and shall for ever remain inviolate."* Our ancestors had profited by the lessons of history, and by their own experience of the tendency of brief authority to transcend its limits by construction, and they thus plainly *excepted out of the general powers of government the unalienable rights of liberty and property.* This declaration of rights was inserted in the constitution expressly, in order that "the great and essential principles of liberty and free government might be recognized and unalterably established." This is, therefore, an authoritative construction of the limitation which they prescribed to the legislative power, when they clothed each branch of it, not with despotic power, but only with the "powers *necessary* for a branch of the legislature of a *free state*." This clause is not exclusively confined, if at all applicable, to the powers necessary for the preservation of order and for regulating the manner of proceeding. These are provided for in other parts of the

constiution. On the contrary, the clause in question has a direct application to *legislative* powers, and these can not be exercised jointly by both branches as one body, but must always be exercised separately by each house, acting independently of the other. The clause was therefore necessarily and properly expressed in the distributive form defining the powers of "each branch." Each was established with members holding for different terms, and required to possess different qualifications from the other. They sat in different halls, under organizations and with officers entirely different from each other. The clause, therefore, can have no application to their legislative powers as a joint assembly, for, as such, they had no such power whatever to which it could apply.

Keeping in view, then, that the legislature are empowered to enact only such laws as are necessary for a nation of *freemen*, and that the rights of liberty and property are particularly enumerated as a portion of that freedom which is never to be violated, let us proceed to inquire into their authority to convert the property which happens to be located within the territorial limits of municipal corporations, into the capital stock of railroad companies, without the consent of its owners.

"The right which belongs to the society, or sovereign, of disposing *in case of necessity*, and for the *public safety*, of all the wealth contained in the state is called the *eminent domain*. This right is, *in certain cases*, necessary to him who governs, and consequently is a part of the sovereign power. But when he disposes of the property of a community, or an individual, *justice* requires that the owner be compensated out of the public money. If the treasury are not able to pay it, *all the citizens* are obliged to contribute to it, for the expenses of the state ought to be supported *equally*, or in a *just proportion*." *Vat.*, 104 *B.* 1 ch. 20 s. 244. This principle of the public law was modified and restricted in our constitution by the declaration that no man's property "shall be taken or applied to public use without the consent of his representatives, and without just compensation being made." *Const. Pa.*, Art. 9, Sect. 10. But the acts authorizing the municipal authorities to make these subscriptions have neither the form nor the substance of the exercise of the constitutional power to take property for public use. Property is not here taken, or authorized to be taken for public use, but the right is claimed to make a contract, binding the inhabitants for the payment of money without their consent. The attempt is to appropriate their money to the purchase of railroad stock, and to convert their local municipal governments, *pro tanto*, into private corporations, located beyond their jurisdictions. There is no offer or purpose to offer any compensation except the stock, and supposed advantages of the railroads proposed to be made. There is no provision or purpose to provide for the assessment of the compensation, or for any measure by which the just amount shall be ascertained. No state can make any thing but gold and silver a legal tender. The compensation, when property is taken for public use, must be in money, and can not be made in railroad stock, in land, or in any other article of property. *Vanhorn's Lessee* vs. *Dorrance* (2 *Dall.*, 386). These subscriptions are, therefore, not to be sustained under what is called the *eminent domain*.

It has been urged that they may be sustained under the *taxing power*. But these statutes do not necessarily and absolutely authorize taxation, although the subscriptions proposed to be made may, in certain contingencies, lead to that result. A tax differs from the seizure of private property for public use under the constitutional provision for a just compensation, in this, that the first is a demand from each inhabitant of his just share of the expenses of the government; the other is the seizure of his property, *in addition to and without any regard to his proportion of the public burdens.* The duties of sovereign and subject are reciprocal, and any one who is protected by a government, in his person or property, may be compelled to pay for that protection. It is a debt founded upon the contract of government, which may be as justly levied as any other debt. But this court has declared it to be "a rule of the public law founded upon principles of justice which no government can disregard without violating the rights of its citizens, that taxes shall be assessed in such manner that *all the citizens may pay their quota in proportion to their abilities, and the advantages they derive from the society.*" *Com'th.* vs. *Hood's Exrs., Eastern District*, May, 1853. This principle is sanctioned by writers of eminence in Europe and in this country; *Vattel B.*, ch. 20, Sect. 240, 2 *Kent*, 331. The legislature can not authorize particular districts to be charged with more than their just proportion of the public taxes. If they may authorize a city or county to be exclusively taxed for a purpose not local in its nature, they may authorize such a tax to be imposed exclusively on a single ward or township, or on a certain class of the inhabitants, or on a certain number of obnoxious individuals, or even on a single person by name! If this doctrine be sustained, the political party who may be in the minority might be charged with the whole of the public burdens. Thus the liberty and property of the citizen may be swept away from him in violation of the clearest principles of equal justice. The existence of such a power in the government is utterly at variance with the objects for which it was instituted. Instead of securing the rights of the citizens, it puts them in greater peril than that which surrounded them in a state of nature. It is idle to talk of liberty, and the right to "*acquire, enjoy*, and *protect*" our "*property*," while we acknowledge the existence of a despotic power which may roll over us like the car of Juggernaut, and crush all these rights in the dust at the pleasure of those who guide it.

The power of the legislature to create cities, boroughs, counties, and townships, for the purposes of *local government*, is not denied. It has been found so convenient and necessary, and has been so long established by usage and acquiescence, that we recognize it as a part of our system of government. But the municipal powers thus created must be confined to *local* and *governmental objects*. There has been no usage or custom under which the people of particular districts can be embarked in *extra territorial adventures* against their will. It is not intended to assume the absurd position that a municipal corporation can do no valid act beyond its territorial limits. It has the right to accomplish all its local municipal objects, and this right *carries with it, as an incident to the principal power, the authority to use all the means necessary to produce*

*the desired result.* If a supervisor of the township highways can not obtain within his township tools or laborers to open or repair the roads, he may obtain them elsewhere beyond the township limits. If the commissioners of a county, in the erection of a county bridge or a county building, can not obtain suitable materials, or architects, or laborers within the county, the right to obtain them beyond its limits is a necessary incident to the principal power. The paving and lighting of the streets of a large city, and supplying it with wholesome water, are necessary to the comfort, safety, health, and even the existence of its inhabitants. If suitable paving materials can not elsewhere be obtained, it may send to Quincy for granite; if material for the manufacture of gas can not be had within its limits, it may send to Liverpool, Richmond, or Pittsburg for coal for the purpose. If the wells and springs of water within the city are insufficient in quantity or quality, it may bring water from the Croton, the Schuylkill, or elsewhere, and may construct works for the purpose at *any necessary point*, either within or beyond its territorial limits. The test of its power is the *object to be attained.* If that be lawful, and *within its municipal duties and powers*, the means follow it as necessarily as the shadow does the substance. But in the case of these subscriptions to railroad stocks, the theater of action is not only extra territorial, but the object sought to be attained is itself beyond the range of municipal powers and duties. It is no part of the duties of municipal corporations, such as the cities, boroughs, counties, and townships of this commonwealth, to construct distant railroads, *for the purpose of drawing the commerce and travel of the world within their limits.* If they may do this, it is impossible to assign any limits to their powers. They may establish lines of steamers across the Atlantic and Pacific oceans, and commercial agencies and extensive mercantile houses throughout the world; they may build hotels within and beyond their limits, the latter to direct the travel to points within their borders, and the former to accommodate it when it comes there. The manufacturing interests are equally within the range of municipal powers, because they are necessarily connected with commercial prosperity. These authorities may therefore, on the same principle, erect extensive manufacturing establishments. They may thus take control of every branch of industry. Like Aaron's rod, municipal enterprise may swallow up all private enterprises. It may thus extinguish separate and individual rights of property, and bring every thing into common. What is this but a *Fourier establishment* upon a magnificent scale? The system of the *Socialists* may have its advantages, but no man can constitutionally be *compelled* to embark in it. The state, as an incident of her independent existence, has a right to improve her condition at the common expense of her people; but she has no more right to abandon the liberty and prosperity of any portion of her citizens to the will of others than she would have to transfer them to a Russian or an Austrian despot. She has no more right thus to compel particular classes to build railroads than she has to coerce them into the erection of stores, hotels, and manufacturing establishments. She has no more right thus to bring every thing into common stock than she has to abolish the institution of marriage, and to extinguish the existence of separate families.

The principle is the same whether the railroads to be constructed are located a thousand miles off, or terminate at, or pass through the municipal territory. In neither case can the municipal corporation embark in the enterprise by placing its revenues under the control of private corporations. These principles were sanctioned by this court in 1839, as I understand the case of *M'Dermot* vs. *Kennedy*. The borough of Newville, under a charter which fully authorized the town council to enact such ordinances as shall be determined by a majority of them necessary to promote the benefit and advantage of the borough, determined that it would be to the benefit and advantage of the borough to pay to the Cumberland Valley Railroad Company $1000 to change the location of their road, so as to bring it near the town, that it might derive "advantage from the trade and travel which the road would bring." The cause was put by agreement on the question whether the borough had the legal power to make the subscription, and to assess and collect taxes for its payment. The learned and experienced President Reed decided in the court below, that "it was not a borough purpose—that the advantages of the railroad were private rights, not corporate municipal rights—and that if the right claimed by the town council be maintained, then the inhabitants of Newville have given over 'the inalienable right of acquiring, possessing, and protecting property.'" The judgment was rendered against the power claimed by the corporation, and *that judgment was affirmed by the supreme court. Brightly's Rep.*, 332. Let it be remembered that the charter gave the town council full power to do any thing which a *majority* of them thought for the benefit and *advantage of the borough*—that the majority were expressly constituted the judges of what was for its "benefit and advantage"—and that the change of location of the railroad was determined to be a "benefit and advantage" to the borough. That it was beneficial and advantageous was not denied, and could not be doubted. But the objection to the exercise of the power was, that the *object* sought to be obtained was not properly a *borough purpose*—and that the exercise of the taxing power by the town council for such a purpose was unconstitutional, because it invaded the rights of the citizens to "acquire, enjoy, and protect their property." Under the extensive powers conferred by the charter, I can perceive no other ground upon which the decision could have been placed without restricting the express words of the law; and as the reasons given by the judge below were perfectly unanswerable, and were not answered or attempted to be answered, or disapproved of by the supreme court, the inference is that they were adopted. It is not probable that a heresy, on such an important constitutional point, would have been suffered to pass without correction. The decision of this court, in that case, is therefore, in my opinion, a direct adjudication on the question now before us. It covers all the grounds necessarily taken in the case under consideration. Has it been overruled? And if so, upon what grounds?

It stood for undoubted law for ten years. But in May, 1849, the case of *Commonwealth* vs. *M'Williams* came up for decision. It was a *quo warranto*, in which the supervisors were charged with exercising the taxing power *under the act of 13th of April, 1846, for the use of the*

"*Spruce Creek and Water Street turnpike road company.*" This allegation was denied by the plea, and the case went to the jury on that issue of fact. The plaintiff failed to [illegible] her allegation by evidence. The court below thereupon told the jury that "the evidence failed to support the information, and that, therefore, the verdict must be for the defendant." On a writ of error the supreme court, in like manner, decided that "all the evidence in the cause proves *conclusively* that the taxes complained of were *not* levied *under the act of Assembly pleaded*, but by virtue of authority vested in supervisors of townships by virtue of the act of 15th of April, 1834, consequently, *upon the very point presented by the pleadings*, the verdict and judgment could not be otherwise than for the defendant." This decided the cause; and there the learned judge might, with great propriety, have stopped. With the most perfect respect for him, and for those who differ from me in this matter, I can not but believe that the judicial duty is always best performed when the judge carefully avoids prejudging questions, which do not properly arise. This is a duty of high and especial obligation when those questions affect the constitutional rights of the people for whose benefit the government was established. The record presented no question for decision in regard to the power of the supervisors to subscribe for shares of the capital stock of a turnpike company, at the cost of the inhabitants of the township. In volunteering an opinion upon that question, at the desire of the parties, the learned judge exhibited a good-natured disposition to gratify them with his counsel, but he was not in the line of official duty, and it is therefore not to be presumed that he spoke against instructions from his judicial brethren, or that he delivered their opinions. The authorities cited in support of his opinion, are *Commonwealth* vs. *M'Closkey*, et al. (2 *Rawle.*, 374); *Harvey* vs. *Thomas* (10 *Watts*, 68); and *M'Clenaghan* vs. *Curwin*, (3 *Yates*, 362). The first (*Commonwealth* vs. *M'Closkey*) is cited to prove that "*where the prohibition is not found in the primordial part*, the exertion of a power can not be deemed unconstitutional even though it seems to trespass upon our ideas of natural judgment and right reason." But no such doctrine is to be found in the case. On the contrary, the validity of an act of Assembly against the principles of natural justice, is not there put upon the ground that there is "no prohibition of it" in the constitution. Far from it. Its validity is there expressly stated to depend upon the question whether it was "*within the general scope of their constitutional power.*" And the doctrine that the federal or state legislature possesses all the powers from which they are not expressly restrained, was in that very case declared to be "a political heresy altogether inadmissible in a republican government." (2 *Rawle*, 373.) The second case (*Harvey* vs. *Thomas*) was one in which the lateral railroad law was held to be constitutional upon the plain and undoubted principle that "the end to be attained by it is the *public prosperity*—that Pennsylvania has an incalculable interest in her coal mines, that the incorporation of railroad companies is a measure of *public utility*, that the privilege given to an *artificial person* is as constitutional when given to a *natural* person." But the case was cited for the position unnecessarily taken by the late chief justice, that "the legislature might appro-

priate private property to the use of a private way without making compensation, *since the constitutional inhibition relates solely to public uses.*" The notion of unlimited and despotic power in the legislature to take one man's property and give it to another, for no public purpose, without compensation, never had any footing in Pennsylvania, or in any other state where the people are free. It is denied in 5 *Paige*, ch. *R.*, 159; 11 *Wend.*, 149; *Saxton's*, ch. *R.*, 695; 2 *Peters*, 357; 18 *Wend.*, 59; 4 *Hill*, 144, and 3 *Dall.*, 587. It was also denied in *Bakin* vs. *Raub* (12 *S.* & *R.*, 272); in *Vanhorn's Lessee* vs. *Dorrance* (2 *Dall.*, 386); in *Commonwealth* vs. *M'Closkey* (2 *Rawle*, 373); in *Norris* vs. *Clymer* (2 *Barr.*, 279); in *Pittsburgh* vs. *Scott* (1 *Barr.*, 311); in *Lamberton* vs. *Hogan* (2 *Barr.*, 24); and in *Norman* vs. *Heist* (5 *W.* & *S.*), 174. In *Norris* vs. *Clymer*, and *Norman* vs. *Heist*, it was most distinctly and unequivocally recanted by the late Chief Justice Gibson himself. In the case last named, he says that "it was not deemed necessary to *disable* the legislature *specially* in regard to taking the property of an individual, with or without compensation, in order to give it to another, not only because the general provision in the Bill of Rights was sufficiently explicit for that, but because it was expected that no legislature would be so regardless of right as to attempt it." As the opinion of Mr. Justice Bell in the *Commonwealth* vs. *M'Williams*, is founded principally upon the supposed existence of absolute power in the legislature, as stated by the late Chief Justice Gibson in *Harvey* vs. *Thomas*, it is to be regretted that he omitted to notice the cases in which the power was denied, and particularly the two in which it had been distinctly repudiated as an error by the distinguished jurist who gave it currency. It is also of some importance, in connection with this question, to bear in mind that the learned judge who delivered the opinion in the *Commonwealth* vs. *M'Williams* seems to have overlooked his own views of the "*definite and limited power of the legislature*," as expressed but two years before in *Parker* vs. *Commonwealth* (6 *Barr.*, 513). It may likewise be remarked that he does not seem to have been apprised of the *then unreported* decision of this court in *M'Dermot* vs. *Kennedy*, in which, according to my understanding of the decision, it held that the exercise of the power claimed in the case before us was a violation of the right of property expressly reserved from the general powers of government. The last case cited by the learned judge (*M'Clenaghan* vs. *Curwin*) was a case in which it was held that the act to incorporate a turnpike company was constitutional, and that, under the original compact with the landholders, in which they received six acres in every one hundred without compensation, in trust for the purpose of making roads, the land might be taken for the purposes of the turnpike road without paying for any thing but the improvements made by the occupant. It is difficult to understand why this power should have been doubted or denied, or what it has to do with the question under consideration. The land taken for the road did not in equity belong to the patentees—they held it expressly in trust for the purposes for which it was appropriated. No man was compelled to travel over the turnpike road, nor was any man compelled to subscribe to the stock or to pay taxes for its construction. Those who did not

think proper to travel over it were at liberty to wade in the mud or jolt over the stones of their ordinary roads as before; but if they desired to make use of the labors of others, it was just that they should pay a reasonable toll as a compensation. It seems to follow that the opinion in *Commonwealth* vs. *M' Williams*, so far as it purports to be founded upon the decision cited to support it, is utterly unsustained by authority. So far as it stands upon the principle that the legislature may exercise all powers from which they are not expressly excluded by the constitution, its foundation is equally frail. No jurist after proper reflection ever thought it necessary for a free people to write it down in their constitution that the legislature should allow them to purchase land and to farm it, to employ themselves in trades and professions, to embark in the manufacturing or mercantile pursuits, to make contracts in regard to the business of life, to travel or remain at home as business or pleasure shall prompt, or to engage in any pursuit whatever provided it neither injured others nor endangered the public morals. There is no special provision to secure these rights from legislative invasion. But, as they are the rights of freemen, which have never been surrendered, the legislature that should attempt to violate them would be scourged into retirement by the unanimous voice of their indignant masters, while their unconstitutional enactments would be declared inoperative for want of authority by every judge who understood the true foundations of law and free government.

The stateliness of a building may delight the eye, but its stability depends upon its foundations, which are concealed in the bosom of the earth. Passing by the attractions which surround the opinion in *Commonwealth* vs. *M' Williams*, I have carefully examined its foundations, and find that it has no support from either principle or authority. But as the opinion is not upon a question arising on the record or in the evidence, or otherwise judicially before the court, it is not binding as a precedent in this, or in any other tribunal. It is entitled to no more consideration than the opinion of any private gentleman of equal intelligence, learning, and experience. It may therefore be disregarded, without in the slightest degree violating the principle of *stare decisis*. On the contrary, an adherence to it, in opposition to the decision in *M' Dermot* vs. *Kennedy*, as I understand it, would be a violation of that principle. It is not probable that the tribunals of other states have been misled by it; but if this be the case, we can only regret that they have followed a false light; they must bear in mind that the report of the case gave them full notice that the question thus disposed of was *not the matter in judyment in the case*, and that every one familiar with judicial action, knows that an opinion on an abstract question is never regarded by sound jurists as authority for any thing.

But we are asked to follow the decisions in other states on this question. These decisions, although entitled to respectful consideration, are not authority here. If they had been sanctioned by long acquiescence of the people, after a thorough experience of the results to which they tend, they would deservedly have influence on our minds; but they are of recent origin, and were pronounced under the influence of that courtesy which ever disposes the judiciary to sustain the action of the legis-

lature, unless in a clear case. They may be presumed also to have been influenced by the consciousness of "weakness" and "inability" to resist the antagonism of a department which in some cases had a voice in the appointment of judges, and in others possessed also the power of removal. It is not unlikely, also, that the great advantages of the public improvements projected, created a pressure there, similar to that which now exists here, and which, it is acknowledged, it is difficult to resist. But this is no reason why judges elected by the people, and who can resist every unjust coercion from any other department, by an appeal to the common sovereignty, should hesitate to give that protection to the citizens which the constitution secures. The tendency of power to encroach upon popular rights is *continual*, and it necessarily follows that those rights can only be maintained by a *perpetual* struggle. This is the reason why *bad precedents* have but little weight in constitutional questions, when they violate the rights of the people or the principles of the government. It was very properly said by Mr. Justice Bell, in *Parker vs. Commonwealth* (6 *Barr.*, 521), that "a different rule would expose the fundamental laws of the state to continual danger of subversion from encroachments which in the beginning did not attract public attention." A plain violation of the constitution, like a public nuisance, acquires no validity by its repetition or continuance.

In the continual vibrations attendant upon the struggle between power and liberty, it is not strange that the powers of European cities should be influenced by the varying character of that struggle. Padua was at one time enslaved by her conquerors, at another it rose to perfect independence, and then sank down into Austrian despotism. London was at one time a rude military fortress, surrounded by woods and marsh—at another a splendid prefecture of Rome, with its columns, capitals, tesselated pavements, and statues of heathen divinities—then a municipal corporation with most extensive powers—then stripped by the hand of tyranny of all its corporate rights—then restored with new and extensive privileges, accompanied with the extraordinary parliamentary declaration, that its charter was so far above the law that it can never hereafter be declared forfeited. Hamburg was, at different times, subject to the dukes of Saxony and the counts of Holstein, at another time it acquired the rights of sovereignty as a free and independent city. Bremen, Lubeck, and other cities exercising the powers of sovereignty, have passed through similar changes. Even Rome herself, once the mistress of the world, and the mother of nations, is now a "weeping Niobe," under the most absolute despotism. What light, therefore, can the powers and usages of the ancient or modern cities of the old world throw upon the powers of municipal corporations here? None whatever. The former were the creatures of time and circumstance, with no definite or uniform limit to their powers, sometimes absolute sovereigns—at other times absolute slaves. The latter are the creatures of the law, established for the purposes of local government alone, with powers specified and limited in their charters. The usages of the first form no precedent for the action of the last. The references in the argument of counsel to the cities of Europe are therefore dismissed without further remark.

It is conceded that the legislature may create cities, boroughs, coun-

ties and townships, with such territorial limits and such extent of population as they think proper to designate. They may erect a borough or a township, composed of three rich men and two poor men, or three poor men and two rich men, if they think proper. Putting the case in the most favorable light of a power exercised according to the wishes of a majority, is it not enough to clothe the three rich men in the one case, and the three poor men in the other, with power over the others, so far as relates to the *local government* of the borough or township? Can it be possible that under a constitution which professes to respect the rights of property, the three rich men may be clothed with power to compel the poor men to contract debts for distant railroad projects, which may sweep from them their humble dwellings acquired by a life of industrial toil? Is it true that their widows and orphans, left with nothing but a dwelling to shelter them, and the bare means of subsistence and education, can be thus involved in a debt without their consent, which may in the end reduce them to homeless destitution? Or is it true that three poor men, who have, perhaps, nothing to lose, have the power to involve the rich in liabilities which may strip them of their possessions and reduce them to beggary?

Immense bodies of uncultivated lands are owned by non-residents. Some of the owners are citizens of Pennsylvania, some are citizens of other states, and others are inhabitants of foreign countries; some are widows, others are minor children. All have purchased their lands under solemn grants from the states, and have paid taxes for the support of the government for many years. These owners are protected by the constitution of the United States from every act of legislation which shall impair the obligation of their contracts, and they have a right to demand that protection from the judiciary of the federal government. Is it possible that the people who happen to live in the counties where these lands are situated, may charge them with immense debts for the construction of railroads? Is it true that one man's land may thus be taken to build a railroad through the land of another? That one may be thus impoverished to enrich another, and that deeds, patents, and all the most common contracts on which men are accustomed to repose in security, may be thus not only impaired, but absolutely nullified and trodden under foot? Is this to be the practical construction of the great principle of liberty, taken from Magna Charta, and incorporated into our own constitution, that "no man can be deprived of his property unless by the judgment of his peers or the laws of the land?" If this may be done, our property is held at the will of others, and there is no such thing as the right of property. If this be constitutional law, our liberty is in the same jeopardy, for our citizens may be imprisoned for the taxes assessed to pay the debts thus contracted without their consent. But when two out of three county commissioners, without a vote of the people, are authorized to lay these enormous burdens upon the persons and property of a whole county, who shall measure the extent of the wrong? Why should the members of municipal corporations, who are made such without their consent, be placed in a worse condition than those who voluntarily embark in private corporations? If a man becomes a stockholder in a bank, the legislature have no power to convert the corporation into

a railroad company, or even to authorize the diversion of a single dollar of the capital to that object, without the unanimous consent of the stockholders. A majority may control the management of the corporation so long as they keep within the objects of the original charter, but they can not change its character or objects, even with the sanction of the legislature. When the object of the alteration of a charter is auxiliary to the original object, and designed to enable the corporation to carry into execution *the very purpose of the original grant, with more facility than could otherwise be done*, an individual corporator can not complain; but when the alteration is a *fundamental change in the original purpose*, the corporators are not bound by any such act of the legislature, although accepted by the directors and a majority of the stockholders. *Stevens* vs. *The Rutland and Burlington Railroad Co.* (1 *Am. Law Reg.*, 154); *Natusch* vs. *Irving*, et al (*Gow on Part. Appen.*, 576); *Ware* vs. *The Grand Junction Water Co.* (2 *Rus. & Mylne*, 471); *Cunleff* vs. *The Manchester and Bolton Canal Co.* (1 *English Cond., ch. Rep.*, 131 *n.*); *Middlesex Turnpike Co.* vs. *Lock* (8 *Mass.*, 268); *Same* vs. *Swan*, (10 *Mass.*, 384); *Same* vs. *Walter* (10 *Mass.*, 390); *Hartford and New Haven R. R. Co.* vs. *Croswell* (5 *Hill*, 385); *Ellis* vs. *Marshall* (2 *Mass.*, 269); *Gray* vs. *Monongahela Nav. Co.* (2 *W. & S.*, 150); *Indiana and Ebensburg Turnpike Co.* vs. *Phillips* (2 *Penn. R.*, 184); *Munt* vs. *The Shrewsbury, etc., Railway Co.* (3 *Eng. Rep. Law and Equity*, 144); *Livingston* vs. *Lynch*, et al (4 *John Rep.*, 573). And the reason of this is that members of *private* corporations, like other citizens of the commonwealth, have a right of property which even corporate majorities can not violate. No good reason has been assigned why the members of *municipal* corporations, the people themselves, should not possess the same rights. It may be appropriate in the discussion of *political* questions to talk about submissions to the will of the majority, but where *property* is concerned, it is to be disposed of according to the will of the owner.

In despotic governments, where the people have no rights of liberty or property, and where all power is concentrated in the sovereign, every question is necessarily a political one, to be disposed of according to the discretion of the government. But we owe a lasting debt of gratitude to the valor and wisdom of our ancestors for liberating us from this bondage, and expressly "reserving the rights of liberty and property out of the general powers of government." Under our free constitution, questions of property are therefore not political ones, but mere questions of *meum* and *tuum*, to be decided, upon a fair trial, in due course of law. Municipal corporations can not destroy or affect the rights of property. They are mere creatures of the government, instituted for governmental purposes alone. They may be established without the consent of the inhabitants within their limits, and may be abolished at the pleasure of the power that created them. They have no permanent existence for a single day. They are therefore incapable of any act, except the necessary duties of local government, and apart from that duty can not enter into any contract which shall perpetuate their existence, or bind the persons or property of the inhabitants or others. Nor can they be clothed by the legislature with any such power, for want of the essential element in every contract, *the consent of all the parties to be bound.*

But it is said that the legislature are the judges of what acts fall within the range of municipal duties and powers, and that their judgment is conclusive on the question—that no matter how great may be the abuse of authority in this respect, it is an injury for which the judicial power can furnish no redress. This argument proves too much; for, if true, it abolishes the distribution of power, and destroys the very check created for the preservation of the liberty and rights of the citizen; and instead of putting his constitutional rights under the protection of "the judgment of his peers" and "the law of the land," it places them entirely under the discretion of the legislature. If they may destroy the rights of property whenever they think proper to decide that municipal interests and duties require their destruction, they may deprive the citizen of his life or his liberty, under the same exercise of discretion. Upon the same principle they may decide that all his houses, lands, and goods shall be sold, and the proceeds disposed of according to the will of the majority, and that the minority themselves shall be reduced to bondage as the slaves of the majority. Such a construction would clothe the legislature with the most absolute and unlimited power, and would be utterly destructive of all constitutional rights. To say that no remedy exists in the judiciary for such a plain violation of the constitution, is to abrogate that provision which declares 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 due course of law, and right and justice shall be administered without sale, denial, or delay." That this provision applies as well to injuries attempted by any department of the government, as to those perpetrated by individuals, is apparent from its connection with clauses expressly provided to protect the people from any invasion of their rights by the former. That this was the object of it, is also manifest from its insertion in the very section which provides that the citizen may bring suits even against the commonwealth herself.

It is true that where the unconstitutionality of an act consists in the concealed motives for its enactment, or these motives are so intermingled with legitimate ones, that they can not be distinguished and separated, the judicial power may not extend to the case. It is then a question of fraud which it would not be proper for one department of the government to impute to another, and in which one can not, in a collateral proceeding, have jurisdiction over the other. The taxing power, when exercised according to all the forms of constitutional authority, may, it is true, be tainted with an intention to appropriate the funds to private, or other improper and unauthorized uses. Against this abuse the remedy is with the people, and may be beyond the reach of judicial action. But where the unconstitutional object is distinctly apparent on the face of the act, where the purpose, as in this case, is admitted to be one which does not fall within the legitimate limits of municipal powers, where the invasion of constitutional rights has not been concealed, or placed out of reach by the confusion of intermingled legislative motives, and where, as in this case, we see it in its nakedness, long before it envelops itself in the cloak of the taxing power, there is no difficulty whatever in arresting the evil at the threshold.

The legislature have undoubtedly an enlarged discretion. It is no part of our duty or inclination to impugn the motives of members, or treat their acts with disrespect. It can never be their intention, as a body, to disregard the rights of their constituents. But in the pressure of their varied and burdensome duties, it is not always possible for them to perceive the bearing which their enactments may have upon individual rights. For this reason the sovereignty was not intrusted exclusively to them, or to any single department of government. For this reason the judicial power was created; and it is the duty of that power to act faithfully according to the purposes of its existence, and when "right and justice" shall require it, to declare that the constitution is supreme, and that to render an enactment valid, both the end and the means must be such as do not violate individual rights—that there is no power in the commonwealth which has discretionary authority to take away the property of the citizen without "just compensation," without the "judgment of his peers," and contrary to "the law of the land;" that this can not be done even to accomplish a constitutional object, much less where, as in the case before us, the end and the means are alike unauthorized. It has been truthfully and beautifully said by the chief executive officer of the Union, that every citizen of this country is "one of a nation of independent sovereigns;" that he can not wander abroad so far as to go beyond the protection of his country's constitution. The flag that represents the power and the rights of the people is his sure guaranty against injury from all the other nations of the earth. Why shall it not secure him the like protection from his own? It will avail but little to protect him in his rights abroad, if his substance may be exposed to the jaws of devouring tyranny at home. Justice is not to be entangled in nets of form. It is immaterial in what *garb* unconstitutional oppression may approach the citizen, whether in the purple and fine linen of associated wealth, in private corporations, in the more attractive costume of municipal majorities, or even in the honored robes of legislative power. It is the duty of the judiciary to administer justice so as to protect the citizen from every form of unconstitutional attack.

The opinion here given is, of course, confined to the case before us, in which those who ask our intervention opposed the proposed usurpation upon their rights as soon as it came to their knowledge. As the legislature and the municipal authorities are the agents of the people, for some purposes, and are professedly acting for their benefit, it may be a question hereafter how far the latter can stand by and receive the benefits of such subscription, or allow third persons to be deceived into investments, in the belief that the acts are approved of, without being precluded from afterward objecting. In dealings between man and man, where an agent transcends his authority and the principal omits to dissent as soon as the act comes to his knowledge, he is, in general, bound by it. Under the law of nations, where there is an abuse of power, if the nation is silent and obeys, the people are considered as approving of the conduct of their rulers. *Vattel*, 18, 11. It is upon this principle that treaties and contracts of usurpers, made in behalf of the nation, by its rulers *de facto*, are binding upon the nation. The

present case is entirely free from the application of this rule. When other cases shall arise to which it may properly apply, justice will be done according to law. I would be the last to sanction repudiation of debts contracted in good faith. But the true way for municipal corporations to avoid this calamity is to contract no debts except such as are clearly within their corporate powers. If the contrary be attempted, the power of the law can not be more appropriately exercised than in applying its preventive process. The magnitude of the interests involved, and the great power and influence of the parties to be enjoined, furnish no reason for disregarding the supremacy of the LAW, for "her seat is the bosom of God; her voice is the harmony of the world; all things in heaven and earth do her homage; the very least as feeling her care, and the greatest is not exempt from her power."

In conclusion, I am in favor of granting the injunction, because—

1st. The proposed subscription puts the property of the citizen under the control of a private corporation without his consent, thus depriving him of the right of "possessing and protecting it," and therefore violates the 1st section of the Bill of Rights.

2d. It converts the members of a municipal government into a corporation which has nothing governmental in its objects, and which, being bound by contract, can not be "altered, reformed, or abolished" at the pleasure of the people; and it is therefore a violation of the 2d section.

3d. It puts the property of the citizen, without his consent, under a government where it can no longer be protected by "free and equal" votes, but where wealth controls poverty, and where money has more votes than men; and therefore violates the 5th section.

4th. It deprives the citizen of his property without the "judgment of his peers," and without a trial in "due course of law;" and therefore violates the 9th section.

5th. It takes the property of the citizen without just compensation, and is there therefore a usurpation of powers not granted, as well as a violation of rights plainly expressed and implied in the 10th section.

6th. It deprives the citizen of the lands and goods secured to him by patents, deeds, and other contracts, and therefore violates the 17th section.

7th. It invests a corporate body with the privilege of taking private property without requiring such corporation to make just compensation in advance, or to give adequate security therefor; and therefore violates the 4th section of the 7th article of the amended constitution.

8th. The appointment by the legislature of the municipal officers as the agents of the present plaintiffs to charge their lands and goods with these burdens, without their actual consent, gives such officers no more authority than a similar enactment would confer upon Queen Victoria or the Emperor Nicholas. It is assuming the garb without the reality of assent, and is therefore an injury about to be perpetrated under circumstances of peculiar aggravation. To deny a "remedy by due course of law" and to refuse to administer "right and justice without delay" in such a case, would be a violation of the 11th section of the declaration of rights.

My views on this subject may be unfashionable. But when credit

shall be exhausted, and the day of payment shall come; when the bonds (which are to be issued like other obligations of mere sureties without making any provision for payment) shall come to maturity—when the railroad excitement shall subside, and reason shall resume her dominion—when the exhilaration of profuse expenditure shall give place to the gloom to be produced by the grinding exactions of the tax gatherer—when the rich shall be impoverished, and the poor shall be cast into prison—when all classes shall be involved in millions of debt beyond the means of payment—when individual industry and enterprise shall cease with the destruction of individual rights—when the freemen of this commonwealth shall become the bondmen of corporations, I shall, if surviving, have the melancholy consolation of knowing that I have endeavored, to the extent of my feeble abilities, to avert these calamities from my fellow-citizens, and to maintain their rights of property according to my understanding of the constitution.

As I think that the injunction ought to be granted, for the reasons already assigned, it is unnecessary and improper, on this preliminary motion, to consider the other points urged in the support of the application.

Lowrie J.—It is insisted that a municipal corporation, even with the consent of the legislature and of a majority of its voters, has no constitutional right to become a stockholder in a railroad corporation and may not borrow money to enable it to do so. The measure derives no essential virtue from the vote of the people of the town or city, or from the will of their officers; for the citizen claims the more authoritative protection of the state. He owes no allegiance to towns or cities, or to local majorities of any kind, but only to the state, which alone is sovereign; and it is this allegiance alone that enforces his obedience to local authorities. Towns and cities may command and act where the legislature can give them authority to do so, and has given it; and without this, neither town officers nor town majorities, even though unanimous, have any legitimate control over the property or rights of the citizen. All the efficacy of the subscription is therefore dependent upon the act of the legislature, and if under the constitution such an act is excluded from the province of government, then of course no legislative sanction and no combination of governmental majorities can make it valid.

The principle involved in this case has been so often acted on by the legislatures of our own and of other states, and its correctness has been so often affirmed by judges, whose learning and talents I may emulate, but can not hope to equal, that it is with the utmost diffidence that I venture to express a contrary opinion.

When a proposed measure promises a present advantage, and there is no apparent wrong to any one in carrying it out, it is not unusual to enter upon it without scrutinizing with any suspicious care the tendency of the principle on which it is based, and even without studying what the principle of it is. The example being once set, is followed by many similar instances; and it is not until the practice begins to run to an extreme, and to develop its dangerous results, that we begin to suspect its fundamental principle, or to doubt the propriety of the

action of those who led the way. This thought may furnish some apology for the boldness that questions the first impressions of legislatures and of courts; and it is not without considerable illustration in the laws, arguments, and decisions on this very subject. It would be surprising if the first attempts to define the application of a principle should be entirely successful; and even if they were, they could not be known to be correct until they had stood the test of many subsequent disputes. Like a boundary line through a wilderness country, it may require many experimental surveys, conditional lines, temporary concessions, and earnest contests before its true place can be defined and settled.

In the case of the *Commonwealth* vs. *M'Williams* (11 *State R.*, 70), this court *seems* to have affirmed the constitutionality of such an act as that we are now considering; because no unconstitutional principle was pointed out by the counsel or seen by the court, as being involved in the measure. The only positive principle, enunciated by the court in support of the measure, is that the legislature may authorize local taxation for local improvements. Without that principle (not needed by the case), that act of Assembly could not have been sustained, and I shall endeavor to show that, even with it, it could not be.

Several other cases in other states carry the principle of local taxation even farther. *Godden* vs. *Crump* (8 *Leigh*, 120); *Harrison* vs. *Holland* (3 *Grattan*, 347); *Thomas* vs. *Leland* (24 *Wend.*, 65); *Shaw* vs. *Dennis* (5 *Gilman*, 405); *People* vs. *Brooklyn* (4 *Comstock*, 419). But none of these cases are in point as to the means by which the measure is proposed to be effectuated here; and in my opinion they do not involve the essential principle of the present causes.

It is otherwise, however, in the case of *Bridgeport* vs. *Housatonic R. R. Co.* (15 *Conn.*, 475); *Nichol* vs. *Nashville* (9 *Hump.*, 252); *Talbot* vs. *Dent* (9 *B. Monroe*, 526); *and Cincinnati, W. & Z. R. R. Co.* vs. *Clinton Co.*, lately decided by the Supreme Court of Ohio.

I take the last case as a fair sample of them all. The aim of the learned court, so far as it is important to notice it here, is to show that the work was of such a local character as to justify local taxation by the legislature, either directly or through the local authorities, and having done so (as is supposed) the inference is drawn—"if either might do the whole (work), is it not too obvious for doubt, as a question of power, that each may be authorized to do a part?" Certainly it is. But I most respectfully think that this does not exhaust the argument. Nor do I presume that the learned court regarded it as so doing; for, in another place, they say that the object being proper, it "might be done by any means not prohibited, adapted to the end in view, and subscription of stock to a company incorporated for that purpose, is not objectionable." Here is the very question of the cause; and without admitting the correctness of the views expressed as to the absoluteness of the legislature's power of local taxation, or improvements which they may call local, I can not help thinking that this question of the means has not been fully considered. Are not the means prohibited by the constitution?

When we notice the character of municipal corporations, it seems somewhat strange that they should be allowed to borrow money for any pur-

pose, except as a mere temporary expedient. Our municipal corporations have none of the sacredness that belonged to the chartered municipalities of England. Theirs were grants of franchises and privileges, generally purchased and paid for, and guaranteed by Magna Charta, and were part of the very means and process of the development of individual rights, for which Englishmen were continually and earnestly contending. Ours are mere instruments of government, having essentially no higher value than other local offices, being instituted, as these are, for the purpose of devising and executing certain local regulations, which it would be inconvenient and almost impracticable for the legislature to do by direct legislation. Their functions are different from the local offices of counties and townships, chiefly because of a more dense population, and not at all because of any constitutional necessity. Properly speaking they have no faith to pledge; because they have no place in the constitution, and no guaranty that their existence will be continued even for a year; because their jurisdiction, limits, and taxing power may be expanded, contracted, and subdivided at the pleasure of the legislature; because usually their taxing power is limited to the mere necessities of their corporate duties, leaving them little or nothing to answer other demands upon their plighted faith; and because the legislative power over them for alteration, extension, and annihilation can not be taken away, and ought not to be impeded by their act of incurring debts. Their power ought to be carefully limited, for the experience of all municipalities, ancient and modern, shows that there is always a tendency in corporations to sacrifice individual rights to the interest of the corporate body. A watchful observer of the acts of our own cities and towns can point out many instances of this. But it stands written in every age, in almost every year of the history of the Grecian and Italian cities, democratic, oligarchic, or monarchic, and this disregard of individual rights was, more than any thing else, the cause of their decay.

The corporation to be aided by the investment is a railroad company. That such is a private corporation has very often been decided, and is not disputed. It is essentially so, for it is not an instrument of government, and no legislative declaration can alter this fact. In it the right of voting is regulated on principles totally different from the elective franchise of the constitution. It is private and not public, for its province is regulated, not by the constitution and general laws of the land, but by its charter, which stands as the contract terms of its existence, at least among its members. It is private, because it is not a law imposed upon any one by legislative authority; but a plan of union, accepted as such by persons, voluntarily and each for himself, associating themselves according to its terms. He that becomes a member of such a corporation, voluntarily gives up so much of his property as he invests in it; he converts his money or other property into corporation stock. Besides this, his whole estate may be in some measure subject to the control of the corporation; for all private corporations may be so constituted, that the members may be made personally liable for the corporation debts. And this is not all, for if this may be imposed upon a municipal corporation, it may be imposed upon any township or ward, or half or tenth part of a township or ward; for the legislature can subdivide any of

them at pleasure. Nay, they may on the same principle be forced to become members of any private partnership formed for similar purposes, called public.

What, then, is the substance of the proposed measure? It is to make a municipal corporation, and therefore all its citizens, and to some extent all persons owning property within its limits, members of a private corporation by an act of government. It is to take the property of the citizen, by an act of government, and invest it for him in the stock of a private partnership. It is to take his credit or his property out of the protection of the state constitution, and place it under a charter which must thereafter be its only law. It is to place it where neither his power as an individual can control it, nor his vote as a citizen affect it. Under the constitution he stood as the equal of all men, in the choice of the officers who might affect any of his interests. (*Bill of Rights*, Sect. 5.) Under the charter now proposed to be forced upon him, his voice is not heard at all, or if at all, most indistinctly and indirectly; for neither the citizens nor their municipal representatives may have any voice in choosing the majority of the railroad directors, and the votes which they do give bear no adequate proportion either to their numbers or their interest. Force upon them this new relation, and as to so much of their interests, you take away all their rights as individuals and as citizens; and they are all, some with and some without their consent, made carriers of goods and of passengers, and liable in some degree to the duties and the risks of that relation.

Now here is the very question of the cause, and I proceed to its more direct consideration. May government force any portion of the citizens into such a relation? May a municipal corporation embark the interests of its citizens in the speculations of a private corporation or partnership? I think it can not.

May not government authorize municipal corporations to engage in any sort of trade or business for the public benefit, on the faith of the taxes it has raised or has power to raise? Yes, it can, if that is proper governmental business; but it is not. And of course, if the business be not governmental, government can levy no tax to carry it on. Is the stress laid upon the idea of the public benefit of the business? Then what line of business is there that is not regarded by those engaged in it as being for the public benefit? Can proper public business be defined according to this standard? Generally, perhaps, it may; and then such business as this is declared to be the indefeasible right of man, as an individual, when it is declared that the right of acquiring and possessing property is indefeasible and inherent in man, and that it is excepted out of the general powers of government. (Sect. 1.) This declaration means nothing, if government may convert itself or part of itself into a trading corporation or socialist commune, and pledge the credit and property of the citizens to sustain its schemes of trade. If it may, then all the guaranties of private property contained in the declaration of rights are but cobweb restraints upon the power of government; for it may pledge all the property of the citizens, by engaging in some trading speculation.

I state an extreme case, not that I have any fear that it will happen,

but merely that the principle may stand out with more prominence. The constitution means that there is a real distinction between the pursuits of the individual and the province of the government; and it marks that distinction as clearly as general terms will admit. When it declares that the right of the individual man to "acquire, possess, and protect his own property and pursue his own happiness is inherent and indefeasible," and excludes it from the province of government, it means that this right shall not be invaded, and that government shall not undertake to control the individual in the exercise of it, either by directing his enterprises, investing his funds, or choosing his associates. If government can do this at all, in the manner here proposed, there is no limit to its power, and the whole form of our institutions may be changed by act of Assembly.

There may, no doubt, be many cases wherein it is difficult to mark the boundary between the province of the government and that of the individual citizen; but here there is none, for the line is distinctly marked by the fact that this particular business has been intrusted by law to private hands, and is subjected to the law that governs private relations. Can the citizens be compelled to enter into such a relation?

The attempt is forbidden by the constitutional declaration that the right of the people "to alter, reform, or abolish their government," that is, all governmental institutions, is "unalienable and indefeasible." (Sect. 2.) Admit the solecism that government may force any portion of its citizens into membership in an institution in which contract is the essential bond. Then either this relation stands without its proper contract consequences, and you abolish the essential and constitutional distinction between contract relations and legal ones, including the inviolability of the former, which is impossible; or government has power to establish institutional relations among the citizens, which neither it nor they can "alter, reform, or abolish." That is, government can establish social relations among the citizens—contract and yet governmental—which neither it nor the people can change; because our constitution forbids the government, and the constitution of the United States forbids both government and people, from "impairing the obligations of contracts."

Such interference with private rights is excluded by the constitutional rule in favor of the inviolability of contracts. (Sect. 17.) This rule involves the idea that those individual rights which are the proper subject of contract, and in so far as they are so, may be placed beyond the jurisdiction of governmental rules by the mere will of individuals expressed in a contract. This shows that contract relations are higher in degree than those established by law, and that rules of law are intended to define the relations between individuals only when they have not themselves fully defined them by an agreement. Thus the common-law maxim, *conventio vincit legem*, acquires new authority from the constitution, and it may be its province is enlarged. Contract relations being thus placed above legal ones, it necessarily follows that the law can not force them upon any one. If, then, this is to be regarded as a contract relation in its character and consequences, it is one that the law-making power can not institute in any form. If it is not a contract

relation, then it is a governmental one, and may be dissolved by the power that created it. The obligation, being imposed by law, may be discharged in the same way. Its contract form does not alter the case, for its legal character depends upon its essence, and not upon its form; otherwise power could make its own forms the means of justifying the most palpable usurpations.

The incongruity of the proceeding presents itself in strong light, if we take into consideration the rule which has been so often affirmed, that the charter of a private corporation is placed by the constitution of the United States entirely beyond the reach of all state power. It is said that over sixty millions of dollars are invested and proposed to be invested in this way, in several states, under various acts of Assembly. This amount is equal to the assessed valuation of the property in about half of the counties and half the territory of this state, taking the more thinly populated parts. The amount may be over-estimated, but that is not important. What, then, is the proposition? It is to place all this amount of property under the control of private chartered corporations. Not by the individual will of each property holder acting for himself, but by the will of the government. That is, government interferes with private property in order to place it beyond the control both of the individual and of the government. It exercises power in order to abdicate power, or rather to transfer it to private hands. The property whose relations were subject to the rules of the law and the constitution is outlawed—banished its relations—and sent into the desolate exile of a private corporation, where it can claim only an exile's rights, and where the voice of the law and of the constitution is unheard, and the equal ballot of the independent freeman is disregarded. Here is *diminutio capitis* and no *jus postliminii*.

To my mind it seems very plain that this measure is in violation of the whole spirit of the declaration of rights. It violates especially the first section, by undertaking to control the citizen in the investment of his funds and the choice of his business. It violates the second, by imposing upon him an institution which neither the government nor the people can alter or abolish. It violates the fifth, by imposing an institution wherein the elective franchise is taken away. It violates the ninth, by taking the property of the citizen by a special act, and without trial. It violates the seventeenth, by making the citizen a member of a private partnership without his consent. The eleventh would be violated, if we should shut the doors of this court against him, and refuse him a prompt and full remedy. And the very nature of government is violated, by government erecting over its citizens an institution which it can not control.

I have now finished my direct argument on the point which strikes me as the pivot of the case; but I can not avoid the belief that a glance at the history of the development of private rights, which resulted in producing the ideas embodied in our declaration of rights, will tend to show that I have not misunderstood those ideas.

Perhaps all the internal political contests that the world has ever witnessed, have been, consciously or unconsciously, contests for the natural rights of individuals. Superficially regarded, they seem to have

been mere contests for power. But it is far otherwise. In them all the sentiment is that the individual has been wronged by the government; and the contest, therefore, is for individual right rather than for power. Power over others is a means of advancing the individual; and for this purpose the selfish and overbearing will seek an undue share of it; but the mass of the people will never seek it for its own sake, but because they believe that their natural and individual rights will be more respected, the more their influence in the government is felt.

It is doubtless true, that the right of the individual as against government did not develop itself in the consciousness of Grecian and Roman antiquity; for a state of almost constant external war is peculiarly unfavorable to its development. When martial law is the normal state of a people's institutions, man is useful only as an element and instrument of society, and individual rights are merged in the solidarity of the state. With them power was the means by which the burdens of war were cast in such a manner as to weigh least heavily on those that ruled. With them the nation's glory was measured by the nation's extent, and by its power over other nations, and not by the intelligence, and virtue, and liberty of its citizens. The highest aim of society was boundless dominion; and the highest aim of the individual was the chief seat in the kingdom. Equality of rights was unknown to them, except as the portion of the ruling caste, who arrogated to themselves all power. That individuals had rights independent of law, was a principle which they never comprehended. With them power was absolute, and the highest merit was martial skill; and hence right and law, valor and virtue, were identical terms.

All matters fell within the province of government. Religion, arts, trades, education, amusements, were the subjects of legislation. Not only the means, but the very form and essence of education and religion, were under the control of the state. Socrates was sacrificed for his efforts in the cause of education and progress, and Plato received a hint that some of the hemlock of his master's cup was left for him.

It was never so, but in an exceptional way, with the race of people from whom we derived our origin and our principles. As far back as history marks the progress of the Germanic tribes, liberty and independence was the motto on their banners. Personal independence was part of their governmental common law, and therefore part of their constitution. It was the natural result of their national origin. Theirs was the natural and spontaneous growth of a rural and homogeneous people, whose numbers were increased by the arts of peace, and by a virtuous regard for the family relation, and whose virtues and energies were developed by their conquests of the mountains and marshes, and forests and wild beasts of the earth, and under a government, free, unencroaching, and adapted to their circumstances. Roman development was from a city center, by the arts of war, by the conquest and enslavement of their fellow-men, always proceeding in disregard of individual rights, and, in order to maintain its position, requiring a government that disregarded them.

And when the German people invaded and conquered the Western Roman empire, war brought with it an analogous disregard of individual

rights, and fixed it among the institutions of government by the establishment of the feudal system. But in England the idea was soon reclaimed as constitutional common law, and vindicated in Magna Charta; and since then the whole history of England is one continual protest against governmental invasions of private rights; and he reads history badly who regards it as a protest against merely royal power.

Definitions of the utmost boundaries of right and of authority are not so common in England as here, because with them the system is in continual progress, and because general principles are not so much the means of a nation's growth, as inductions from its experience and history. In the revolution of 1789, France endeavored to invert this order, and to set out by a course founded on philosophy and general principles. But it was a failure, because the people were not ready for it. A nation is not born in a day. The principles on which it acts and by which it advances are the spontaneous accretions of its natural growth becoming evolved as needed, and adapted as evolved. David's sling seemed an insignificant weapon, but it suited him better than a sword, helmet, and coat of mail. But the statesmen of the French National Assembly properly defined the English and American idea of liberty, and presented a just generalization of the facts of history when, in 1780, they declared that "it consists in the ability to do any thing not injurious to others, and the natural rights of every man are only thus limited."

They understood the right of property when they declared that, it was "inviolable and sacred, and no one could be deprived of it except when the public necessity, legally established, clearly required it; and then only on condition of just and previous compensation." They understood the province of government when they declared that "the end of all association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, security, property, and resistance to oppression." All this is involved in the personal liberty, personal security, and private property guarantied as the natural and inherent rights of every Englishman, and especially of every Pennsylvanian, all being necessary as motives, encouragements, instruments, and rewards of that personal virtue and energy that are necessary to every individual, and therefore to national development. It is all involved in the very religion which they profess, and which teaches that every man has his own conscience, his own duties, his own will, his own intelligence, his own future.

I say the general mind of France had not yet been trained to these high ideas of liberty, and they did not constitute part of the nation's consciousness. Hence the days of Robespierre, when it was fancied that the laws of the fabulous or mythical Lycurgus were the true cure of all political ills. This was the very reverse of the enlightened political principles of the National Assembly; for under those laws individual liberty had no existence; government directed all things.

Americans could commit no such error. They had been trained in the principles of English liberty, and had regularly and spontaneously outgrown them, their principles and their institutions being developed together. Our whole provincial life was a struggle against governmental encroachments upon individual rights, and was the means of

training us for a government of our own, by developing in us the principles embodied in our state constitution, as "the general, great, and essential principles of liberty and free government."

Our whole declaration of rights stands as a monument of the regard which the people of the state have for the independence and protection of individual rights, and every line is marked with this principle. All our American constitutions show that it is also an American principle, and it has been attempted to be introduced into the policy of most of the nations of Europe. The new clause, Art. 7, Section 4, added in amending the constitution, and providing that the legislature shall not give any corporation or individual, the privilege of taking private property for public use without compensation first paid or secured, is only a more adequate form of securing a well-established principle, heretofore often invaded by the provision of a fruitless remedy. Under such a constitution, and within the prohibited limits, private rights are safe against the voice and act of even unanimous millions, unless they are willing to stand self-branded as usurpers and tyrants; and I can not doubt that the provisions of the bill of rights to which I have heretofore referred, do most expressly protect the citizen from the governmental invasion of his rights that is here intended.

Let us not be afraid of unduly reducing the province of government. The social principle is always strong enough to prevent this, and the tendency of events is always in the contrary direction. It is too common, the wish to cure all social ills and advance all social projects by the power of government. It is too common, the wish to place the industry, enterprise, and morality of the people under the care of the state; though all history proves that they sicken and decay under the influence of large governmental powers, and that, in Christian lands, they revive and flourish under the spirit of individualism which is natural to man, and which can be properly developed only where the pragmatism of the state is excluded. The state is no proper leader in any such matters. It is delegated, not to devise plans of acquiring wealth and securing happiness, but to protect individuals in the proper pursuit of their own lawful plans; not to guide enterprise into new channels and new undertakings, but to protect those already entered upon, and keep open and improve their avenues. Man advances only by pursuing his own ideal of morality and enterprise; and this he pursues with an energy proportioned to the brightness of the rewards which his own eye discovers in it. When government interferes in such matters, it truly represents those only who suggest the plan; and they only will appreciate the ideal that it is intended to embody or realize; and they only, and not the people generally, can be relied on to give it effect. And so here, a small band of individual stockholders are likely to have the control of the millions of municipal subscriptions now proposed to be made, in this and other cases, and the very proposition to make them has prevented an incalculable amount of individual subscription, and set aside that much of the individual energy, forecaste, and watchfulness so necessary to the success of such enterprises. The laborer will not tax his own energies when Hercules undertakes his work, and he will be equally backward if Hercules attempts

to control him. The vast majority of the people desire to be allowed to mind their own business in their own way; and it is this majority that ought to be regarded. And when the government undertakes to meddle with them, at the call of noisy speculators seeking public favors, no amount of official majorities can purge the deed of its tyrannical character.

Besides this, all history proves that the corruption of government increases with its powers, and that its purity and therefore its permanence, depend much upon the limitation of its jurisdiction. When its power is large there are strong, and even ferocious, contests to get the use of its power. Even the power of passing private laws, authorizing private corporations, directing public improvements, and appropriating public money, have subjected governments to the worst temptations and given rise to intrigue, fawning, and favoritism, and have annually attracted to our capitols swarms of voracious and unprincipled speculators, disgracing the public character and causing more than one government to be publicly suspected and charged with corruption, and honest visitors there to be suspected of selfish and dishonest purposes. Every exertion of power that increases its patronage by enlarging its functions should be watched with suspicion, for it increases the temptations to corruption, endangers the purity of those in power, casts a shade upon the character, and lowers the standard of public morality.

Our governmental stability depends much upon the absence of temptations to corruption, and upon our reverence for the principle that the natural rights of the individual are sacred against the touch of government. Society was made for man, not man for society. Born to live in society, his virtues, intelligence, and energy are developed by it; and by the intercourse, and competitions, and efforts to which it naturally gives rise; and repressed and discouraged when attempted to be governed and forced by it. The natural disposition to appropriate is part of man's individualism. Upon it depends the very right of property, and without it the positive gift of dominion over the earth would have been ineffectual. If it is unduly restrained or interfered with, the emulations which are at the bottom of all the energetic competitions upon which the progress of a people depends will be most seriously affected. Men's energies are never so well expended and so fully exercised as when left to the guidance of their own motives, tastes, and intelligence. People will not and can not work under the direction and compulsion of the state with any thing like the same effect as when their occupation and pursuits are chosen by themselves and urged on by their own hopes and their own will.

It was, I believe, this experience and these reasons that called for our bill of rights, and they illustrate the propriety of the application which I desire to make of its principles. With most profound respect for those who differ from me, I must be allowed to say that it is a long stride toward the very worst form of government, as applied to a nation—socialism. I think the injunction ought to be granted, for the reasons given above, and for other reasons just given by my brother Lewis.

Woodward J.—Though it is possible to imagine that the city of

Philadelphia might be able to make provision for the payment of the loans authorized by these acts of Assembly, out of rents of property, dividends on stocks, exchange or sale of stocks, legacies, and such like resources, yet taxation was the power evidently to be conferred. The question, therefore, which we have to decide, may be stated thus: *Had the legislature constitutional power to authorize the city of Philadelphia to subscribe for stock in these railroad companies? to borrow money to pay the subscriptions, and to levy taxes to pay the loans?*

We make considerable progress in the discussion of any question by stating it properly. From the statement of the present question, it is apparent that some matters which entered largely into the discussion at bar have no necessary connection with it. The *policy* of such legislation is in no degree a question for the judiciary. That belongs exclusively to the people and their representatives. Nor have the doctrines of *eminent domain* any thing to do with the question before us. It is said there are but two modes under our constitution, in which the public may take private property—the one, by virtue of what is called *eminent domain*, when compensation is secured by the constitution—the other, by taxation when compensation is provided for—except what results incidentally from a republican form of government.

I do not agree with one of the learned counsel in the West Chester case, who argued that there is no distinction between *eminent domain* and *taxation*. I think there is. Both are exercises of sovereignty, but the former has respect to the property of individuals, and is regulated only by the public exigencies, while the latter respects the whole community, or whole classes of individuals, and is regulated by some standard prescribed by law. Again, when private property is taken for public use, compensation must be made, and that must be in money and can not be in kind—*Vanhorn's Lessee* vs. *Dorrance* (2 *Dallus*); *Sutton's Heirs* vs. *City of Louisville* (5 *Dana*, 29). Money, said Lord Mansfield, is the measure of value. In some sense money is property; but when our constitution requires compensation in *money* to be made for *property* taken for public use, it marks a distinction between money and property—between value and its measure. But taxation is a public demand, not for *property* in the sense of the constitution, but for money or personal services, and that without compensation. True, under most tax laws, property may be seized and sold for default of payment in money, but this only as means to an end, just as the body may be imprisoned if property can not be found. Nor are these distinctions disproved by the instance put in argument, of money seized to pay troops on the point of mutiny in the face of an invading foe, when it was said, if compensation be made, it must be in kind. The answer is, that such a seizure would be neither the exercise of *eminent domain* nor of the power of taxation, but of martial law. In adequate emergencies, martial law suspends the *habeas corpus*, inflicts summary punishments, and appropriates private property without regard to the guaranties of the constitution. *Inter arma silent leges.* But in the operations of *civil* government, the legislature exercises its constitutional sovereignty, sometimes in taking specific property from

individuals for a price, and devoting it to public use, and sometimes by imposing a tax on property, without change of its title or its use.

What we have to deal with here is the constitutionality of laws for taxation; and all those clauses of the constitution, and all the arguments of counsel which apply to legislation, founded on the eminent domain, are beside the point, and may be laid out of the discussion.

Do I take undue liberty with the question, in thus shearing it of much matter which distinguished counsel supposed pertained to it? Are they not tax laws? The words of the enactments, as we have seen, import taxation. The complainants so understand them, for they tell us they are "bound by law, and do pay all taxes justly assessed and levied on their property in the city of Philadelphia," and they charge that by said subscriptions, and the issuing of said bonds, "the debt of said city, now exceeding seven millions and a half of dollars, would be greatly increased, the credit thereof seriously impaired, *and the taxes chargeable and to be levied in the said city upon the property of your orators and their fellow-citizens will be greatly augmented.*"

Besides, if these acts affect city property at all, it must be through taxation, for the specified roads are not to touch the city, nor to "*take*" an inch of its property, within the meaning of the tenth section of the bill of rights. Taking private property, and applying it specifically to a public object is one thing—assessing property with public taxes, according to a predetermined standard, is quite another thing. These acts mean the latter and not the former, if their words be regarded; if the interpretation of the complainants be received, or if the distinctions of the constitution between eminent domain and taxation be not obliterated.

Considering, therefore, these acts of Assembly as providing for objects which are to be attained through taxation, I next proceed to notice briefly the principles on which the constitutionality of such legislation is to be tested.

The striking peculiarity in the civil and political condition of the people of this country is, that they live under the jurisdiction of two separate and distinct governments, both formed by themselves, and the powers of each limited by written constitutions. The people of Pennsylvania, made absolutely free, sovereign, and independent, on the fourth day of July, 1776, settled for themselves a frame of government, which, as modified by the present constitution, organizes the various departments of a republican government, legislative, executive, and judicial, and vests in them, not specific and enumerated powers, but *legislative power, executive power, and judicial power.* Whatever is in the nature of these three governmental powers (and for their nature we must refer ourselves to the principles of political science) belongs to these departments respectively, but not without limitations. The bill of rights is a series of reservations, out of the powers granted to these departments, and concludes with a solemn declaration in these words: "To guard against transgressions of the high powers which we have delegated, we declare that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate." The primary questions, therefore, that arise upon the consti-

tutionality of an act of Assembly, are, first, Is it in the nature of legislative power? and secondly, Does it trench upon any of the reservations in the bill of rights? If the first of these questions can be answered affirmatively, and the other negatively, the resulting conclusion is that the act is constitutional. So far in regard to the state constitution.

The *federal constitution* sprung from the experienced necessities of the states of the confederacy, and was formed out of powers *specifically granted and enumerated* by the people. To the extent of the powers granted, this instrument restrains the sovereignty of the states, but the "powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Because the people are more largely represented in the state government than in the national, and because the powers granted to the federal government are in derogation of state rights, the rule of strict construction, as applied to these grants, is obviously conservative and just, though not universally admitted.

The people are the source of all political powers. They enumerate those they *grant* to the federal government, and those they *reserve* from the state government. The legislative power of the states extends to all subjects, properly legislative, not found in one or the other of these enumerations, and the only question additional to those already stated, that can arise on the constitutionality of a state law, is, Does it contravene the grants in the federal constitution?

But this question need not be considered here, for in all that has been said against these acts of Assembly, they have not been charged with contravening any of the grants in the constitution of the United States.

Recurring, therefore, to the questions stated, I proceed to inquire, first, whether these acts of Assembly are according to the nature of legislative power.

That taxation is a legislative power has never been questioned in this country. In despotic governments it is usurped by the supreme executive, and in the limited monarchy of Great Britain it has sometimes been exercised by the king, but always with popular discontents; and in the instance of Charles the First to the loss of his head. The people have long since regained this right, and it is now vested in parliament.

Here it was claimed for our colonial legislatures against the legislative body of the mother country, where we were unrepresented; and as soon as the people became free they brought it as near home to themselves as possible, by providing in all their constitutions that *revenue bills* should originate in the house of representatives, where they are most largely and directly represented. Yet there is nothing about this power in our constitution, except what is implied from the provision just referred to. Government presupposes the power of taxation, and can not exist without it; and because it is not denied in the bill of rights, it is granted in the general grant of legislative power. In the federal constitution it is expressly given to the legislative body. This indicates at once the distinction in the theory of the two constitutions, and the sense of the country, that it is a legislative power.

But it is said that this power can not be delegated. Strictly speaking, none of the powers of government can be delegated. They are vested in co-ordinate departments, to be *exercised*, and without the right of *transfer*. But the legislature may provide *agencies*, through whom to exercise the power of taxation, and that is not properly called a delegation or transfer of the power, which is merely an exercise of it through a suitable agent. Accordingly, from the beginning of our government, the legislature have divided the state into counties, townships, school districts, boroughs, and cities, and have provided for the appointment or election of certain tax officers, in their respective localities, and have authorized them to assess, collect, and apply taxes. This has been, not so much a *delegation* of the power of taxation to those municipal divisions, as the *exercise* of it through and by means of chosen agencies. In exact accordance with this kind of legislation, which, having been coeval with the constitution, affords the best interpretation of it, these acts of Assembly authorize one of the municipal districts of the state "to make provision for the payment of the money borrowed, as in other cases of loans to said city." Was this a *delegation* of a legislative function? How could the legislature make provision for the repayment of the borrowed money, as in other cases of loans to said city? Their faculties are all legislative. They have no executive power, and the constitution and habits of the body unfit them for applying rules which it is their province to prescribe. They are obliged to act through chosen agencies when providing for the revenues of the state. State taxes, the internal improvement system, common schools, and all state objects, have to be intrusted to agents, though the *power* that controls them resides in the legislature. In the same manner, when the legislature would tax the citizens of the city of Philadelphia, to rebuild the railroads in question, they must use the hand of some agent, and whose could be more wisely selected than that of the "constituted authorities" of the city? And even that hand is not forced to the work, but employed only with the consent of the body to which it belongs—a circumstance which indicates the moderation of legislative power. But the objection most insisted on has reference, not to the legislative power of taxation, nor to the agencies called in aid of its exercise, but to the *objects* and *purposes* to which it is applied. These are to construct railroads outside of the geographical limits of the city. While the constitutional power of the legislature to create, renew, and extend the charters of municipal corporations is admitted, it is maintained that *municipal administration* is the only purpose for which they exist; and it is denied that legislative power can tax them for any other.

By subscribing to the stock of these railroad companies, the city of Philadelphia will become a member of the companies. They are private corporations. Intending to become common carriers, they will assume large responsibilities, a share of which must fall on each corporator. The enterprise is costly and hazardous, and may result in great pecuniary profits or disastrous losses. Is it a municipal purpose? Does it come within the circle of objects which municipal corporations were designed to accomplish? Without going into the history and

common law of such corporations, I unhesitatingly answer these questions in the negative. There is no congruity between such an enterprise and the legitimate purposes of municipal corporations. They were designed to regulate the internal affairs of the places in which they were located. Police, health, streets, lanes, alleys, and the like, are the appropriate subjects of municipal administration, and though a city may go beyond its boundaries to purchase necessaries for its existence, safety, and comfort, yet its jurisdiction is properly exercised only within its territorial limits, and on subjects that pertain to its domestic economy and well-being. Railroads to connect distant points of country, to develop physical resources, and to promote commerce, are great public benefactions, and emphatic expressions of the energies of an age distinguished for activity and bold adventure. But they come not within or near to that class of objects which we have been taught to consider as municipal purposes. Yet, when the legislature enables a city to lend a hand to such enterprises, where is the constitutional provision which the judiciary can say is violated? The power of taxation is unrestrained in the constitution, both as to extent and purpose. Municipal corporations are not defined in the constitution, nor in any general statute. If we go to the common law, that teaches us they may be formed by a prescription, by statute, or by royal charter, and that their ordinary purposes are such as I have indicated, but it imposes no restraints on legislative power in respect to them. On the contrary, a learned writer informs us that "in England the legislature has not often exercised the power of creating municipal corporations, because it has been esteemed a flower of the prerogative. Where the ordinary regulations alone are necessary, the king incorporates, by charter, but when it is thought proper to invest the intended body with any *extraordinary* power or privilege, the aid of parliament is necessary." Again, "the statute may invest the body with powers contrary to the general rules of law, but they must be granted in clear and unambiguous words." Again, he says, "It is quite unnecessary to say what privileges may be granted or regulations prescribed to a corporation by an act of parliament, *for the power of the legislature in this respect can not be defined.* (*Willock on Municipal Corporations*, Sections 10, 12, and 226.)

Without saying, that with us this power *can not* be defined, it must be admitted it has not been. The people alone are competent to set bounds to a clearly granted and unquestionable power. The judiciary can not assign limits to that which the people have decreed shall be unlimited. If they could, the judiciary would be the only real power in the state, and might hinder the most salutary legislation. Are we to set aside these enactments because they do not harmonize with our ideas of municipal purposes? This is the most solid ground to which we have been pointed, but it is not strong enough to sustain a decree. I have no doubt of the right and duty of the judiciary to declare a law unconstitutional when it clearly contravenes any of the provisions of the state or federal constitutions, but it is a power to be exercised with great caution. For nearly fifty years of our political existence, under the constitution of 1790, no act of Assembly was set

aside for unconstitutionality. Judges claimed the power, and said they would exercise it in clear cases, but in all that period no case arose which in their judgment was clear enough to justify the exercise of the power; and it is well known that that great light of this bench, so recently extinguished, stood opposed, for many years, to the *existence* of any such judicial power. Since the constitution of 1838 was adopted, several acts of Assembly have been declared unconstitutional, but they were all clear cases. When the legislature disregards the distribution made by the powers of government among the three co-ordinate departments—or the reservations of the bill of rights—or the grants to the government of the United States, the judiciary, whose office it is to expound the law, may, and I hold are bound to, declare the act unconstitutional and void. But on lower ground than this, and especially on ground so low as the equivocal and undefined purposes of municipal corporations, acts of Assembly have never been declared unconstitutional. It was said in the argument, and authorities were exhibited to prove, that the constitutionality of legislation, similar to this we are considering has been asserted in seven states of the confederacy. These concurring opinions of the courts around us, sitting under state constitutions similar in their structure to ours, are entitled to great respect, and seem to show that the corrective of this species of legislation, novel as it unquestionably is, and pernicious, as many believe, is with the people, and not with the courts.

The power of legislation, by representatives of their own choosing, is one of the invaluable privileges of the people. It is this which makes them a free state. This is self-government—the best of all powers of government, and therefore least in need of clogs and restraints. When, through inadvertence, this power is applied to objects forbidden by the letter of the constitution, the interposition of the judicial arm is properly invoked. But so long as it keeps within its appointed orbit, judges can not interfere with its progress without themselves departing from their proper sphere.

It remains to consider briefly the second question proposed, Does this legislation trench on the bill of rights? The first section of that instrument is relied on, which enumerates among the inherent and indefeasible rights of man, that of "acquiring, possessing, and protecting property."

It must never be forgotten that the "declaration of rights," as the 9th article of our constitution is called, is part of a frame of civil government, and is to be construed with reference to the whole instrument, of which it is a part. When, therefore, "the right of acquiring, possessing, and protecting property" is asserted, it does not mean to exempt property from *taxation!* since without taxation civil government can not exist. Nor does it mean to exempt it from the prerogative of *eminent domain*, for the right to take private property for public use is elsewhere expressly asserted, and without this also, government could not exist prosperously, if indeed at all.

The acquisition, protection, and defense guarantied must be consistent with and subordinate to these first principles, else one part of the constitution destroys the other, and so the government is dissolved.

I am clearly of opinion, that this section can not be set up against a tax law. *Nor is there any clause in the declaration of rights which restrains the legislative power of taxation.* I know this may seem to some a startling proposition, but, rightly considered, there is nothing alarming in it.

The great conservative principle, which lies at the base of our institutions, is popular representation, and it was, doubtless, a profound reliance on this principle which induced the framers of our constitution to plant in the legislature the taxing power, without stint or restraint. And as the tree is best known by its fruits, so are the results of experience the best tests of political theories. In those governments where suffrage and representation have been withheld from the masses, men and property have been taxed to support royalty and aristocracy in costly magnificence; to carry on wars bred by the bad passions of the rulers, or to construct expensive and useless works as memorials of individual grandeur. How different with us! Taxation by the general government, indirectly applied, is limited to the necessities of economical administration. Taxation in Pennsylvania, beyond the ordinary purposes of government, has been devoted to the education of the ignorant, relief of the insane, the dumb, the blind; to the construction of highways and bridges, and canals and railroads. These are the purposes to which a REPUBLICAN GOVERNMENT applies the power of taxation, and when so applied it is a beneficent power. Even though incongruously blended with municipal purposes, as in the instances before us, it is by no means clear it will not be productive of more good than evil. And that it will never long be perverted to injurious use is as certain as the law of self-preservation; for so long as the people rule themselves, it is impossible to anticipate that they will employ any of the powers of government for their own oppression. The fact is, the internal improvements of Pennsylvania, ill contrived and badly managed as in some instances they have been, have added incalculably to the material wealth of the state; and the taxation they have occasioned, if it seemed high as compared with former standards, sink into insignificance when compared with taxation in other countries, or with the resources of national wealth and greatness which it has multiplied in our own. It is easy to imagine possible abuses of any unrestricted power, but the voice of our own experience (and I know no safer oracle) teaches us that we may safely trust the interests of the future to that form of government which has been productive of so much happiness and prosperity in the past.

But, not to pursue the subject further, my opinion is, that upon the received principles of constitutional construction, these acts of Assembly are constitutional and not void; consequently, that the motion for an injunction should be denied.

KNOX, J.—I intended to have given my views somewhat at length upon the highly important question presented in this case; but not having had convenient opportunity, since the argument, of writing out in detail the reasons which have induced the conclusion to which I have arrived, rather than prolong the decision of the question, I shall content myself with stating the result of the deliberations which I have

given the subject, reserving the right to file a more extended opinion hereafter.

The right of this court to declare an act of the legislature unconstitutional is unquestionable; and I may safely add, unquestioned. Yet it is equally plain that this right should only be exercised in a case free from doubt or difficulty.

The presumption is, that the legislature has judged correctly of its own constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the government can be called upon to interpose between the people and their immediate representatives. The authorities cited by the counsel for the respondents show that this rule is recognized by the courts of several of our sister states, and it is the language uniformly spoken by our own judges.

In ascertaining whether there has been this clear usurpation by the law-making power, I agree with the Chief Justice and Mr. Justice Woodward, that the tests to be applied are—

1st. Is the act in the nature of a legislative power?

2d. Does the constitution expressly or by necessary implication forbid the exercise of such a power?

The two questions are closely assimilated, for if it is not in the nature of a legislative power, the constitution does, by necessary implication, forbid the General Assembly from exercising it. All attempts upon the part of the legislature to exercise the class of powers committed to the care of the judiciary are clearly unauthorized and unconstitutional, because there is a necessary implication, arising from the organization and recognition of the judicial branch of the government, that its authority shall be supreme and its jurisdiction exclusive upon subjects committed to its care, and upon questions to be determined by its judgment.

Hence the legislature can not lawfully grant a new trial in a case once determined. This court might, with the same right, declare that a bill which had passed through all the forms of the legislature should again be submitted to a vote in the senate and house of representatives, and presented to the executive for his approval or rejection, as for the legislature to say that a verdict of a jury and the judgment of a court should be set aside in order to give the parties litigant another opportunity to ascertain where "right and justice belong."

It is unnecessary to multiply instances or words to prove that the legislature can not rightfully exercise judicial and executive authority, but that it is confined to its own sphere of action, separate and distinct from the other powers or branches of the government. Its powers, although limited, are so extensive and varied, that it was not thought consistent with the conciseness and brevity of the organic law to enumerate them.

That the creation of a municipal incorporation, or the enlargement of its powers subsequent to its origin, is the exercise of a legislative power, is too plain for argument. But to what extent can its powers be enlarged, and what additions may be made to the original purposes for which it was created? Or, in other words, how far may the legislature go in the exercise of a legislative power? I submit that there

is no limit to this authority until it is met by the mandate of the constitution—"Thus far and no farther." I am aware that under this rule acts may be passed which will in the minds of many persons be contrary to natural justice and subversive of the just rights of the people. The remedy for the evil is to be found in further constitutional restrictions, not in restraints interposed by the judiciary. The limit of the power of the representatives of the people, in my judgment, should be written upon the pages of the constitution rather than remain in the breast of our judges.

There is, to my mind, great danger in recognizing the existence of a power in the judiciary to annul legislative action without some fixed rule, by which such power is to be exercised.

Our opinions are so diversified and varied, that what to one mind may seem clearly right and proper, to another will appear to be fraught with imminent danger.

If we have not a certain standard by which to test the constitutionality of legislative enactments, if each judge is to be governed by his own convictions of what is right, or otherwise, I fear that restraints upon judicial rather than legislative action will be demanded by a people ever jealous of the accumulation of power in the hands of the few. I can not find in that instrument which we have sworn to sustain, any terms which, by fair construction, prohibited the enactment of the laws in question.

In my opinion it is satisfactorily shown by my brethren, with whom I agree in this case, that the prohibition against taking private property for public use without compensation can not be made to embrace the point here at issue. I can not strengthen the argument by repetition, and I shall not attempt it. I will simply add, that I fully concur with them in saying this is not the exercise of the right of eminent domain, but that of taxation, which right must necessarily exist in the legislature, the application of it being solely left to its judgment, restrained only by the accountability of the agent to the principal, the servant to his master.

In the language of Chief Justice Marshall, in *M'Cullough* vs. *Maryland* (4 *Wharton*, 428), "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the government acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government the right of taxing their property; and as the exigencies of the government can not be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislature and the influence of the constituents over their representatives to guard them against its abuse."

I can not agree that the power exercised here is in derogation of the bill of rights, or any of its parts. There is in it no limitation upon the right of taxation to any amount, no matter how to be applied.

I am of the opinion, therefore, for the reasons above hinted at, and for others, already stated by other members of the court, that the legislature may lawfully authorize municipal corporations to subscribe to the capital stock of railroad companies, and that such authority may

be given directly to the corporate authorities, or it may be made to depend upon the assent of a majority of the incorporators.

That the authority may rightfully extend to the issuing of corporate bonds for the payment of the subscription, the interest and principal of which, if necessary, to be paid by taxes assessed upon the persons and property of the taxable citizens of the incorporation whose faith is pledged for the redemption of the bonds thus issued.

With the question of expediency, as a member of this court, I have nothing to do. This must be determined first by the legislature in granting the power to subscribe, and second by the people, either by themselves or through their selected agents, in availing themselves of the authority thus granted.

I am opposed to awarding the injunction prayed for.

ACTION FOR SLANDER. EVIDENCE OF PROVOCATION RECEIVABLE IN MITIGATION OF DAMAGES.

[Botelar *vs.* Bell; 1 Md. R., 173.]

This was an action for slander brought by the appellee against the appellant. The words complained of by the plaintiff below, conveyed a charge that he was insolvent; he being at that time in business as a miller. They were alleged to have been spoken on the 20th of July, 1848. The case came up upon two exceptions by the plaintiff below to rulings of the court, upon points of evidence. We propose to call attention to the *second* exception only.

The defendant offered to prove, upon his part, that from time to time, from 1845, to July, 1848, the plaintiff had imputed to him insolvency, and particularly that in July, 1848, it was communicated to defendant that the plaintiff had said that he, the defendant, was broke, and that the defendant was very much irritated by the communication; and that the defendant was frequently told of opprobrious language used towards him by the plaintiff, and was always irritated by it. The court below refused to allow the defendant to give evidence of the language of the plaintiff, "unless the defendant could show further that *at the time* of the utterance of the language charged in the declaration, or proved upon trial, in aggravation of damages, or *about the time of uttering* the same, the defendant was influenced in uttering the same by the language so offered to be given in proof." To this refusal the defendant below excepted as follows:

Le Grand, C. J.—The second exception presents the question, how far the defendant is permitted, in mitigation of damages, to show that the plaintiff has been in the habit of vilifying him. Apart from the declarations of the defendant himself, we do not see how it were possible for him to prove, directly, he was influenced to the use of the language with which he is charged by that of the plaintiff. In the absence of his own declarations, it is matter to be inferred by the jury, from all the circumstances surrounding the case. The requirement, therefore, of the court, that he should give such evidence, was such as it was impossible to comply with.

The words charged in the declaration are alleged to have been spoken on the 20th of July, 1848; and the communication made to the defendant by the witness Clagget, was made some time in the same month. Under the rules of evidence, was such testimony admissible for the purpose for which it was offered? We think it was. We are aware it has been held in England, and in several of our states, that to enable the defendant to prove opprobrious language of the plaintiff by way of showing provocation, it is incumbent for him to have acted *immediately* under the irritated state of his feelings produced by the communication. Indeed, some of the decisions have gone so far as to deny altogether the right of the defendant to show he has been vilified by the plaintiff. (May *vs.* Brown, 3 *Barn. & C.* 113. McAlexander *vs.* Harris, 6 *Munf.*

465. Goodbread *vs.* Ledbetter, 1 *Dev. & B.* 12. Steerer *vs.* Beckler, 1 *Miles*, 146.) But Lord Ch. J. Denman held it to be competent to the defendant to prove libels published *months* before the one charged on the defendant, to show provocation for his conduct, his lordship observing, that he would caution the jury not to set off one libel against another; but that, if the defendant published his articles under the provocation of a previous publication, they might consider, that to a certain extent, the plaintiff had brought the mischief upon himself. (Watts *vs.* Fraser, 7 *Carr. & P.* 369.) There is a vast deal of good sense in this view, and it is clearly promotive of the ends of justice, which should be the aim and purpose of all courts of judicature. Surely the man who indulges in slanderous language towards another, when he has been provoked to it by a long series of abuse, is less culpable in the eye of the law and of morals, than he, who from a fiendish dislike to his fellow-man, or from a spirit of idle gossip, invents slanders against his neighbor. Our own courts have also justly taken this view. Thus this court has, in one case (Wolcott *vs.* Rigden, 6 *Gill & J.* 413), allowed the defendant to give in evidence, all the attending circumstances, with a view to the mitigation of damages. In another case (Davis *vs.* Griffiths, 4 *Gill & J.*), it was held that the defendant, in mitigation of damages, might show opprobrious language of the plaintiff employed towards him prior to the libel sued upon. In this case it does not appear when it was that the plaintiff denounced the defendant, but the facts show that he was denounced on account of testimony given in the month of March, and the libel of defendant was not published until the 25th of May following. Looking to the spirit of these decisions and the good sense which is their foundation, and the manifest justice of their principles, fortified as they are by the high authority of the learned late chief justice of England, we dissent from the court below in its ruling on the second exception, and are of opinion that it was competent, in mitigation of damages, for the defendant to show the manner of language held towards him by the plaintiff; it being, of course, always a question for the jury to determine, whether the language used by the defendant, was used because of the provocation offered by the plaintiff, or was the result of mere wantonness and maliciousness of feeling and corruption of heart. Where the plaintiff has provoked the slanderous words of the defendant, his claim to damages ought to be diminished.

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CONSTRUCTION OF A WILL.—"CHILDREN" READ "DAUGHTERS."

[Chew *vs.* Chew; 1 Md. R., 163.]

The appellant, widow of Robert Chew, filed her bill of complaint in the court of chancery, claiming dower in certain lands devised to her husband, by the will of John Chew, dated the 9th of May, 1815.

The clause in the will under which the appellant claimed is in these words:—"I give and bequeathe unto my wife Elizabeth Chew, all my lands during her natural life; and after the death of my said wife, I give and

bequeathe all the said lands to my son *Robert Chew*, and my daughters Anne, Artridge, Elizabeth, and Agnes Chew, to have and to hold the same *during their single lives;* and in case *my children* here mentioned, should marry, or my son Robert should die without lawful issue, then, and in such case, it is my desire that my son Walter Chew, have and enjoy the whole of said lands to him, his heirs and assigns for ever. It is further my will and desire that eight acres of the above-mentioned lands, embracing the saw-mill and mill-seat, be laid off by my son Walter, as soon as convenient, after my death, for *his immediate use and benefit*, but that he be debarred from selling or disposing of the same until in possession of my whole landed estate, as above recited."

The defendants, in their answer to the bill, denied that complainant was entitled to dower, and denied that her husband had title in the land. The complainant then instituted an action at law for her dower. In this action a verdict was rendered for the defendant, and demandant appealed. On the appeal the demandant offered in evidence the will of John Chew, containing the above clause, and proved that the widow of the testator held the lands from the death of the testator in 1815, until her own death, when Robert and the daughters named in the will took possession;—that Robert married the defendant in 1828, and died in 1838, leaving issue;—that Artridge and Anne Chew died during the life of Robert, and that Anne died in 1846, after the filing of the bill for dower.

The court, at the request of the defendant, instructed the jury, that the demandant was not entitled to her dower in the lands in the present action, because there was no evidence that her husband Robert Chew was seized in his life-time of such an estate in the lands, as entitled his widow to dower. The plaintiff excepted. The present appeal raised simply the question:—"Was the instruction of the court below correct?"

Mason, J.—This case depends upon the construction of the above-mentioned clause of the will of John Chew. The question directly submitted to our consideration is,—did Robert Chew take such an estate under this clause of the will as would entitle his widow to dower in the lands? It is a well established and long standing rule in the construction of all testamentary instruments that the intention of the testator, as expressed by the language of the will, shall prevail, if consistent with the settled rules of law, and that the most liberal and enlarged interpretation will be given to all such instruments, in order to effectuate the manifest design of the testator.

In order to sustain the instruction of the court below, which forms the ground of the plaintiff's exception, it must be conceded that Robert Chew took no higher or greater estate in the lands devised by his father, than that taken by his sisters; and that they all took as joint tenants, with the right of survivorship. We cannot give to this will a construction which will lead to any such conclusion. Nothing can be plainer than that the testator designed to make a difference among his several children, and that the terms "during their single lives" and "children" related exclusively to his daughters, and not to his son Robert. Although his purpose may have been obscurely and imperfectly expressed, yet it is nevertheless obvious that it was his design merely to provide a home and a maintenance for his daughters, during the period that they were single and

unprotected; but that this provision for them was to continue only until they were married. That the terms "single lives," could not have had any reference to Robert, is manifest from the language which immediately follows, and which is in these words, "and in case my said children here mentioned, should marry, or my son Robert should die without lawful issue, then, and in such case, it is my desire that my son Walter should have said lands," &c. Now, what are the contingencies upon which the estate is to pass to Walter? The marriage of the daughters and the failure of issue in Robert. The very result which is here contemplated, and provided for by the testator, and which is to defeat the contingent estate to Walter, namely, "Robert's having lawful issue," is repugnant to, and inconsistent with the idea, that the estate was only to continue in Robert during his single life.

The same may be said of the term "children," used by the testator. If he designed this word to have its usual signification, and to embrace within its meaning his son Robert, why did he in the very same sentence repel such an idea, by placing him in a different attitude in reference to his estate, from that given to those he denominated "his children?" His "children" were not to marry; if they did, they lost their interest in the property; yet Robert was not to have his estate defeated unless he died without *lawful issue*, which only could have resulted from marriage, and therefore to suppose that he designed to embrace Robert within the terms "single lives," and "children," is to suppose he meant nothing when he said "in case my son Robert should die without lawful issue."

In construing wills, force and effect should be given, if possible, to every expression used by the testator. The different clauses of the will should be so interpreted as to harmonize all apparent conflict of language, and the whole of the instrument should be taken and examined together in order to arrive at the true intention of the testator, which shall in all cases prevail, if there be apt words to effectuate it. How are we then, in accordance with these principles, to give any force or meaning to the expression, "in case Robert should die without lawful issue," unless we confine the words "single lives," and "children," in this application, to the daughters alone, and not to Robert. Such a construction would be doing no violence to any rule of law, nor would it be a very gross violation of the rules of grammar. On the other hand, to adopt the construction contended for by the appellee, and to make the words "single lives" and "children," relate to Robert, as well as to the daughters, would be in effect to silence or expunge entirely from the will the subsequent language referring to Robert's having "lawful issue;" for if the estate was to survive to the daughters or to Walter, upon the death of Robert, what meaning could attach to the reservation or provision in favor of "the lawful issue" of Robert?

Again, it is contended that the last expression in the clause of the will which we are considering, relating to Walter Chew, and which is in these words, namely, "until in possession of my whole landed estate, as above recited," would indicate that the testator contemplated making his son Walter, the ultimate beneficiary of his whole estate, after the termination of the life-estate in his other children. The application of the rule of construction already referred to, which requires that if possible, force and

effect should be given to all the different parts of a will, would lead us to give a different interpretation to this expression, in order to preserve and effectuate the previous language of the testator, wherein he says that Walter Chew is only to enjoy the whole of his lands, "to him, his heirs and assigns for ever," upon condition that "Robert should die without lawful issue." As in the instance already put, if the interpretation contended for be the proper construction of this particular expression, it is obvious, that it being directly in conflict with the previous language of the testator, it must have the effect to neutralize or annul it.

This language, in our opinion, is susceptible of a different construction, which would render it perfectly compatible with the previous expression of the testator in regard to the "issue of Robert." The clear and obvious meaning of the testator in using the language, that Walter "be debarred from selling or disposing of the same until in possession of my whole landed estate *as above recited*," is, that he should be absolute owner of the land only in the event of the death or marriage of his sisters, and the death of his brother Robert *without issue*.

Otherwise he was to take no more than a life-estate in "eight acres of the above-mentioned land embracing the saw-mill and mill-seat."

To adopt the views of the appellee's counsel, so forcibly presented to us in this case, we should be obliged to strain the language of this will for the purpose of gathering from it an intention on the part of the testator, to create among his children an estate in joint tenancy. We are not prepared to take such a step. On the contrary, this court is imperatively required, by a long course of judicial decisions in this state and elsewhere, sustained by every dictate of reason, justice, and humanity, to view with disfavor, estates in joint tenancy, and to give the widest and most liberal construction to testamentary instruments, in order to defeat them wherever we can. In this case we have no difficulty in accomplishing such a purpose.

There is one other view which renders it impossible that this devise should create a joint tenancy. If the position which we have already taken be correct, that Robert Chew took a different estate in these lands from that taken by his sisters, as was conceded by the appellee's counsel, in one view which they took of this case, then he could not have taken an estate in joint tenancy with his sisters, because one of the necessary ingredients or pre-requisites of such an estate is absent, viz. *unity* of *interest*. To an estate in joint tenancy the following circumstances are necessary, namely, unity of interest, unity of title, unity of time, and unity of possession; or in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

If Robert therefore has a different interest in these lands, from that of his sisters, all grounds for contending that the estate is a joint tenancy must fall, inasmuch as one of the essential requisites of such an estate is wanting.

There remains but one other objection to be disposed of, and that is, that the law requires that the seizin of the husband should be a *sole* seizin, and that as Robert Chew held these lands jointly or unitedly with his sisters, he has not such a *sole* seizin as would entitle his widow to

dower. The authority relied upon as controlling the case in this particular affirms the doctrine "that the law requires the seizin of the husband to be a sole seizin. If the husband during all the time of the coverture be seized jointly with another, no title of dower will attach." But from what the same author afterwards says, we think he designs the principle to apply only to cases of joint tenancy, and estates of kindred character, and not to tenancies in common. He clearly exempts cases like the one now under consideration from the operation of such a rule, for he says: "Although a *sole* seizin is necessary in order to confer a title to dower, it is not requisite that it should be a seizin of the entirety. A sole seizin of the freehold and inheritance in any particular share or property of lands, either as tenant in common, in coparcenary, or otherwise, will be subject to the attachment of dower to the extent of the share of each tenant, in respect of whose relation, as husband, to any particular woman, that title can accrue."—(*Park on Dower*, 38–41.)

Every wife is by law entitled to be endowed of all lands and tenements, of which her husband was seized in *fee simple* at any time during the coverture, or in *fee tail general*, or as heir in *special tail*, and of which any issue which she might have had, might by possibility have been heir; and she shall be endowed as well of lands where the husband had *seizin in law*, as where he had an *actual seizin*.

Courts of justice regard with the tenderest solicitude the widow's claim to dower, and while they would be unwilling to disallow it, except under the clearest rules of law, they will always, by the most liberal policy and rules of construction, favor this most humane provision of the common law, which was designed for the sure and competent support of the bereaved widow, and the better nurture and education of her unprotected children.

For the reasons we have assigned the court is of opinion that upon the death of John Chew, his son Robert took an estate in fee tail (which is made, by our Act of Assembly, an estate in fee simple), in one fifth of the lands mentioned in the will, and that the daughters each took an estate for life in one fifth of the same lands, as tenants in common, subject to have their said estate defeated upon their marriage or death, with remainder in each share to Robert and his heirs; and that as a necessary consequence, his widow the demandant is entitled to be endowed in said lands.

Judgment reversed.

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A WATCH WILL NOT PASS UNDER A BEQUEST OF "WEARING APPAREL," NOR OF "HOUSEHOLD FURNITURE AND ARTICLES FOR FAMILY USE."

(Gooch *vs.* Gooch; 33 Me. R., 535.)

*Trover* for a gold watch.

The plaintiff claimed the watch as given to him by a bequest in the will of its former owner, in which will the testator bequeathed his "*wearing apparel*" to the plaintiff. The defendant claimed it under a

bequest in the same will, giving to her the "*household furniture and other articles for family use.*"

WELLS, J.—If the watch belongs to the plaintiff it must have been given by being included in the words "wearing apparel."

It appears that the testator purchased the watch a few years before his death, and generally used it, by carrying it upon his person. Words used in wills are to be taken in their common and ordinary sense. The ordinary meaning of "wearing apparel" is vesture, garments, dress; that which is worn by or appropriated to the person. Ornaments may be so connected and used with the wearing apparel as to belong to it. There are implements, such as pencils and penknives, carried about the person, but not connected with the wearing apparel. These are not to be considered as clothing. To which class does a watch belong? It may not properly be called an implement, for it is used merely to look at. Neither is it used as clothing or vesture. In its use, it more nearly resembles the pencil or penknife. The Court are of opinion that the watch did not pass under the phrase "wearing apparel."

It is contended that the watch was given to the *defendant* under the clause of the will, bequeathing to her the "household furniture." This expression means such things as are provided for and appropriated to uses in the house; as a clock, &c. A watch, kept hung up for use in the houses, might be considered as belonging to it. There may be articles, which are sometimes used in the house, but are carried out by day and brought in at night. These articles would not have such a fixedness as to be considered household furniture.

Considering that the watch was used principally upon the testator's person, we do not think it is to be viewed as any part of the household furniture.

Neither is it to be deemed "an article for family use." That phrase may be properly limited to articles for use or consumption in the family. Such was not the watch.

We hold, therefore, that the watch was not given to the defendant.

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SEARCH WARRANT. WHAT DESCRIPTION WILL BE REQUIRED OF THE PLACE TO BE SEARCHED AND THE PERSON OR THING TO BE SEIZED.

[The State *vs.* Robinson; 33 Me. R., 564.]

The Constitution of the State of Maine contains the following clause:

"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 seize any person or thing shall issue without *a special designation of the place to be searched*, and the *person or thing to be seized*, nor without probable cause, supported by oath or affirmation."

The same right is secured by the Constitution of the United States and by the constitutions of New Jersey, Indiana, Iowa, Wisconsin, and California, in nearly the very words employed by the constitution of Maine. The constitution of Massachusetts does not require a search-warrant to

describe *the place to be searched*, but it declares that every person has a right to be secure from "unreasonable searches and seizures," and that this right is violated by a warrant "which is not accompanied with a *special designation of the persons or objects* of search, arrest, or seizure." The same remark applies to the constitutions of Vermont and New Hampshire.

Many of the remaining state-constitutions employ upon this subject nearly the same language with that of the constitution of Maine already quoted. Instead, however, of requiring that the warrant shall contain a *special designation* of the place to be searched and of the person or thing to be seized, they merely require these to be described "*as near as may be*;" or employ a similar phrase in definition of the degree of accuracy to which the warrant must employ in description. Such is the provision in the constitutions of Rhode Island, Connecticut, Pennsylvania, Delaware, Florida, Alabama, Mississippi, Kentucky, Texas, Missouri, and Michigan.

The constitutions of Virginia, Tennessee, Ohio, Illinois, and Arkansas, simply declare in substance that "general warrants whereby an officer may be commanded to search suspected places without evidence of a fact committed, or to seize any person not named, or whose offence is not particularly described and supported by evidence, are oppressive and ought not to be granted." These constitutions contain no provision requiring a warrant to embody a description of the *place* to be searched or one of the *property* to be seized, where property is the object of search.

The constitutions of New York, Maryland, Louisiana, Georgia, and South Carolina, appear not to contain any specific and express provisions on the subject of search-warrants, and the extent of detailed description required in them.

With these introductory remarks, we proceed to a statement of the facts in the present case. It arose upon a complaint made to the Municipal Court of Portland, by three voters of that city, under the act for the suppression of drinking houses and tippling shops, approved June 2d, 1851, and well known as the Maine Liquor Law. The complainants set forth in their complaint, that they had reason to believe, and did believe, that certain spirituous and intoxicating liquors were kept and intended for sale, by a person unknown to the complainants, but who was not authorized under the Act referred to, to sell such liquors, "*in a certain building situated on Plum street, called a shed, in said Portland*;" and that said liquors had thereby become forfeited to be destroyed. And the complainants prayed that due process might be issued to search said shed, and that said liquors, if there found, might be seized and kept until final action upon the complaint. A warrant was accordingly issued by the Municipal Court to the constable requiring him to enter in the day-time the shed before named, and therein to search for said liquors and to seize and safely keep the same if there found, until final action and decision upon them.

Further proceedings were had, the result of which was, that the liquors were declared forfeited, and ordered to be destroyed.

Upon proceedings taken in appeal from this decision, which it is not necessary to report minutely, it became necessary to consider whether the descriptions given in the warrant of the *place* to be searched, and of the *things* to be seized, were sufficiently precise to satisfy the constitutional

provision respecting search-warrants above quoted. We give only such portion of the decision as relates to this subject.

SHEPLEY, C. J.—1st. *Of the description of the place to be searched.*

The language used in the complaint, as descriptive of the place of deposit, is recited in the warrant. It is described as "a certain building situated in Plum street, called a shed;" and the officer is commanded to enter and search "the shed before named."

There might be several sheds situated on that street, and the officer would be authorized to search any one of them, and all of them would therefore be liable to search. If the command had been to search a certain building in Fore street, called a shop, all the shops situated on that street might have been subjected to search.

The constitution declares that "no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized."

When a designation so limited and special, as to distinguish the place or thing from all others of the like kind, cannot well be made, it should not be required. There can, however, be no difficulty experienced in practice, if such a designation of the place be required as would, if used in a conveyance, be sufficient to describe and convey it. That description which, if used in a conveyance, would not convey the premises, and which would not confine the search to one building or place, cannot be considered as a special designation of the place. The complaint and warrant were, therefore, defective, and the search was unauthorized.

2nd. *Of the description of the thing to be seized.*

It is insisted in argument, that there is no such special designation of the thing to be searched for and seized, as the provisions of the Constitution require; that liquors not intended for sale must be seized by virtue of such a warrant, when found in a warehouse or building with those intended for sale; that such has been and must continue to be the effect, when liquors intended for sale, and not intended for sale, are found in the warehouse of a railway or in the hold of a vessel; that to prevent this, a more limited and special designation of the liquors should be required, in conformity to the provisions of the Constitution; that the particular kind of liquor should be designated; that a description by the use of generic terms is not a special description.

The question, whether such a general description can be allowed, is not unattended by serious difficulties. It must be admitted that liquors, not intended for sale and not liable to forfeiture, may be seized by virtue of such a warrant, when found in the same building or place in which those intended for sale are deposited. It is difficult to perceive how such a result can be prevented by a more limited or special designation. If the liquors were designated by the use of the terms brandy, rum, gin, whiskey, and wine, with a further description of their being contained in a hogshead, pipe, barrel, or other cask, and with a limitation of each kind to a particular description of cask or vessel, there might be found other brandy, rum, gin, whiskey, and wine, in like casks or vessels, and in the same building or place, and not intended for sale, and which might be seized by virtue of a warrant, in which the liquors to be seized were attempted to be thus more particularly designated. If a warrant should

be issued to search for stolen goods, designated as bales of cotton cloth, other bales of cotton cloth of like appearance, and not stolen, might be found in the building or place designated, and be seized.

It has been contended that these difficulties might be avoided, by distinguishing the property to be searched for, from other property of the like kind, by a statement or averment that the property to be searched for was owned by a particular person. It is no part of the description of an article to state by whom it is owned. The special description required by the constitution could not have been intended to include an historical account of the article.

It may often be found difficult, if not impossible, to describe articles stolen or liquors intended for sale, so perfectly that they can be easily distinguished by an officer having no previous knowledge of them, from others of a similar kind, not stolen or not intended for sale.

The administration of law is occasionally, and perhaps unavoidably, so imperfect, that innocent persons may be subjected to inconvenience and expense by official acts and processes designed for the punishment of the guilty. If liquors not intended for sale, or goods not stolen, should be seized by virtue of such a warrant, the owner would be enabled to procure their restoration, by the adoption of proper measures to accomplish the object. Such a designation of the thing to be seized could not have been intended to be required as would prevent any effectual search for stolen or other secreted goods. There may be different kinds of spirituous liquors, which, to the eye of an observer, would present the like appearance, and if no warrant to seize them, when thus seen, could be issued, without a particular designation of the kind of liquor, it would often be difficult, if not impossible, to execute the law. If goods or liquors should be required to be designated by marks upon the casks, vessels, boxes, or bags, containing them, searches and seizures of them might often be prevented by an obliteration or removal of the marks.

If a designation by the species and not by generic terms were required, the difficulties alluded to might not be avoided, for others might be found in the same warehouse or place, of a like species and appearance.

That provision of the constitution was designed to prevent unreasonable searches and seizures, but not to prevent the accomplishment of any useful purpose, by searches and seizures. It could not have been the intention of the framers of the constitution to require such a special and particular designation of the thing to be searched for as to prevent the accomplishment of any beneficial purpose by a search-warrant.

The court is not satisfied that the complaint and warrant ought to be considered as illegally made and issued, because the thing to be searched for was not more specially designated.

ILLUSTRATION OF THE PRINCIPLES OF LAW RELATIVE TO VOLUNTARY CONFESSIONS.

[The State *vs.* Havelin; 6 La. Ann. R., 167.]

Havelin and Otterson were tried upon a charge of arranging combustible matters with intent to set fire to a building.

On trial, a police officer testified that when Otterson was in custody, he told said Otterson that he might have been instigated by Havelin to act as he had done, and that it might be best for him to make a statement; that it was possible he might be permitted to turn state's evidence, if he would make a confession; that several days after he conversed with said Otterson again, while yet in custody, upon the subject of a confession, and reduced the substance of his statement to writing; that before and after writing the same, he informed Otterson that the statement might be used against him, and that he (the officer) had no power to make him any promise of freedom; and that, thereupon, said Otterson voluntarily signed the statement.

The confession was then offered in evidence on the part of the state, and admitted under exception. It stated, in substance, that Otterson was the assistant of Havelin in keeping a grocery store, which was the building attempted to be fired; that Havelin employed Otterson to set fire to the building in order to defraud Havelin's insurers of the amount of an insurance which he had effected upon his stock; and that the combustible matters found on the premises, when the alarm of fire was given, were placed there by Otterson under Havelin's instigation.

One objection taken to the evidence was, that the confession was not voluntary.

PRESTON, J.—It is well settled that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judgment, examination, or after commitment, whether reduced to writing or not, and to what person, or at what time or place it may have been made, is strong evidence against him. It is laid down, however, by elementary writers, that the confession must not be drawn from the prisoner by a threat or promise, for a confession obtained by one, however slight, cannot be received in evidence; and that if a confession has been obtained from the prisoner by undue means, any statement afterwards made by him, under the influence of that confession, cannot be given in evidence. Mr. Archbold, probably the most accurate writer on criminal law, considers, that if a promise or a threat was employed to induce the prisoner to confess, and the prisoner was induced by such promise or threat to make the confession offered in evidence, then the confession must be rejected; but that, if it appears that although such promises or threats were held out, they did not influence the prisoner, but his confession was voluntary, and he was not biassed by the promise or threat in making it, the evidence of the confession is admissible.

The eagerness with which any pretext was seized upon at common law

to exclude confessions, probably grew out of the rigor of the criminal code of England, and it is questionable whether so much strictness should be adhered to under our milder code. For the only principle upon which confessions are rejected, in any case, is, that they may have been obtained by such promises or threats as render their truth uncertain. It would seem reasonable, then, to allow the confessions, if not extorted, to be laid before the jury as proper judges to determine what credit is due to them under the circumstances of the case. At least there is no reason for courts exercising great strictness in excluding them from the consideration of the jury as being worthy of no credit; and in doing so, the jury is to exercise a legal discretion, which must be governed by the circumstances of that particular case, and with regard to which, it is difficult to lay down any general rules. They may consider the age, situation, and character of the prisoner, and the circumstances under which the confession was made. In the present case, for example, they might consider how far the confession conformed to facts stated by other witnesses; as, that in an alarm of fire, combustible materials were found in candle-boxes under brandy, gin, and oil barrels, diluted with camphene or otherwise. For confessions obtained by such threats and promises as would have excluded them, may, it has been held, be received in evidence, if attended with extraneous facts which show them to be true. (State *vs.* Hudson, 9 *Ferg.* 408.) So the jury may have considered the prisoner capable of reasoning with himself that as he had no apparent motive to set fire to the building, and Havelin had the pecuniary interest growing out of his insurance, and the promptings of his embarrassment, the public officers would allow him to turn state's evidence if he made confession of the fact. Considering then that no promises were, in fact, made to him by the police officers, and that he was fully informed that his statement might be used against him, he may have persisted in making the confession, from the promptings of his own hopes, founded on the nature of his case, and not from any promise, which he was expressly informed could not be made. We cannot say, therefore, that the court erred in admitting the confession as evidence against him.

## ACTIONS FOR DEFAMATION.—EVIDENCE IN MITIGATION.

**The inconsistency of the rules of pleading and evidence in actions for defamation, commented upon and explained.**

[*Follett* vs. *Jewett*; New York Supreme Court, Monroe Special Term. Official Report not yet published.]

This case brought under very searching review the law in relation to mitigating damages in actions for defamation. Without detailing the facts, we present an abstract of the views of the court.

SELDEN, J.—The courts have struggled with the incongruous rules which have prevailed upon the subject of the mitigation of damages in actions for defamation, for more than a century, without ever having taken the trouble to trace the difficulty to its source. The rules have frequently been denounced as absurd. (*Dolloway* vs. *Tunill*, 26 Wend., 383.)

In *Cooper* vs. *Barber* (24 Wend., 105), Judge Bronson thus states the rule: "Facts and circumstances which tend to disprove malice by showing that the defendant, though mistaken, *believed the charge true* when it was made, may be given in evidence in mitigation of damages. But if the facts and circumstances offered, *tend to establish the truth of the charge*, or form a link in the chain of evidence going to make out a justification, they are not admissible in mitigation of damages."—and the same position is elsewhere taken (*Root* vs. *King*, 7 Cow., 613; *Wormouth* vs. *Cramer*, 3 Wend., 395; *People* vs. *Horton*, 13 Wend., 9). To us it seems that nothing could be more inconsistent than this rule. Its separate branches are directly repugnant to each other. The words, "facts and circumstances," as used, do not include rumors or reports of the truth of the charge, or mere information to that effect, derived from other credible persons; these belong to another branch of the subject. How then can we conceive of any facts and circumstances which, when proved, would show that the defendant *believed* the charge to be true, and which would yet have no tendency to prove it true? How could the defendant persuade the jury that he believed the charge, without showing some reason for that belief? The rule nullifies itself, and virtually prohibits the defendant from giving any evidence to repel the presumption of malice. On the other hand, the plaintiff is at full liberty to give evidence of express malice with a view to enhance the damages. (*Defries* vs. *Davies*, 7 Car. & Payen, 112; *Bromage* vs. *Posson*, 4 Barn. & C., 247; *Howard* vs. *Sexton*, 4 Coms., 157.)

First, then, malice is presumed from the falsity of the charge; to this the plaintiff may superadd of positive malice, and thus aggravate the damages, while the defendant is precluded from giving any evidence to repel malice in mitigation. He is told that he may give evidence to show that he believed the charge to be true, provided it have *no tendency*

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NOTE.—We are under obligation to his honor, Judge Selden, for a copy of his opinion in this case.

to prove it true; that is, he may, if he can, show that he believed it true, but not show that he had the slightest reason for believing it. This is mockery.

There is not the least difficulty in tracing this absurdity to its origin, and showing precisely how it crept into our judicial system. Originally, not only anything which had a legitimate tendency to disprove malice, but even the truth of the charge itself, might be given in evidence under the general issue in an action of slander to mitigate the damages. (*Smithies* vs. *Harrison*, 1 Lord Raym., 727.) It never was any objection to evidence in mitigation, that under a different state of the pleadings, it might constitute a complete defence. But it seems that the practice was found liable to the objection that plaintiffs were frequently surprised by proof as to the truth of the charge, which they had made no preparation to meet. When, therefore, in the later case of *Underwood* vs. *Parks* (2 Strange, 1200), which was an action of slander, the defendant offered, under the plea of not guilty, to prove the words *to be true*, in mitigation of damages, the chief justice refused to permit it, saying, that "at a meeting of all the judges upon a case that arose in the common pleas, *a large majority of them* had determined not to allow it *for the future*, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words." It is this little item of judicial legislation which has created all the trouble. The embarrassment consequent upon it has been felt from that day to the present. The object of the rule was just and right, but its effects, when operating in connexion with other established rules, were not foreseen. If, after this, a defendant in an action of slander offered to mitigate the damages, by proving, under the general issue, not that the words were true, but that he had, when they were spoken, good reason to believe them to be true, he was met by the objection that this would violate the rule in *Underwood* vs. *Parks*. This objection was sound. A rule which excluded evidence of the truth of the words, if carried out, must necessarily exclude evidence tending to prove them true. It would obviously be impossible to anticipate the effect of the evidence, and to discriminate in advance, between such as might prove conviction in the minds of the jury, and that which would fall short of it. Here, then, a dilemma was at once presented. The established rules of pleading would allow *nothing short* of a justification to be spread upon the record. The defendant, therefore, was prevented by this rule from pleading the absence of malice in mitigation; and by the rule in *Underwood* vs. *Parks*, from giving it in evidence without being pleaded.

The whole difficulty would have been obviated if the judges, when they undertook to change a rule of the common law, had foreseen that unless they went a little farther in their legislation, and provided that defendants might *plead, or give notice of matter in mitigation*, their rule would effectually exclude them from the benefit of such matter, if it existed.

In England, the courts, in some instances, paying more regard to justice than to logic, held, that although a defendant could not give in evidence, in mitigation, matter which, if pleaded, would amount to a justification, he might, nevertheless, prove anything falling short of it. (*Kno-*

*bell* vs. *Fuller*, Harris's Peake, App. 32; *Leicester* vs. *Walter*, 2 Camp., 251.) But it was manifest that this rule, and that in *Underwood* vs. *Parks*, would not stand together, and the legal profession then resorted to another expedient for avoiding the effect of the latter rule, which was to put in a plea of justification in all cases in which they introduced their evidence, with a view of having it considered in mitigation.

In many of the states the courts have followed this course, but in this state, and in Massachusetts, the judges, with a logic which cannot be impugned, whatever we may think of the justice of its application, insisted that a rule which excluded evidence of the truth of libelous words, must exclude evidence having a tendency to establish its truth. This conclusion would have produced very little practical inconvenience, if they had left open the mode resorted to in England, of avoiding its effect, by receiving evidence going to disprove malice, under a plea of justification, or rather by considering such evidence in mitigation when thus given. But here arose, first in Massachusetts, and then in this state, another obstacle in the way of a defendant who was prepared to prove his innocence of all malicious intent. It was held that putting a plea of justification upon the record, was in itself *conclusive* evidence of malice, and prevented the defendant from setting up a want of malice, or claiming any mitigation on account of its absence. (*Root* vs. *King*, 7 Cow., 613, 4 Wend., 114; *Purple* vs. *Horton*, 13 Wend., 9.) Thus were defendants hedged about on every side, and mitigation of damages, by disproving malice, was rendered impossible. If they declined to justify upon the record, their evidence could not be received, because it would violate the rule of *Underwood* vs. *Parks*; and if they did so, and failed to make out a complete justification, however near they might come to it, they, according to this doctrine of the courts, only aggravated their guilt. This was the state of the law in this state at the time of the enactment of the Code.

This brings us to the remedy which the Code has provided. Section 165 reads as follows:—

"In the actions mentioned in the last section (*i. e.* libel and slander), the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances."

How was it possible to devise a provision more exactly adapted to meet and remove the embarrassments which we have seen existed!

The omission in the rule of *Underwood* vs. *Parks* is supplied, and the doctrine obviously unsound, in regard to the effect of a plea of justification, abrogated.

His honor concluded the opinion with an application of the rule of the New York Code to the case at bar, which would not be of general interest to our readers.

STATUTE OF FRAUDS.—PART PERFORMANCE.

The best rule for the construction of the statute of frauds, upon the subject of part performance, is, that every contract is within the statute, except where there has been such a part performance as cannot be compensated in damages.

[*Moore* vs. *Small;* 19 Penn. R., 461.]

From the opinion in this case, we extract some valuable remarks upon the true rule for distinguishing the cases of part performance which ought to be held without the statute of frauds.

WOODWARD, J.—The statute of frauds and perjuries, regarded as a rule of property, is simple and intelligible. Every mind is capable of understanding that contracts about land, if more is meant than a three years' lease, must be in writing. This rule is as appreciable by the common mind as those others which make twenty-one years' adverse possession of land, title thereto; but actions on simple contracts, after six years' delay, require judgments to be revived once in five years; and liens of mechanics, and material men, to be entered within six months after the contract executed.

And what rule is more reasonable? Land is the most important and valuable kind of property. Or if it be not, there is no other stake for which men will play so desperately. The evidence of land title ought to be as sure as human ingenuity can make it. But if left in parol, nothing is more uncertain; whilst the temptations to perjury are proportioned to the magnitude of the interest.

The infirmities of memory, the death, the corruptibility, the honest mistakes of witnesses, and the misunderstanding of parties, are all elements of confusion and discord, which ought to be excluded from titles to the most coveted, if not the most valuable of terrestrial objects. And it is the purpose of the statute of frauds and perjuries to exclude those elements, and to compel men to create testimonials of their intentions which are certain and enduring.

Blackstone speaks of the reign of Charles II., as more politic than its predecessors, and it was distinguished by several enactments that marked an advancing civilization. The statute for the prevention of frauds and perjuries was one of these. Though enacted before the charter to William Penn, this statute has been held not to extend to Pennsylvania. But its most material provisions were supplied to us by an Act of 21st March, 1772. It is remarkable how completely, both in England and Pennsylvania, the public mind has acquiesced in these enactments. History tells of no popular movement in either of these representative governments, for the repeal or material modification of the statute of frauds and perjuries. Chancellors and judges have often manifested great uneasiness under its operation, and have expounded and refined, until the rule has ceased to be looked for in the statute itself, but must be tracked through volumes of jarring and contradictory decisions. The people, however, whose representatives furnished the rule, have indicated

their willingness that it should have free course, by never calling on their representatives to repeal it.

And yet it must be confessed, the idea first started in England, I believe, by Sir William Jones, that a statute made to suppress perjuries and frauds, should be so construed as not to become an instrument of fraud, was a logical deduction. The popular acquiescence of which I have spoken, may be due, in some measure, to this necessary and reasonable construction. But that the statute should have effect, except where its operation would defeat its objects, is a corollary from this principle of construction, and agreeable to reason, though lost sight of in the decision of many cases. Hard cases make bad precedents, is a maxim that has been strikingly illustrated by the course of decision under this statute. Judges have been borne away, by sympathy for parties, from the letter of the law, and in their benevolent efforts to accommodate it to the changeful circumstances of cases, copious fountains of litigation have become unsealed. Nobody has lamented this judicial amiability more than the judges themselves. For the last twenty years there has been scarcely a judge of any considerable reputation, either in England or the United States, who has not in some manner put on record his regrets, the results of large experience, that the statute had been so widely departed from, and his conviction that more evils have resulted from such departures, than they have remedied.

The best rule of construction that I have ever seen applied to the statute, may be stated thus: *Every parol contract is within the statute of frauds and perjuries, except where there has been such a part performance as cannot be compensated in damages.* This rule excludes the possibility of the statute becoming an instrument or occasion of fraud, for if in any case it is not unjust to rescind a parol contract, it cannot be fraud to rescind it. It seems to me more reasonable than the rule that delivery of possession under the parol contract shall be part performance to take it out of the statute, as has been asserted in many cases. Without possession taken and maintained under the contract, there can be no pretence of part performance, but generally that is an act which admits of compensation, and therefore too much is made of it, when it is treated as a sufficient ground for decreeing specific execution. This rule, though not steadily adhered to, has been recognised in many cases in this court. (*Clark* vs. *Vankirk*, 14 Ser. & R., 354; *Eckhert* vs. *Eckhert*, 3 Penn. R., 362; *Wack* vs. *Sorber*, 2 Wharton, 253; *M'Kee* vs. *Phelps*, 9 Watts, 85; *Lee* vs. *Lee*, 9 Barr, 178.)

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STATUTE OF FRAUDS.—EFFECT OF ANSWER IN EQUITY.

**The recital of a parol agreement in the answer of a defendant in equity, is not a "memorandum" in the sense of the statute, unless the defendant waives the statute as a defence.**

[*Winn* vs. *Albert*; 2 Md. Ch. Decis., 169.]

The circumstances of this case were complicated. It is sufficient for our purpose to say that complainants filed this bill against the creditors

of one Jones, to obtain enforcement of a parol agreement to mortgage real estate, alleged to have been made with them by Jones. At a prior stage of the proceedings in the cause, they had filed a bill of similar character against Jones himself, and he in his answer admitted the allegations of the prior bill. Now it was contended by the creditors that complainants were not entitled to the benefit of the agreement, because it was void by the statute of frauds;—and by the complainants, that there was in the answer of Jones to the other bill, a sufficient memorandum of the agreement to bring it within the statute.

JOHNSON, CH.—Mr. and Mrs. Albert insist that by virtue of the alleged parol agreement with Jones, they have a special lien on the proceeds of the "Wheatfield Inn," to which the agreement related, and are entitled to be paid to the extent of those proceeds in exclusion of his other creditors. Those creditors resist this pretension, and insist, among other objections to it, that the agreement, if any such was made, was void by the provisions of the statute of fraud and perjuries, upon which they rely.

It is not doubted, and indeed has been conceded, that the agreement is within the statute, but it has been forcibly urged on the part of Albert and wife, that there is in the record, *written* evidence of the agreement, sufficient to satisfy all requisitions.

It is contended, that the answer of Jones, to the bill filed against him, by Albert and wife, in which the agreement to convey the property in question, by way of security, is specially charged, does furnish the written evidence demanded by the statute; that the statute does not require the agreement itself to be in writing, but only that it must be *evidenced by writing;* and that the answer of a defendant, admitting the agreement as charged in the bill, supplies the written evidence.

There can be no doubt, that a court of equity will enforce the specific performance of a contract, within the statute, not in writing, where it is fully set forth in the bill, and is confessed by the answer of the defendant, and the statute is not relied on as a defence—and the reason given is, that when the contract charged is fully admitted by the defendant, there can be no danger of fraud and perjury.

Mr. Justice Story, in stating this as the rule, and the reason for it, observes, "perhaps another reason might fairly be added, and that is, that the agreement, though originally by parol, is now in part evidenced by writing, under the signature of the party, which is a complete compliance with the statute," (2 *Story's Equity Jurisp.*, § 755.)

With very great deference to this eminent judge I may, perhaps, be permitted to express a doubt whether this additional reason can be supported upon principle. The statute, by its terms, requires that the agreement itself shall be in writing, or that there should be some memorandum, or note thereof, in writing. It is not to be questioned that an agreement originally by parol, may be subsequently reduced to writing, at the time it was made. But the question here presented is, whether an answer in chancery, confessing a parol agreement, charged in the bill, is equally binding as if the agreement itself had been reduced to writing, and is a complete compliance with the statute of frauds?

It appears to me, to be obvious, if this be so, that a defendant who makes such a confession in his answer, would not be permitted to avail

himself of the statute, as a defence to the bill. How could he be suffered to plead the statute of frauds, upon the ground that the contract was not in writing, when, by his answer, he had reduced it to writing, or so evidenced it by writing under his signature, as to amount to a full compliance with the statute? And yet nothing can be clearer at this day, however the earlier cases may conflict upon the subject, than that a defendant who, by his answer, confesses the parol agreement charged in the bill, may successfully rely upon the statute as a defence. I cannot avoid therefore, entertaining a doubt, whether the statement of Judge Story, with reference to the effect of an answer, admitting the parol agreement set forth in the bill, would be sustained; and am of opinion that when the defendant confesses the agreement in his answer, and does not insist upon the statute, he will be deemed to have waived it, and upon that ground only is a relief granted. I cannot bring myself to think that the answer will be viewed as supplying the requisitions of the statute, when, notwithstanding the answer, the defendant may avail himself of the statute, to defeat the contract. If the statute has been fully complied with, how could it be interposed to protect the defendant? He might, with the same propriety, plead the statute against an agreement actually reduced to writing at the time it was entered into.

There is no reason at all to doubt that Jones was indebted to Mrs. Albert in a large sum of money, and that the debt originated in the misapplication of trust funds in his hands, belonging to her; nor do I think, if he had secured this indebtedness by a valid agreement or conveyance of his property in November, 1845, there is any ground apparent upon this record upon which the validity of such an act could be disputed.

The question then is, have Albert and wife succeeded in establishing a valid agreement against the creditors of Jones, and in opposition to the statute of frauds? They rely upon the answer of Jones to the bill filed by them against him; and insist, that it may be used for the purpose of proving the agreement in this case. Conceding that the answer could be read *as evidence*, and it certainly can have no greater effect than evidence, will it be sufficient to remove the bar of the statute of frauds? It has been shown that an answer admitting a parol agreement, within the statute, will not prevent the party answering from relying upon the statute. Jones himself, notwithstanding that answer, might have taken shelter under the provisions of the statute; and if so, can it be successfully argued, that other parties, though claiming under him, may not avail themselves of the same protection? The answer, if it can be read, then, is evidence, but evidence of what? Why of a parol agreement relating to land, and void by the statute of frauds.

The Court of Appeals, in the case of *Jones* vs. *Huby*, 5 Har. & Johns., 381, 382, say, speaking of the effect of an answer, when responsive to the bill, "that though uncontradicted, it cannot be taken to establish anything in bar of the relief prayed, *which parol testimony* would not be admitted to prove; for it is as evidence only that it is received."

My opinion, therefore, is, that even if the answer of Jones can be read, which is by no means admitted, still it does not deprive the parties of the right to rely upon the statute of frauds against the claim of Mr. and

Mrs. Albert, and that, consequently, the lien insisted upon cannot be maintained.

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TESTIMONY.—INTEREST OF WITNESS.

A witness who has been promised a compensation for giving his testimony, *in case the party calling him gained the suit*, is incompetent by reason of interest.

[*Holland* vs. *Ingram*; 6 Richardson's (S.C.) Eq. R., 50.]

A witness having admitted on his *voir dire* that the plaintiffs had offered him $100, if he would attend and testify, and they gained the suit, was excluded as incompetent by reason of interest. The question was on the propriety of its exclusion.

O'NEALL, J.—The question in this case is so important to the due and proper administration of justice, that it may make it proper to give it a little fuller examination than the case otherwise would seem to justify. For that the witness could not be believed by judge or jury has not been denied by the zealous, persevering counsel, who brings up the appeal. *Cui bono*, might well be asked, should the competency of such a witness be urged? But being urged makes the necessity of a decision, and the monstrous proposition, that a witness, hired to testify, should be allowed to be sworn, makes it necessary to vindicate the exclusion of the witness below.

The reason why interest excludes a witness is, because of the weakness of our nature; it might tempt one to swear falsely; and hence belief cannot *legally* be given to one who has the slightest legal interest in the event of the suit. If this be so, do not reason, common sense, prudence, and justice plainly declare that one, who has either pocketed the bribe, or expects to receive it (although he may not be legally able to do so), should not, for the same reason, be allowed to testify? I think so, and if there has been no rule of exclusion, heretofore, sufficient to drive such an one from the stand, *I would make it now*. But, it seems to me, there is really no difficulty in the matter on authority. There is no doubt, that to exclude a witness, he must have a direct interest in the event of the suit, or in the record, as matter of evidence for him hereafter. I do not understand that in every case the court is to decide that the interest arises out of a certain enforcible legal demand. If the witness has made a contract, which he believes will give him money, in the event of the suit and hence that upon its determination the record will be evidence for him, I think he is at once excluded by the very nature of his contract, for it may be that he will receive the reward of his corrupt bargain without a resort to legal remedies, and hence his interest will be realized; but if he has to sue, will not the record be evidence for him? No one can doubt it. It does not follow, under the rule, that it must avail him. It may be that, after it has been received, the record will be thrown at his head, and he will be told to depart with both it and himself soiled by infamy. Still it was evidence for him in a case in which he could not succeed.

I am very well aware that the tendency of courts is to narrow the objections to competency, and to place many which were once allowed, now, in the scales of credibility. Still, I think, it will be hard to find any case or *dictum* which would make the witness in this case competent, and leave his credit to the jury. (*City Council* vs. *Wilkinson*, 1 Rich, 240; *McVeaugh* vs. *Goods*, 1 Dall., 62; Garde on Evidence, p. 8.)

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TESTIMONY.—ADMISSIBILITY OF OPINIONS.

**The principles on which the court will discriminate between cases in which the opinion of a witness upon a question at issue is admissible, and those in which it is not; explained.**

[*The N. E. Glass Co.* vs. *Lowell;* 7 Cushing's (Mass.) R., 319.]

This case gave rise to some discussion upon the question whether the opinion of a witness, which had been offered upon the trial and excluded, was admissible in evidence. We shall simply quote the remarks of the court on the general question of the admissibility of opinions:

SHAW, C. J.—In weighing circumstantial evidence, the opinion of a witness is often useful, and indeed necessary; but as its admission is contrary to the general rule, and limited to particular cases, it depends so much upon the other evidence which has been given, the nature of the facts to be proved, and the particular posture of the case, it is often extremely difficult to apply it in practice. The principle upon which this evidence is admissible is clear and entirely just. In applying circumstantial evidence, which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two duties to perform; first, by a rigid scrutiny of the evidence to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experience. When we have ascertained by experience that one act is uniformly or generally the cause of another, from proof of the cause, we infer the effect, or from proof of the effect, we infer the cause.

Now, when this experience is of such a nature, that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. It is not because a man has a reputation for superior sagacity and judgment, and power of reasoning, that his opinion is admissible; if so, such men might be called, in all cases, to advise the jury, and it would change the mode of trial. But it is because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt. Suppose a vessel has been stranded, and the charge is that it resulted from unskilful and careless navigation. After all the evidence given of the state of the wind and weather, the position and distance of the land, the sail carried, the course steered, and the nautical manœuvres adopted, landsmen, men of common experience, would be unable to infer that the

disaster was caused by bad seamanship, rather than inevitable accident; whereas a man of nautical experience might draw a certain inference, and pronounce it attributable to the one or the other cause. (*Folkes* vs. *Chadd*, 3 Doug., 157; 1 Greenl. on Ev., § 440; 6 N. Hamp., 463.)

In view of the difficulty of laying down any rule on this subject, precise enough for practical application, the only proper course seems to be, to keep the principle steadily in view, and apply it according to all the existing circumstances affecting the particular case.

*Exceptions overruled.*

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### TESTIMONY.—CONFIDENTIAL COMMUNICATIONS.

**Communications made by a client to an attorney, in relation to the will of the former, which the latter is employed to draw, are clearly privileged.**
**The attorney can only testify to privileged communications, when the privilege is distinctly waived by the client.**

[*Chew* vs. *The Farmer's Bank of Maryland;* 2 Md. Ch. Decis., 231.]

In the proceedings in this cause interrogatories were addressed to Gov. Philip F. Thomas, among which the fourth was substantially to the following effect.

Were you sent for by Mrs. Gibson to prepare her will some time previous to her death? If yea, state the provisions of her will, the reasons she assigned for them, and generally all the conversation that took place upon the subject, and also whether the will was executed.

The witness answered that he was called upon to prepare a will for Mrs. Gibson, and did prepare one, agreeably to her directions; but protested against answering the question further, claiming that the communications were confidential, from Mrs. Gibson as client, to himself as attorney.

Other interrogatories were also addressed to him, with a view to discover whether any, and what persons other than witness and the testatrix, were present at the time of the drawing of the will. The witness declined to answer these, referring to the reasons contained in his protest to the other interrogatory.

JOHNSON, CH.—The application of the admitted rule that communications which a client makes to his legal adviser for the purpose of professional advice or aid, shall not be disclosed, is submitted to the court in this case upon certain interrogatories, propounded to his excellency, Governor Thomas, after argument by counsel. The general rule is not denied, and indeed stands upon such firm grounds of public policy, and is so well fortified by authority, that it would be impossible to contest it. Upon every such communication made by a party to his counsel, attorney, or solicitor, the seal of the law is placed and remains for ever, unless removed by the party himself, for whose protection the rule was established. But although the rule is thus inflexible in the cases to which it applies, there are, what are sometimes called exceptions to it, though these exceptions are rather apparent than real, and will, I think,

be found upon examination to be entirely without the principle upon which the rule rests. They will be found not to be communications from the client to the legal adviser at all, but information which the latter has acquired independently of such communication; and where that is the case, the interests of justice, so far from requiring that it shall be locked up in the breast of the attorney, demand its publicity when necessary to guard or to assert the rights of third persons. The views of the law upon this subject are sustained by the passages referred to in *Greenleaf on Evidence from section* 237 *to* 245, and in my opinion rendered it perfectly proper that the witness should refuse to disclose the communications made to him by Mrs. Gibson. Those portions of said interrogatory which call for the provisions of the will, the reasons assigned by the testatrix therefor, and the conversations between her and the witness upon the subject, seem to me to fall clearly within the rule, and to be privileged communications, which must not be divulged; the witness in his protest to the question stating that all his conversation to her on the subject was in relation to the will, in the drawing of which he was her attorney.

It appears to me that if anything was said in the course of that conversation between Mrs. Gibson and the witness, they standing towards each other, in the matter then in hand, in the relation of legal adviser and client, which could, if revealed by the witness, operate to her prejudice, the rule which prohibits such revelations applies to it with stringent force. If there is any occasion upon which the secrets of the client should be safe when intrusted to his professional adviser, it must be when the client is making the final disposition of his worldly affairs. Then, if ever, he must be suffered to make the most unreserved disclosures. I think, therefore, that the witness was not at liberty to give the information called for in regard to the provisions of the will of Mrs. Gibson, the reasons for such provisions, and the conversation that took place upon the subject.

The information asked for in the fifth question, I think, should be given, because it has no necessary connexion with the character, in which alone communications between parties are protected. The inquiry is, whether there were other persons present at the time the conversation took place, and whether there was anything in the conversation not designed to be heard by those present. Now whether there were or were not persons present, is a fact of which any one else, if present, would have been equally conversant with the witness.

His knowledge of the presence of such persons had nothing to do with his professional character, being acquired by the use of natural faculties possessed by him in common with other men. Such information cannot, I think, be considered as of that description of which the law forbids the witness to speak. It cannot be regarded in any sense as a professional communication, upon which alone the law places the injunction of secrecy. And as it seems to me, the disclosure of it by the witness is clearly warranted by what are called the apparent exceptions to the rule. (Greenl. Ev., § 244.)

Whether other persons were present at the time or have spoken of

what transpired or was said upon the occasion, are facts not communicated to him as her legal adviser, and, I think, cannot be withheld.

It has been said, that the privilege of not disclosing these confidential communications, being the client's privilege, if he is silent the witness has not a right to make the objection. That the silence of the client, when the question is propounded, is an implied waiver of the objection. In answer to this it may be said, and I think well said, that when the witness makes the objection to the question, he must be understood as making it in behalf of the client and not on his own behalf, and therefore when the witness declines answering the question on the ground referred to, and the client or the party representing him stands by and does not release the witness from the obligation not to reveal the information, he must be understood to approve the objection and to insist upon his privilege.

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ATTORNEYS.—REVOCATION OF LICENSE.

**The court has a general power to remove or suspend an attorney for such immoral conduct as renders him unworthy of confidence in his official capacity.**

[In the matter of *Mills*; 1 Mich. R., 392.]

The Revised Statutes of Michigan provide that no person shall practise as an attorney unless approved by the court for his *good character* and learning—that the supreme court may grant licenses to practise to persons of *good moral character*, &c.—and that any attorney may be removed or suspended who shall be guilty of any deceit, mal-practice, crime, or misdemeanor.

Charges were filed in the circuit court against Mills, substantially to the effect that his reputation for truth and veracity was so bad that he was not to be believed under oath. It was objected that this charge, if proved, would not authorize the removal of an attorney; and the question thus raised was reserved for the opinion of the supreme court.

WHIPPLE, C. J.—The authority of the court to remove or suspend an attorney when guilty of any deceit, mal-practice, or crime, exists independently of the statute. Whether this authority to revoke a license granted to an attorney, extends to causes other than those specified in the thirty-fourth section, is now, for the first time, presented for the consideration of the court.

If our courts are restricted to the causes set forth in the statute, there would seem to be a lamentable defect in our laws. The words "deceit" and "mal-practice," in the statute, have direct reference to the conduct of an attorney, as such attorney; and if the authority of our courts to remove or suspend an attorney is to be thus restricted to *official* delinquencies, it follows, that however degraded his moral character may be —whatever fraud or deception he may be guilty of—if such fraud or deception is unconnected with his *professional* acts, he is deemed worthy of a place at the bar. In other words, an individual may be guilty of

acts, which involve a violation of every moral precept, and yet retain our license and practice in our courts, provided these acts were committed in his *private* and not *official* capacity. If it is of consequence to the community that those who are in any way concerned in the administration of justice, should possess a reputation unstained by those vices which in their nature tend to degrade and corrupt, then is it important that a power should be lodged in some tribunal, to purge the bar of such as may have become the victims of such vices. That no person can faithfully and honorably discharge the delicate and responsible duties of an attorney, unless fortified by strong moral principles, is too clear for argument. The *nature* of those duties necessarily implies the possession of high moral character, in order to their conscientious performance. This, our statute contemplates; for it is only those "appointed by the court for their good character," who are permitted to wear the honors and bear the responsibilities of an attorney. If it be necessary, to gain admission to the bar, that a person should furnish the evidence of "moral character," how infinitely greater the necessity, that he should actually possess that character when he shall have entered upon the active and exciting theatre of professional life, where he is beset at every moment by temptations, well calculated to test the firmness of his principles. As it is a condition precedent to his admission to the bar, that an attorney should possess a blameless moral character, I think he forfeits his rights as such attorney, upon a breach of that condition. When a license is granted to an attorney, we certify to the world that he has been approved by the court "for his good character and learning." Upon this certificate the public have a right to rely. They may fairly presume, so long as the attorney retains his office, that his "good character" continues to be "approved by the court," and they may safely rely on his honor and integrity. Should this court, after being officially advised that one of its officers has forfeited the good name he possessed when permitted to assume the duties of his office, still hold him out to the world as worthy of confidence, they would, in my opinion, fail in the performance of a duty cast upon them by the law. It is a duty they owe to themselves, to the bar, and the public, to see that a power which may be wielded for good or for evil, is not intrusted to incompetent or dishonest hands. The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protection of the public, who have a right to demand of us, that no person shall be permitted to aid in the administration of justice, whose character is tainted with corruption.

Upon principle, therefore, I think that the authority of this court over attorneys, ought not to be restricted to the cases specified in the statute. And the reasoning by which I am conducted to this result is conclusive to show, that the Legislature never intended to withhold from our courts the exercise of a power so necessary to preserve the administration of justice from pollution, and the public from imposition.

His honor then referred to the following authorities in support of the position above expressed. (*Ex p. Brownsall*, Coup., 829. *King* vs. *Southerton*, 6 East, 127. *Smith's case*, 1 Broad. J. B., 522; 11 Ohio R., 430. *Leigh's case*, 1 Munf., 481. *Burr's case*, 1 Wheel. Crim.

C., 503. *Smith* vs. *State of Tennessee*, 1 Yerg., 228.) He continues as follows:

I do not wish to be understood as affirming that for every moral delinquency, the court would be authorized to revoke the license of an attorney. In the exercise of a sound discretion the court should only entertain such as are in their nature gross, and unfit a person for an honest discharge of the trust reposed in him. In the case before us, I am of the opinion that, if the charge I have been considering is made out by proof, the respondent has forfeited his office; that if fully established, it necessarily implies a baseness of character which disqualifies him for discharging the duties of his office with that faithfulness and integrity so necessary to preserve the honor of the profession from reproach, the public from imposition, and the administration of justice from impurity.

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INDICTMENT.—DUPLICITY.

A count in an indictment which sufficiently charges *one offence*, is not rendered bad by the addition of averments, *insufficiently setting forth another*.

(*The State* vs. *Palmer*; 35 Me.* R., 9.)

The count of the indictment upon which the prisoners were convicted, contained allegations sufficient to charge an assault with intent to maim, together with others which relate to, but, it was considered, did not sufficiently charge the offence of maiming. The prisoners moved in arrest of judgment. The motion was overruled, and the case was now heard upon exceptions to the decision overruling it. The objection was that the count was bad for duplicity.

SHEPLEY, J.—The question arises, whether a count describing one offence with sufficient accuracy, and containing no sufficient description of any other offence, is bad for duplicity. It is. A substantive charge, not sufficiently alleged in an indictment, can never be rejected as surplusage, for the reason that it may have been the ground of the conviction.

This may be correct when there is no other offence charged in the count; and in such case there would be no reason to reject the averment as surplusage, for the count would be insufficient. When another offence is sufficiently described in the count, it is apparent that the defective allegations cannot have been the only ground of conviction.

The cases of *Commonwealth* vs. *Tuck* (20 Pick., 356), and *Same* vs. *Hope* (22 Pick., 1), decide, that defective averments are in many respects no averments in contemplation of law. It is quite certain that no judgment can be sustained by virtue of them.

The accused could not have been subjected to any additional danger on account of the defective averments in the count, upon which they were found guilty. They were of no importance, and their insertion does

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* This volume is not yet published. We quote from sheets furnished us through the kindness of Redington, J., reporter.

not render the count bad for duplicity, for it does not contain a description of two different offences. It contains a description of one offence, and some additional averments not describing any other offence. To constitute duplicity two offences must be sufficiently described.

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PARENT AND CHILD.—MARRIAGE OF MINOR DAUGHTER.

A father has no right of action, against those who aid in the marriage, though against his consent, of his minor daughter, based upon his right to her society and service during her minority.
In case of such a marriage, the right of the husband to the society and service of his wife, is exclusive and paramount to that of her father.

(*Goodwin* v. *Thompson*; 2 Green's (Iowa) R., 329.)

Rufus Thompson instituted this action of trespass on the case against Archibald Goodwin and others, to recover damages for enticing his daughter Louisa Thompson, to marry one Jefferson Goodwin, against the plaintiff's consent, thereby depriving him of his right to the control, society, and service of the said Louisa. It was not contended that the marriage was not legally solemnized.

The defendants demurred to the declaration, and the demurrer was overruled.

Williams, C. J.—The only question to be decided is this. Can a father maintain an action of trespass on the case, and recover damages for the loss of service, &c., against a person for procuring the marriage of his daughter, who is a minor; when she has voluntarily and in good faith, entered into the marriage contract without any allegation of force or imposition having been practised upon her by her husband or the defendants, so far as the marriage is concerned, and when the marriage has been legally solemnized in good faith. The legislature of this state have enacted that males of the age of eighteen years and females of fourteen, not nearer of kin than first cousins, and not having a husband or wife living, may be joined in marriage; *Provided always*, That males under twenty-one and females under the age of eighteen years shall first obtain the consent of their father, respectively, or in case of the death or incapacity of their fathers then of their mothers or guardians. The statute also imposes a forfeiture of five hundred dollars on any justice or minister, who shall solemnize any marriage within the state without a compliance with the statute, and also forbids any unauthorized person to solemnize the contract under the same penalty.

By the common law marriage is held to be a civil contract. To render the contract valid, the parties must be willing and able to contract. The age of consent for a female has been fixed by the civil law at twelve years and the male at fourteen. The common law, however, had regard to the constitution more than the age of the parties, and therefore held that if they were in that respect competent, the marriage was good whatever the age might be. By the common law of England it was held that if a marriage was solemnized between two parties, who had not arrived at the age of consent, still when they arrived at that age, if they agreed to

continue together as man and wife, they need not be married again. (Black. Comm. 436, 537. 2 Kent Comm. 78.)

Such being the common law in force within this state it is clear that this marriage is not void, notwithstanding the statute. Statutes will not be construed to have an effect beyond that which is to be gathered from the plain and direct import of the terms used in declaring them. Effect by implication will not be given to them so as to change a well established principle of common law. The act regulating marriages within this state merely declares what description of persons may be joined in marriage, "and what are the respective duties of ministers and justices of the peace who are authorized thereby to solemnize the marriage contract. A due regard for the public morals and the interests of the community in view of the marital rights, duties, and obligations, is recognised and inculcated. The sanction of religious and legal rites is enjoined to elevate this contract so far as form is concerned, in making it above all others among men. Such a provision by statute, whilst it indicates the moral character of a community, operates as a preservative of the interests which are involved in one of the great relations which constitute the foundation of society.

In this brief view of the common law in relation to this subject, how does the case stand as affected by the statute? There is no prohibition of the marriage of a minor, who may be under fourteen years, expressed. The statute is merely cumulative in its operation, and cannot have the effect of repealing the common law, so as to render the contract void. Such has been the decision of this court, as well as the courts of last resort in nearly all the states of the Union, in declaring the effect of statutes similar to ours. (*Wyckoff* v. *Boggs*, 2 Halsted, 128; 2 N. H., 268; 3 Marshall, 370.)

We will now consider the case in view of the rights of the parent, the child, and the interests of society as existing in this country.

The parties to the contract being capable of making it, and it being valid in law, so as to secure the parties to it all their legal rights, and bind them to the observance of the obligations and duties involved, it clearly follows that the law holds the claims of the husband from the time of the marriage as paramount to those of the parent. But it is contended that the common law gives the parent the control, society, and service of the child during the entire term of its minority, which is until the age of twenty-one years. This, as a general principle, is true, but however, has its exception. In England, from whence we derive our common law, many reasons, in view of the governmental organization there, exist for establishing a general system on this subject; and determining its operation differently from that which necessarily must prevail here. Such is the law of descent of estates, primogeniture, &c. Nevertheless, from what we have already said, it is seen that even there, in the absence of special statutory provision, a marriage after the age of consent is held valid. The minor child, taken by the obligations of the new relation established by the solemnization of the marriage contract, from the control of the parent or natural guardian, is held to be amenable to the law of the land governing husband and wife. This being the case, under the common law, it is clear that rights belonging to the parent must be

interfered with by the observance of the duties of the marital relation. The wife cannot be held to "serve two masters," therefore the right of the husband must prevail.

By the common law, then, there is no difference between the case of a minor twelve years old, and one twenty years old, in effect as to the consequences of the contract. This being the common law, it can only be changed by statutory provisions such as was resorted to in England, 26 George II., ch. 33. This superseded the common law, but we have no such statute. If an action will lie on behalf of the parent for the procurement of the marriage of his daughter, without doing violence to her rights, she being a minor, what would be the consequence? Two thirds, perhaps more, of the females of our land have been, and most likely will be, married before they arrive at the age of twenty-one years. Litigation for speculation might be resorted to; and a strong motive would be furnished to the parent to withhold his consent. Long and well established usage promotive of the best interests of society would be disturbed by restraining marriage, and the public interests would be materially injured, morally and politically. In this case it is not pretended that anything was done *malâ fide* of which she or the plaintiff complains; but, on the contrary, that the parties were married in good faith with her full consent. The case stands upon the complaint of the parent on the ground of the loss of service. The books are, as far as we have been able to find them, barren of cases like this. Public opinion, as well as policy, co-operating with private interests and convenience, by long usage seems to have established the right of the husband to the society and service of the wife, though she be a minor, to the exclusion of that of the parent after marriage. Indeed, a natural sense of justice in the exercise of a mind uninfluenced by passion or caprice, would dictate the acquiescence of the parent in the legitimate results of this contract, when legally consummated, in which the dearest interests of his offspring are involved. We hold that parents should maintain and exercise a controlling advising influence over their children, and such is their right in the forming of matrimonial alliance; and that it is the duty of the child to abide by their counsel and requirement. But to render liable any persons, who might, in the spirit of kindness, actuated by pure motives, be present at the marriage ceremony, or afford countenance to the child on an occasion of so much interest, would be in violation of right, propriety, and public interest. Upon a full consideration of the case, in view of the public and private interests and rights involved in the question presented, we are of the opinion, in the absence of fraud, imposition, or violence affecting the rights of the child, and thereby affecting the relative rights and duties of parents, that this action cannot be maintained, and that the court erred in overruling the demurrer. Judgment reversed.

MASTER AND SLAVE.—EMANCIPATION.

As between master and slave, the master has the right of emancipation, except so far as it is restricted or taken away by statute.

[*Atwood* vs. *Beck*; 21 Ala. R., 590.]

One Atwood, deceased, bequeathed to certain of his slaves their freedom, and the sum of eight thousand dollars each, and directed that they should be removed by his executors to a free state. The bequests were resisted by the heirs of Atwood, and this bill was filed by them against the administrator, to test the validity of the bequests. One ground taken in argument was, that slavery was unknown at common law, and is but the creature of statute; and that the right to emancipate can therefore only exist so far as conferred by statute; and further, that the bequests of freedom being void, the legacy fell to the ground, for want of capacity in the slaves to take. The Chancellor decreed in conformity with this view, and the administrator assigned error to that portion of his decree. Errors were also assigned upon other points, distinct from this.

CHILTON, C. J.—Are the provisions in the will of Atwood which vest the bondage, title, and ownership of the slaves therein named in his executors, for the purpose of their being taken to a free state, so as to remain free, and directing certain sums to be invested for their benefit, valid bequests, according to the laws and policy of this state? The first and main inquiry is, are the bequests in violation of any law of the land? It is argued in opposition to them, that the right which a master has to manumit his slaves must be conferred by the statute, or it does not exist, inasmuch as the institution of slavery, as it obtains with us, was unknown at the common law, and, as a consequence, the right of manumission, or of enfranchising them, was unknown.

It has generally been conceded (and I have several times admitted it), that slavery, as it here exists, was unknown to the common law; but, upon an examination of the subject, I am strongly inclined to think there was a time in England, when negroes or heathens and infidels, were regarded as the subjects of property. This may be fairly inferred from British diplomacy and British legislation, as well as from elementary writers and several adjudications. In proof of this I need only refer to the treaty of Assiento, concluded on the 26th of March, 1713, between the kingdoms of Spain and Great Britain, whereby the latter secured to the British South Sea Company the privilege of furnishing 4,800 slaves to the Spanish colonies in America, annually, for thirty years; to the statute of 5 Geo. II., c. 6, § 4, which declares that negro slaves in America shall be liable to all simple contract debts as well as specialities; to the 32nd Geo. II., c. 31, in the preamble to which it is recited, that the trade to Africa is advantageous to Great Britain, and necessary in supplying its colonies with negro slaves. According to Swinburn, p. 84, 6th ed., there was a species of slavery in England distinct from villeinage; and the author of the Mirror intimates that it was lawful to hold negro slaves, Mir., c. 2, § 28. See also 1 Bl. Com., 423. *Ruth* vs. *Penny*, 2 Lev., 201.

20 Stir., 51. *Gilley* vs. *Cleve*, 1 Ld. Raym., 147. *Grantham's case*, 3 Mod., 120. Indeed, it was not until the decision of the case of James Somerset, in 1771–2, by the King's Bench, which called forth the great argument of Mr. Hargrave, that this question appears to have been fully settled in England in respect to slavery and the slave trade. (See 20 State Trials, London Ed. pp. 1 to 81.)

Without, however, going further into the old cases, those which I have cited may suffice to show that it is at least very questionable, whether at one period slavery, as it exists among us, was not recognised by the common law. But be this as it may, it is most unquestionably true, that slaves are now regarded by our law as chattels, and the owners thereof have an absolute unqualified property in them. And although such right might not have been recognised by the ancient common law, yet such is the genius and expansive nature of the common law, that it adapts itself to the necessities and exigencies of society, and when a new species of property is introduced, and the statute law is silent as to the rules by which it is to be governed, the common law embraces it, and its rules are applied to it, modified, of course, according to the nature of the property thus subjected to its governance. Navigation and transportation by steam were unknown to our common law ancestors; but no one will contend, that for this reason, the rules of the common law, which are adapted and suited to the nature of such improvements, do not apply. On the contrary, we have daily recurrence to the principles of the common law, to guide us in defining the rights and prescribing the duties of persons in reference to new inventions and improvements, which would otherwise be left to the arbitrary discretion of the judge.

The master, having an unqualified property in his slaves, may dispose of them in any way he pleases, unless restrained by some rule of law, or fixed or settled policy of the state.

The *jus disponendi*, or right of disposing of his property, is an inseparable incident to its absolute and unqualified ownership. This general power which the master has over the slave, both in respect to his treatment and manumission, has been controlled and guarded by legislative checks, prompted alike by humanity for the slave and security for the state. In considering the rules which apply to, and regulate this peculiar species of property, we must look upon them in the double capacity of chattels and intelligent beings. Considered in this latter capacity, our law, pervaded as it is by the spirit of Christianity, and founded on principles of humanity and benevolence, throws around them its protection. This protection is not only secured by the fundamental law, the constitution of the state (Art. vi. §§ 2 and 3), but many statutes have been enacted to secure the same end. The law punishes an assault and battery upon them by any third person (Digest, 545, § 41); prohibits the master or any one by his permission or authority, from inflicting cruel or unusual punishment upon them (ib. 431, § 1); secures to them in trials for offences above petit larceny, the right of trial by jury (ib. 474, § 18), and provides them counsel, in certain cases, at the public expense (ib. 473, § 13); and the master is bound both morally and legally to supply the slave's necessary wants, and he may not avoid this liability by voluntarily putting the slave away from him, without providing some

one to occupy the relation of master to him. (4 Ala., 66.) Subject to these and other restrictions which we shall presently notice, the right of the master to his slaves is the same with his right to any other chattel. He may sell and dispose of them without writing; may convey or bequeath them by his last will and testament, absolutely or in trust, precisely as other personal property; and but for the inhibition created by the statute laws, he might at pleasure renounce his property in them by manumission. If the written law was silent upon the right of emancipation, and no consideration of public policy was fairly deducible from it, what law would forbid the exercise of this right? Certainly not the common law; for the counsel yield this, when they contend that the institution was unknown to that law; but if it were recognised by it, the same right which the lord had to enfranchise his villein, would doubtless be awarded the master in respect of his slave. This right, by the ancient English law, the lord exercised at pleasure, by delivering the villein to the sheriff, and publicly proclaiming him exempt from the bond of servitude by manumission; then showing him open gates and ways, and delivering him a lance and a sword, he became a freeman (Crabbe's His. of Eng. Law, 82); but after writing became common they were manumitted or enfranchised by deed.

But if it is said the institution of slavery, as it exists here, is more analogous to that which obtained among the Romans, and that we should seek for analogies in the civil law, we reply that the master, according to that law, could liberate his slaves at pleasure. (Justinian's Inst. Tit. *Quibus modis manumittatur*, § 1.) See also *McClutchen* vs. *Marshall*, 8 Pet., 220. *Ferguson* vs. *Sarah*, 4 J. J. Marshall's, 103. And cases collateral in Wheeler's Law of Slavery; pp. 279–388.

We are, therefore, of opinion that as between the master and his slave, aside from all statutary prohibition, the right of manumission does exist, and is deducible not only from the absolute ownership of the master in the slave as a chattel, but from analogous rules applicable to slavery, as it has obtained in every civilized country, as far as our researches extend, and as sustained by numerous adjudications of our own country.

# LIVINGSTON'S
## MONTHLY
# LAW MAGAZINE.

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POST-OFFICE DEPARTMENT, Washington, Jany. 27, 1854.

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## CONDENSED REPORTS OF RECENT CASES.

LIVINGSTON'S

MONTHLY

# LAW MAGAZINE.

VOL. II. MARCH, 1854. No. III.

## CONDENSED REPORTS OF RECENT CASES.

### STATE SOVEREIGNTY.—SUITS AGAINST THE STATE.

**Statutory provisions directing in what manner and in what courts suits may be brought against the State by its subjects, are not repugnant to the common law, and should be liberally construed.**

[*The State of Arkansas* vs. *Curran*; 7 English's (Ark.) R., 321.]

THIS was a bill filed by Curran, against the State of Arkansas and other parties. The plaintiff obtained a decree, and the defendants appealed. It was contended on the appeal, on behalf of the State, that no suit could be brought against the State, except by consent.

The constitution of Arkansas provides that "the General Assembly shall direct by law in what manner and in what courts, suits may be brought against the Commonwealth." (Const. of Ark. § 22.) In pursuance of this provision, several statutes relating to the subject were passed by the legislature at the session of 1837–8. It was urged that these statutes were derogatory of common right, and must be construed strictly; and that so construed, they did not authorize the filing of a bill in chancery against the State, but only a suit at law. This form of the question led to an interesting historical inquiry, as to the liability of a sovereign power to be sued by its subject, whether it had been practically denied under foreign governments, particularly in England; so that the statutory provisions in question ought to be considered as subversive of the common law. It is this discussion which we present to our readers, omitting the other points considered in the opinion.

SCOTT, J.—The first question to be determined is that presented on the part of the State of Arkansas, who, by her counsel, contends that no suit can be brought against the State without her consent, and insists that no such consent has been given. And this question is to be solved by an exposition of our constitutional and statutory provisions touching the point in the light thrown upon them by the principles of the common-law and the regulations of the English statutes on this subject, or, in other words, by the general principles of public or municipal laws and the known usage of other enlightened nations. And it may be safely

assumed that it was never contemplated by the people when they instituted the government under which we live, that the rights of property should be less secure under our institutions, than under those of other enlightened and refined nations that had before arisen in the world. Because, it was the great purpose of all our regulations to elevate individual man by securing for him all his more important rights, that he might have a staid foundation and a free scope for the pursuit of happiness.

That the subject should be allowed to implead the sovereign in his own tribunals, and have justice meted out to him according to law, has been by no means unknown in governments far less popular and free than our own. Even the more despotic governments have not entirely denied this privilege. To say nothing of the governments of the ancient world whose history affords examples in point, those of Spain, France, Prussia, and England, have almost always, in some form or other, allowed the existence of this right in the subject, and in some instances have afforded him imperative process for its vindication.

Indeed the principle from which it springs has been, in theory at least, openly avowed by most, if not all governments, as existing in their roots. In the coronation ceremony of the King of Arragon, not only was it avowed in the language used when the crown was bestowed, but also by interposing between the person of the bestower and the king elect, an impersonation of law, thereby more emphatically to declare that the law was greater than the king, and was to remain between his subject and himself. Nor was this altogether an effect but an idle phantasm in the constitution of Spanish monarchy, as shown by the historical fact that after Don Diego, the son of Columbus, had wasted two years in fruitless solicitations at the court of Spain for the rights in the new world that had descended to him from his father, he resorted to the council of Indian affairs, and there obtained a legal sentence against Ferdinand; and thus by the integrity of that tribunal was placed in the enjoyment of rights that had been denied him by an unjust monarch.

Such, also, was the law of the Saxon Kings, and down to the time of Edward I. of England. The process by which these rights of the subject were conferred was not then precatory but mandatory,—"*command Henry, King of England.*" Nor was it known at what precise period the law of England was changed: it is known, however, that although for several centuries last past, the process has been changed to the petition of right, the rights themselves have not been otherwise any the less recognised. Since the change of the law in this respect, the subject, when a plaintiff, cannot proceed against the crown either for property or money, otherwise than by petition. But not so, however, when the crown enters the courts as a litigant in a suit instituted by itself as plaintiff. In that case the crown disrobes itself of its privileges and comes down to the equality of the subject, and henceforward in the litigation of the rights touching that subject matter, the subject has all the rights against the crown that under like circumstances he would have in the courts against another subject, his peer.

Doubtless upon the same foundation in a proper case, an injunction might issue from one of our courts against an unconscionable judgment

obtained by the State against a citizen even in case the laws provided no means for making the State a defendant in any case. But although this might be so, and in such a case a bill in chancery, of the class of bills not original, would be the rightful remedy, this would lay no just foundation upon which a citizen could claim a right to every remedy against the State which could be achieved by all others of that class of bills, and thus include cases of wrong where the State had not, by appearing in the courts as plaintiff, submitted to the jurisdiction, as seems to be contended for in argument. Because such a conclusion would be too broad for the premises, and consequently its greater part would have no logical connexion with that foundation. Nor could the subject, when a plaintiff in a suit against the crown, proceed, even by petition of right, any further than the petition itself, until there had been first an act on the part of the crown, which as an act on its part as defendant was precisely equivalent to that which it does as plaintiff when it goes into the court as such; which act was an endorsement on the part of the king. "Let right be done to the party;" after which, unless the Attorney General confessed the suggestion contained in the petition, and the relief was thereupon awarded, a commission was issued to the proper tribunal to inquire into its truth, where the king's attorney pleads in bar, and the merits were determined upon issues of fact or demurrer in every respect as between subject and subject.

This is all laid down in the old books, and is collected by the learning and industry of the several judges who deliver opinions *seriatim*, in the case of *Chisholm's Ex'r* vs. *The State of Georgia* (Dallas R., 419), from which we learn also that the Petition of Right not only lay for every sort of estate in lands, but for chattels real and personal, and for rights growing out of civil injuries, and those founded in contract express or implied. And that after the statute 8 Edward I., which so directed, all such petitions as touched the seal came to the king through the hands of the chancellor; those which touched the exchequer, through the exchequer; and those which touched the justices of the laws of the land, through the hands of the justices; and all others through some chief minister.

But although there was so much uniformity in the mode of presentation, there was some contrariety as to the endorsement made upon them on the part of the crown. And this contrariety seems to have determined the destination of the petition, so far as the tribunal was concerned, that was to be commissioned to dispense justice touching its subject matter. The usual endorsement, however, was in the general terms we have mentioned, and in all such cases the commission went to the chancellor. But if the endorsement was special, as to a particular tribunal, or otherwise, the commission corresponded. This contrariety arose in some cases from the prayer of the petition itself, as, if it was special that the command should be sent to the justices to proceed to examination, and award the justice due, the endorsement would be made accordingly; and then the justices might proceed without even any commission, the petition and the answer endorsed upon it giving them sufficient jurisdiction. And Lord Somers remarks that, after thorough examination, he had been unable to find even a single case where the general endorsement had been made in any case belonging to the revenue; the usual endorsement in

such case having been to the treasurer and barons, commanding them to do justice: sometimes, however, a writ was issued from the chancery, directing the payment of the money immediately, without taking notice of the barons. Thus it appears that an endorsement on the part of the crown was necessary in every case, and that it served the double purpose of signifying a submission to the jurisdiction of some court, and to point out the particular tribunal; the remedy by petition being, as remarked by Blackstone, matter of grace, and not matter of compulsion, could not proceed beyond the petition without a gracious dispensation on the part of the crown.

The extent of this remedy, as we have seen, seems to have been thus received as law until the time of Lord Mansfield, who, in the case of *Macbeath* vs. *Haldeman* (1 Durn. & East., 172), in support of the doubt suggested in that case, whether the petition would then lay for a money demand touching the public supplies, distinguished such cases concerning the current expenses and public supplies of government from the great mass of other cases where the subjects might have rights against the crown, upon the ground that, since the revolution of 1688, "the supplies had been always appropriated by parliament to particular purposes, and now whoever advanced money for public service trusts to the faith of parliament." He did not, however, determine the doubt suggested, because, as he said, it was not necessary in the determination of the case before him. But he gave color to its validity, not only by these remarks, but by the further observation that, in such cases, the proceedings would probably produce no effect, because, "if there were a recovery against the crown, application must be made to parliament, and it would come under the head of supplies for the year."

Such then was the state of the law at the time of our separation from the mother country. And upon this foundation, and the still deeper one that "the king is above the laws," which has been of the essence of the British constitution, ever since the time when feudal institutions not only usurped all property in the land, but also the entire administration of justice, is based our American notion, that a State cannot be sued by one of its own citizens without the consent of the government expressed in a constitutional form. A notion, which might have been plausibly challenged, if the question was an open one in the courts of this country, as a sickly exotic in American soil, where government is not prescribed to the people by a superior power, but is merely the organ of their own sovereignty, and the creation of laws enacted by themselves, and which derive all their obligatory force from the mutual consent of those who are to render them obedience. Because, in the absence of any affirmative law to create exemption from liability, and as between a citizen who created a state government and that government, on a question relating to any individual right, intended to be secured to that citizen by the institution of that government, there could be no more reason for refusing the right according to the established forms of law, than there could be for refusing the same right against another corporation that was also created by the people, not by themselves in person, but by the exertion of the organ of their sovereignty; unless it could be shown that they had first delegated certain powers, and then surrendered to the government

thus created, all their other powers, which is directly in the face of the Bill of Rights. Because, otherwise, in a government purely of laws, and deriving all its authority from law, there could not be any power or capacity that was above or exempt from law. Such power ought to be inactive in the people, to be exerted when deemed proper, according to the forms of the constitution, for a change of the laws; and such capacity might be created for the government by an affirmative exertion of those powers; but the government could not claim it as an inherent birthright, otherwise than the feudal kings did, by usurpation.

But the law is otherwise settled in all the courts of this country, and we shall so hold it, especially as it seems to have been so taken and accepted by the framers of our constitution, in making the provision that our Legislature should direct by law in what courts and in what manner suits may be commenced against the State. (Const. of Ark., Dig, p. 48, Sec. 22.)

In pursuance of this provision of the constitution, several statutes, more or less touching this subject, were enacted by the legislature.

It is insisted, however, that, in ascertaining what the legislature did provide in this connexion, a strict construction should prevail, and that nothing should be intended in favor of the citizen's right to sue the State that is not within the express and explicit letter of the statute. No good reason has been anywhere assigned, so far as our researches have extended, why a rule of strict construction should govern a question like this. We have seen that it is not inconsistent with the usages even of despotic governments for a subject to sue his sovereign in his own court of justice, and that this right in the subject was unqualified in the English government until the usurpation of the feudal kings, and was afterwards always allowed in a qualified form. And that by our constitution it is affirmatively directed to be provided for by legislative enactment, and not silently transferred within the sphere of their discretion like many other matters without any notice. And it is known, as we have elsewhere said (*Carnall* vs. *Crawford*, Co. 6 Eng., p. 619 and 621) that it was one of the objects of Magna Charta to place the right of Englishmen to apply to the courts of justice for the redress of grievances upon the footing of fundamental absolute rights, and this has certainly never been lost sight of in American institutions, but always kept plainly in view.

The right of a citizen to sue a State is not derogatory to common right, or subversive of the true principles of the common law, but is clearly in harmony with both, and it cannot be supposed that the people in convention, in directing that the legislature should provide in what courts and in what manner suits may be commenced against the State, intended that these provisions should be any other than such as would advance this right in the citizen to apply to the courts of justice for the redress of grievances." The spirit of the law then would rather demand a liberal than a strict construction. At any rate, we can perceive no valid reason, either intrinsic or extrinsic, why we should interpret these acts of the legislature as we would a criminal statute that had created a new crime or misdemeanor, or a civil one that had taken from a citizen a common law right. With these observations, we now proceed to the construction.

If we restrict the right of the citizen to sue the State to what are technically actions at law, and exclude chancery proceedings, and then restrict these actions at law, still further, to the recovery of money demands, excluding the recovery of property, and then further restrict these particular actions to judgment merely, as is contended for, many incongruities will appear in the law, both intrinsic and extrinsic. But all these incongruities will disappear if the statute be construed to allow the State to be sued as well in chancery as at law, and as well for property as for money demands, and then every provision of the various statutes touching the subject, will be found sensible, effective, and in harmony.

Adopting, then, the more liberal construction of the statute, that makes it effective and harmonious in all its provisions and phases, and which carries out fully the manifest design of the constitution, which, as we have said, was to advance the right of the citizen to resort to the courts of justice for the redress of grievances, we are of opinion that this objection raised on the part of the State cannot be sustained: on the contrary, the State was properly made a party.

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### PUBLIC OFFICERS.—ANNUAL SALARY.

**Where the duties of an office are specific, and not continuous during the year, an annual salary attached to the office, will be apportioned with reference to the duties performed, and not to lapse of time.**

(Ex parte *Lawrence;* 1 Ohio State R., 431.)

This was an application for a mandamus to compel the Auditor of State to pay to the relator the balance of his salary as Reporter for the late Supreme Court in Bank, for one year. The facts are sufficiently intimated in the opinion.

Bartley, C. J.—Where the duties of a public officer entitled to an annual salary, continue through the entire year, the salary accrues, and becomes payable for the space of time only during which the duties are required to be performed; and a repeal of the law creating the office before the expiration of the year, would stop the accruing compensation at the time when the duties of the office ceased.

But where the duties of an officer, entitled to an annual salary, are of such a nature that all his duties for the year may be performed and completed within less time than the year, the compensation for the entire year would be payable, in case the duties required by law for the year are performed, although the office might be abolished before the end of the year; and in such case, where there is only a partial performance before the abolishment of the office, the compensation should be apportioned to the duties performed, and not to the lapse of time.

The relator, as reporter for the supreme court in bank, was required to attend the sessions of the court, and report the cases decided. But one term of the court for the year was authorized, and the relator attended this term and reported the cases decided; and faithfully performed all

the duties required of him for the entire year, and although his office expired by the operation of the constitution of 1851, before the end of the year, yet having performed all the duties required of him by law for the year, he became entitled to the annual compensation.

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CORPORATIONS.—LIABILITY FOR TORTS.

A corporation may be liable in damages for instituting a malicious prosecution.

[*Goodspeed* vs. *The East Haddam Bank.* Connecticut Supreme Court: 1853. Not yet Reported.]

This was an action on the case against the defendants, a corporation, for falsely and maliciously prosecuting a vexatious suit against the plaintiffs, without probable cause. On motion of the defendants a non-suit was granted in the court below, on the ground that a corporation could not be made liable in its corporate capacity for a vexatious suit. The plaintiff now desired that the non-suit might be set aside, and a new trial granted.

CHURCH, C. J.—By a statute of this State, the prosecution of a vexatious suit without probable cause is made actionable. The principles which govern an action for this cause are the same as govern actions for malicious prosecutions at common law.

The claim of the defendants is, that a corporation cannot, from the nature of its existence, be held liable for any act or tort, the essence of which consists in intention—that a corporation cannot act maliciously. Formerly, it was supposed and frequently adjudged that corporations were not liable for torts. This idea has been exploded in modern times, and we see no more difficulty nor impropriety in holding them responsible for torts, wherein the gravamen is malice, than for others. The acts are the same and the injury is the same, in the one case as in the other. If there is a wrong, there must be an adequate remedy. If the act done is a corporate act, the intent with which it is done must be of the same character.

The suit brought by the bank was in the name of the bank, for the benefit of the bank, and the cause of action such as the bank within its chartered powers might prosecute; and thus, it must be presumed that it was prosecuted by the same agencies and instrumentalities as other suits in favor of the bank are commenced and carried on, viz. by its President and Directors. The directors of a bank are not mere servants and agents of the corporation, acting by a delegated authority, as are cashiers, attorneys, &c. They are, for all practical purposes, the corporation itself, and the motives and intents in corporate transactions are attributable to the corporation. (2 Metcalf, 163, 6; Paige's Ch. R., 502, 7 Wend., 31.)

It is objected that it is impracticable to prove malice in a corporate act. It may be more difficult than in ordinary cases, but from this it does not result, as a legal principle, that it is not provable. In an action

for a vexatious suit or malicious prosecution, the proof of want of probable cause in the action or prosecution complained of is proof of malice, so is the falsehood of a charge in an action for a libel. Corporations have no greater privileges or immunity than natural persons, and cannot be permitted to avoid responsibilities for acts working injury to others, by a resort to reasons or principles merely artificial or technical; such as might have been conclusive with the schoolmen of olden time, but are quite senseless when applied to the practical operations of the present day. The policy of the law requires that corporations be holden to the same liabilities as natural persons, so far as this can be done practically, and that their rights and privileges be equally secured and preserved.

A majority of the court are of opinion that the non-suit should be set aside.

Two of the judges dissented.

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CORPORATIONS.—SERVICE OF PROCESS.

It is a good plea to a declaration on a judgment obtained against a corporation of New Jersey, in another State, that the process was served upon its President when accidentally in that State. But if the Corporation sends its officers and agents into another State, and transacts its business there, it is liable to be sued in that State.

[*Moulin* vs. *The Trenton Life and Fire Insurance Co.* Supreme Court of New Jersey; November, 1853. Not yet Reported.*]

The action in this case was upon a judgment obtained in the State of New York. Two pleas were put in, the substance of which is stated in the opinion. To these pleas the plaintiff demurred.

ELMER, J.—When the case of *Mills* vs. *Duryee* (7 Cran., 481) was decided by the Supreme Court of the United States, a majority of the judges seem to have understood that a judgment of a superior court of one of the States, when an action was brought upon it in another State, would be, in all respects, of the same effect as a judgment of a court in the same State where the action was brought. Such was undoubtedly the opinion of Judge Washington, who, in the case of *Field* vs. *Gibbs* (Peters, C. R., 158), expressly states that if the judgment has been obtained against a person residing out of the State who was never served with process, or notified of the existence of the suit, the remedy must be had by application to the court which rendered the judgment.

Mr. Justice Johnson, who dissented, predicted that great embarrassment would arise from the decision, and his prediction was soon verified. The courts of the States yielded to the decision of the tribunal, which, in questions relative to the Constitution and laws of the United States, is superior to them, and therefore entitled to controvert them; but it was found indispensably necessary to prevent the most gross injustice, that it should be followed only in cases where, as the fact in that case was, the defendant appeared or was served with process. In almost every instance

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* This case is kindly furnished to us in MS. by his Honor Judge Elmer. It will appear in 4 Zabriskie, probably a twelvemonth hence.

where actions were brought upon judgments obtained without a due service of process or appearance, those courts sustained a special plea in bar, setting up that fact as a ground of defence. This course of decision has recently been sanctioned by the Supreme Court of the United States, in the case of *Darcy* vs. *Ketchum* (11 How., 165). That court has placed its decision on the ground that, "upon the principles of international law, a judgment rendered in one State, assuming to bind the citizens of another, was void within the foreign State, when the defendant had not been served with process, or voluntarily made defence, because neither the legislative jurisdiction nor that of courts of justice had binding force." The principles of international law in this respect, are simply those of natural justice. So that this decision accords in substance with the doctrine of the English courts, in regard to Scotch, Irish, and colonial judgments, which is, that such judgments are conclusive, unless proved to have been rendered upon principles contrary to natural justice. (4 Bing., 686 ; 2 Barn & Ad., 951. 12 Cl. & F., 368. 4 El. & E., 252.)

It is indeed highly probable that the case of *Mills* vs. *Duryee* would have been differently decided, had the law in regard to the conclusive character of foreign judgments been at that time understood to be as it has been since established. As it is, however, the only practical effect of the decision has been to require the facts relied on to avoid a judgment of the courts of a sister State, as having been rendered contrary to the principles of natural justice or international law, to be specially pleaded, instead of permitting them to be given in evidence under the plea of *nil debet*. Most of the American cases have adopted the reasonings of Chief Justice Parsons in *Biswell* vs. *Briggs* (9 Mass., 462), viz. "That judgments rendered in any other of the United States are not, when produced here as the foundation of actions, to be considered as foreign judgments, the merits of which are to be inquired into, as well as the jurisdiction of the courts tendering them. But such judgments, as far as the court rendering them has jurisdiction, are to have in our courts full faith and credit." It is obvious, however, that the jurisdiction of a court depends upon the law of the country to which it is subject. If a State law enacts, as is the fact in some of the States, that an advertisement of a notice of the pending of a suit in a newspaper shall authorize the defendant's appearance to be entered to an action against him, the courts of that State have jurisdiction over him in such a case, and are bound to exercise it. But when a judgment, thus obtained, comes to be the foundation of a proceeding in the courts of a State not bound by the particular law, in the absence of constitutional provisions, it will depend upon the law of comity what effect shall be given to it. By the law of comity, and by the constitution and laws of the United States, as now interpreted, the question will be whether, as Lord Denman expresses it in *Ferguson* vs. *Mahon* (11 Ad. & E., 179), the court had, *properly*, jurisdiction ; or, in other words, did it obtain jurisdiction in a way consonant to natural justice, for, in the absence of positive law, that is the only standard?

The record of a personal judgment in a court of another State of general jurisdiction, being *primâ facie* conclusive, unless it appears on its face that the defendant was not served with process and had no opportunity to defend himself, it is presumed that the judgment was duly

obtained. Hence a plea that undertakes to show it to be void for want of a process or appearance, must contain every averment necessary to prove it so, and must negative every legal presumption in its favor. (*Shemway* vs. *Stillwell*, 14 Cow., 292.) The first plea in this case avers in substance, that the defendants were not citizens or residents of the State of New York or existing as a corporate body under its laws, and that no process, or other legal notice of the suit, had been served upon them or any one duly authorized in their behalf, and that there was no appearance or defence in the case. The averment that the process was not served "on any one duly authorized in their behalf" is in my opinion ambiguous. One of the requisites of a good plea is, that it be certain; and where a thing is omitted which is necessary to give certainty to the statement, it shall be taken most strongly against the defendant. (Co. Lit. 303 b. ar. ad. pl. 235.) Here it is not alleged that the process was not served on any one duly authorized to act in any business on their behalf, and I think the averment must be understood to mean only, that it was not served on any one duly authorized to act in their behalf, in the matter of that suit. The second plea avers, that at and before the commencement of the suit upon which the judgment was obtained, the defendants were not residents or citizens of the State of New York, or existing as a corporation under or by virtue of its laws, and had no office or place of business within said State, and were not within its jurisdiction; that they were a corporate body under and by virtue of the laws of New Jersey, where the president and officers of the corporation resided and were citizens; and that the president of said company being accidentally in the city of New York, process was served on him, and that there was no appearance or defence in the suit.

No case, in which the precise question raised by these pleas has been adjudicated, was cited by the counsel, nor have I been able to find one. In the case of *McQuin* vs. *Middletown Man. Co.* (16 John., 5), Chief Justice Spencer delivering the opinion of the court, upon a question arising under the law of New York then in force, says: "If the president of a bank, of another State, were to come within this State, he would not represent the corporation here; his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." This was a *dictum* only, but it has been approved by Justice Rogers in the case of *Bushel* vs. *Com. Ins. Co.* (15 Serg. and R., 176), and similar language was used in the cases of *Middlebrooks* vs. *the Springfield Fire Ins. Co.* (14 Conn., 304), *Libbey* vs. *Hodgson* (9 N. Ham. 396), *Peckham* vs. *Perish* (16 Pick, 286), *Nash* vs. *The Rector, &c.* (1 Mills, 78). These cases turned rather upon the construction of the statutes of the different States, than upon a question how a foreign corporation might be subjected to process, so as to make a judgment against it conclusive in another State.

By the comity universally acknowledged in the States of this Union, and acted upon by the Supreme Court, in the case of *Bank of Augusta* vs. *Earl* (13 Pet., 519), corporations may send their officers and agents into other States, transact their business, and make contracts there; and in some instances the laws of the States prescribe the mode and terms upon which they may do so. I am not prepared to say that if they

choose to avail themselves of this privilege, natural justice will be violated, by subjecting their officers and agents to the service of process on behalf of the corporation they represent. On the contrary, I think natural justice requires that they shall be subject to the action of the courts of the States, whose comity they thus invoke. For the purpose of being sued, they ought in such cases to be regarded as voluntarily placing themselves in the situation of citizens of that State. A natural person who goes into another State, carries along with him all his personal liabilities; and there is quite as much reason that a corporation, which chooses to open an office and transact its business, or to authorize contracts to be made in another State, should be regarded as thereby voluntarily submitting itself to the action of the laws of that State, as well in reference to the mode of commencing suits against it, as to the interpretation of the contract so made. But I am quite prepared to say, that where a corporation confines its business operations to the State which has chartered it, a law of another State, which sanctions the service of process upon one of its officers or members, accidentally within its jurisdiction, is unreasonable, and so contrary to natural justice, and to the principles of international law, that the courts of other States ought not to sanction it. In such a case a president, or other officer, ought not to be considered as carrying with him his official character.

The first plea in this case, averring only that the process was not served on any one duly authorized to act for the defendants in the suit, does not exclude the presumption that the defendants may have kept an office, and habitually transacted their business in New York, and made the contract declared on there, and that the president, or some other officer of the company, may have been there transacting its business when the process was served, and is therefore, in my opinion, no bar to the action. The demurrer to this plea is well taken.

But the second plea does negative such presumption. It not only avers that the defendants, at and before the commencement of the suit in which the judgment was obtained, had no office or place of business in the State of New York, and were not within its jurisdiction, but that the process was served on the president when he was accidentally therein. Such a service did not properly give jurisdiction to the court of New York, so that the courts of this State ought to treat a judgment thus obtained, as binding here. In my opinion, this plea sets up a good bar to the action, and the demurrer thereto must be overruled, and judgment rendered for the defendants.

RAILROAD COMPANIES.—RULE OF DAMAGES FOR LANDS TAKEN.

If the expense of fencing the railroad track off from his remaining land, falls on one whose land is in part taken for a railroad, this should be considered in appraising his damages.
General benefits likely to result to the owner of such land, in common with all his fellow citizens, from the building of the road, do not go to diminish his damages.

[*The Milwaukie & Mississippi Railroad Company* vs. *Eble.* Wisconsin Supreme Court. Not yet Reported.*]

EBLE, the plaintiff below, brought this action to recover the value of his land, taken for the road of defendants below, under their charter, and also for damages, resulting to him from the construction of their road across his land. The Company appealed from the verdict and judgment of the court below, which they thought too favorable to the plaintiff. The appeal was based upon several grounds. We give simply that portion of the opinion which relates to the rule of damages and valuation.

Those provisions of the charter of the Company, which are material for the understanding of the case, are in substance as follows:

Sec. 10. Provides that it shall be lawful for the Company, or their agents, to enter upon any land for the purpose of exploring, surveying, and locating the route of their road, doing thereto no unnecessary damages; and when their route shall be determined, it shall be lawful for the Company, or their agents, at any time to take possession of, and use such lands, not exceeding four rods in width, along the line of the route, subject, however, to the payment of such compensation as the Company may have agreed to pay therefor, or as shall be ascertained as afterwards provided.

Sec. 11. Provides that when the compensation for the purchase of such land or for the damages of the owners of it, cannot be adjusted by agreement between the Company and the owners, the judge of the district court of the county in which the lands lie, shall appoint three commissioners to estimate the value of the land, taken or required by the Company; and all damages which the owner shall sustain, or may have sustained, by reason of the taking of the same for the road, taking into consideration the advantages as well as the disadvantages of the road to such owner.

It was alleged upon the appeal that the court below erred in instructing the jury as to the rule of damages and valuation. The charge of the judge on this point was as follows:—

"There are two questions for the jury to pass upon. *First*—What is the value of the appellant's land, taken by the railroad company? The evidence shows that three and sixty-five-hundredths of an acre is taken. For this you should allow the actual salable value, at the time of the appraisal by the railroad commissioners. It is not a question how much a man would ask for a strip of land, taken as that was taken, through his farm; but what was that quantity of land, of that quality

* Our report is condensed from the opinion of the Court, and other papers, for which we are indebted to Judge Hubbell.

worth, at that time, for sale or use, by the acre. And you are to judge of it by the selling value of other similar lands, in that neighborhood, and by the uses to which it may be put.

"*Secondly*—You are to find, over and above the price of the land taken, what damage the appellant has sustained by reason of the taking of this land by the company. The constitution required payment of the value of the *land taken*—but the statute gives the owner, further, his damages, if there be any, by reason of the taking of his land, over and above benefits. On this branch of the case you will be guided by your examination," (the jury visited the premises, by order of the Court,) "and by the testimony. A question has been raised by the defendants' counsel, whether the cost of fencing along the line of the railroad may be taken into the account. I think, on this point, that if you find it is, or will be necessary for the appellant to erect fences along the line of the railroad, you may allow such sum as would enable him to erect, and keep up continually, a fair, suitable fence. If the land is arable or tillable, or is or may be used for meadow or pasture, a proper fence, to protect the crops or confine the cattle, should be regarded; but if it is wild and unoccupied, you may consider what, if any fence, would be required, and make a proper allowance for it, when you think it will be required. On this subject, your guide may be, to give the appellant so much money as will make him as good, as if the railroad had not been located on his land. So, also, the damages to the appellant, in other respects, in case you should find any. Your inquiry will be, what sum will make his farm as valuable as it would be if the railroad had passed over his neighbor's farm, and not over his. If the road is of general advantage to the neighborhood, or town, where the appellant lives, the appellant is entitled to share this common benefit with the rest of his fellow-citizens. If, however, it is of any especial advantage to him—if it makes any particular lot more salable—if it drains some part of the land, or if it fertilizes some part—or if it opens an avenue to him not common to others—all such, and similar advantages and benefits should be considered by you, and be deducted from the damages which you may find.

Hubbell, J.—With respect to the "rule of damages" laid down for the jury, two grounds of objection were urged in argument:

1. The allowance of anything for fences was improper. 2. General, as well as special benefits, ought to have been taken into account.

Now the railroad company were not required by their charter to fence the line of their track, but they were authorized to cut through the fields or forests of private persons, and take the land in their own way and time, subject only to the payment of "the *value* of the land so taken, or required, and the *damages* which the owner or owners thereof shall have sustained, or may sustain, by the taking of the same, over and above the *benefits* which will accrue to such owners, from the construction of such railroad." The expense of fencing the land, which remained to the appellant, was certainly no part of the "value" of the land "taken." And, inasmuch as the necessity for such fencing was created by the company, by their act of taking, the expense of erecting and maintaining a suitable fence, along the line of the road, across the appellant's land, was properly included in his "damages." The question whether

any fence was necessary, and if any, what kind of one, was properly left to the jury.

As to the other ground of objection, it is true the charter furnishes no absolute rule for estimating "benefits." The Court must infer, that a just and reasonable rule was intended. If general benefits, accruing to land-holders from the construction of this extensive improvement, were to be regarded, then those who are subjected to a forced sale of their property, to furnish the track, must suffer greater losses and inconveniences than the rest of the community. It is a poor argument to say the legislature had the constitutional power to inflict this injury upon particular individuals; and that it has happened in many other cases, where private property was taken for public use. The question is, was such the design of the law-making power, in the present case? It is believed not. It is due to the legislative wisdom of the State, to impute to it a design in accordance with general principles of justice and equality. And such a design is consistent only with the limiting of the benefits, to be set off against damages, to such special advantages as each proprietor shall be found to have derived from the making of the road across his land. Looking at the entire clause of the charter, I think we must arrive, by construction, at the same conclusion. We must hold that the phrase, "the construction of the road," as there used, does not mean the completion of the whole work, but the construction of that particular portion which occupied the appellant's land. The benefits were to be deducted from the damages. In estimating damages, the jury were expressly limited to such as resulted from "the taking" of the appellant's land; and it is but reasonable to suppose that general benefits were not to be offset against special damages. In every view of the case, the charge of the circuit judge upon this point, must be held correct.

But again, it is claimed that the Court erred, as to the rule of damages *and valuation*. If it is intended that a *separate* and distinct valuation of the lands was not required, then clear and definite language, thrice repeated, is without force and effect.

Beyond a question, the jury were first to estimate and determine the "value of the land taken," and then, further, the "damages which the owner might sustain," by the "taking of the same." And, to preserve the constitutional right of the individual to "compensation" for his property, thus "taken for public use," the company were required to pay such *value* in full, without deducting therefrom any portion of the benefits, estimated, or calculated to be likely to flow to him from the construction of the road. This construction alone is consistent with the requirements of the constitution, and with the spirit and letter of the company's charter.

RAILROAD COMPANIES.—RULE OF DAMAGES FOR LANDS TAKEN.

Where plaintiff's land was taken for a railroad, and his damages appraised, and adjoining land of his used for a cartway by the company, while constructing their road;—Held that his claim for compensation for such use, was not barred by the appraisal.
But a further claim advanced by plaintiff, for damages to his adjoining land, by reason of blasting of rocks during the necessary excavations for the track, was held to be so barred.

(*Sabine* vs. *The Vermont Central Railroad Company.* Vermont Supreme Court. Not yet Reported.*)

This was an action for trespass brought to recover damages for alleged injuries sustained in consequence of the building of defendants' railroad across plaintiff's land.

The defendants' charter, in providing the mode by which they might acquire the right of way over such lands as their route required them to cross, authorized the appointment of commissioners of appraisal, empowered "to determine the damages which the owner or owners of such land or real estate may have sustained *or shall be likely to sustain by the occupation of the same for the purposes aforesaid.*"

The plaintiff's damages resulting from the actual taking of land for the track appear to have been duly appraised by the commissioners. He now advanced another and further claim against the defendants for having used land of his not taken for the road, as a cartway, while engaged in building their road; and also, for damage done by them, by means of blasting rocks in the course of the excavations for their track; which operation had resulted in covering up with the fragments of the rock a considerable tract of land adjoining that taken for the road.

REDFIELD, C. J.—Perhaps the only question of any difficulty in this case is that in regard to the jurisdiction of the commissioners appointed to estimate land damages under the defendants' charter, in respect to the appraisal of consequential damages to land not taken. It will be noticed that the words of the act are of very great extension in regard to the appraisal of consequential damages to all owners of land or real estate any portion of which is taken; which is the plaintiff's case.

The owner is to have appraised to him all damages which he shall be likely to sustain by the occupation of his land for a railway. This must include, not only all direct loss in being deprived of the use of the land taken, but all consequential damage to the remaining lands which may fairly and reasonably be supposed to have been within the contemplation of the commissioners in making their appraisal.

This too must have reference not only to the running of the road, but to all special and peculiar annoyances during the construction of the road. But it must be of course the ordinary and probable consequents of such acts and operations; that which is not of the ordinary course of consequents, is not to be taken into the account, and what is not to be taken into the account in making the appraisal, is not of course barred by the appraisal and payment of the damages.

* Received from Judge Redfield.

The claim for the use of plaintiff's land by defendants, for a cartway during the construction of their road, would seem to come clearly without the limits of the appraisal. The most that could be said to come fairly within the appraisal, in regard to the use of the adjoining lands, for passage during the construction of the railway, would only extend to gaining access to the land taken. It could scarcely be claimed, that the use of the adjoining land, for a cartway, could be fairly within the contemplation of the appraisal. It could not then be known with any degree of practical approach towards certainty, how much material at any given point it would become necessary to bring from a distance, or at what point it would be necessary to use the adjoining land as a cartway, or whether any such necessity would occur. And indeed, it is ordinarily supposed, that the cartways will be upon the six rods taken for the railway. And where a different course is pursued, it is ordinarily done for convenience, and not of necessity. So that such a use without permission, is ordinarily a mere trespass. There seems, therefore, to be made out a right of recovery to this extent.

But the other portion of the plaintiff's claim seems not to come fairly, certainly not clearly, within the same general principle. And it presents a question undoubtedly of very considerable difficulty, when we are inquiring for the mere equity of a particular case. But all cases, and especially cases involving such mighty interests, and ultimately such vast consequences, in the infinity of their number and variety, must be decided upon such general principles of reasoning and justice, as commend themselves to the common mind, regardless of those trivial inequalities in detail, which no degree of finite labor or wisdom can fully prevent or equalize.

In this case, if ledges or loose stone of considerable size are upon the land taken for the track of the road, at the time of the appraisal, it would naturally be in the mind of the appraisers, that the stone must be removed in the course of constructing the road, and being of a character only removable ordinarily by blasting, it must occur to them, that fragments, more or less, must be thrown upon the adjoining lands, and that it would be necessary to go upon the land, to remove such fragments.

It would be the duty of the company, no doubt, to conduct this blasting in such a way as to do the least possible injury to the adjoining lands, and when, by such operation, stones were thrown without the limits of the land taken by the road, by unavoidable necessity, to remove them as soon as it could reasonably be done. And the fact that such fragments were embedded in the soil, could make no difference. It could not be allowable for them to suffer the stone to remain thus. There is no necessity for this, but there is for throwing them, to some extent, upon the adjoining land.

It seems probable enough, from the facts detailed in the present case, that the damages sustained arose chiefly from not removing the stone in due season. But the recovery below went upon the ground, that the defendants had no right to throw the stone upon the plaintiff's land. It therefore becomes necessary to consider that question. The Massachusetts courts seem to have considered, that for damages of this character, no action will lie, if there is no want of ordinary care on the part of the

company. And no doubt, for any such want of common care, whether, in conducting the operations of construction, or in not relieving a party from necessary temporary loss or inconvenience, the action should be case and not trespass. And the party is not to be made a trespasser, *ab initio*, by mere nonfeasance. (*Stoughton* vs. *Mott*, Boston Law Reporter, Oct. 1853.) Indeed it has not been claimed that the plaintiff might maintain trespass for this injury, except upon the ground that the defendants had no right to throw the stone upon the plaintiff's land.

It seems to us very obvious, that the right of the defendants to blast these rocks, in a reasonable and prudent manner, did exist, and was conferred by the decision of the commissioners appraising the plaintiff's damages. And if we test the effect of that adjudication by the ordinary test of the extent of judgments, in merging claims, viz. that every claim is barred which was presented, or which might have been presented under the particular question, before the commissioners, there will be little ground of question remaining. The plaintiff had the right to claim, and was of course bound to present his claim, for all damages he was likely to sustain, not only in the running of the road, by fires of engines, and the like, but in the building of the road, in the ordinary mode, where blasting is universal, and this not in respect of the land taken only, but of the remaining land, as has been repeatedly decided. And if this claim was not presented, when it might have been, it is barred upon general principles universally recognised, that no one shall be again called in question for what was, or what might and should have been adjudicated.

It seems to us, that to deny the defendants the right to excavate by blasting, is to deny them the right to construct their road; and if they have the right to blast, they are no more liable, or in any different form, from what all citizens are for the prudent conduct of their legal business, which may be attended with injurious consequences to others. If the throwing of fragments of rock is an unavoidable consequence, then so far as the owner of land taken is concerned, his probable and perspective damages as to his remaining land is to be appraised, and if he does not make such claim, or if more damage occurs than was anticipated at the time, he is equally barred, as if his claim had been presented, or less damages had occurred, than was appraised.

As we have intimated, it is clear that for blasting at improper seasons, thereby causing unnecessary damage to crops, and for doing it in an imprudent or unskilful manner, or for not removing the stone in due time, and that must be considered the shortest time in which it can be done, and with the least injury to the land, the party is entitled to his remedy in the proper form. But if the defendants' charter confers the right to do the act, of which, as we have said, there can be no doubt, it seems to us impossible to allow the action of trespass for the original act, thereby treating it as unlawful. And it is too well settled, to be now brought in question, that no mere omission, or want of care or skill, in doing a lawful act, will render such act a trespass by relation.

In a late English case (*Sharod* vs. *London and Northwestern Railway Co.*, 4 Law and Equity R., 401), it is held that a railway train being under the control of a rational agent, the company are never liable in trespass for any damages done by such train. This is undoubtedly by

the general rule in relation to master and servant, unless where the master gives express command to the servant to do the act. But if that rule is to be applied to railway companies to the fullest extent, they are never liable in trespass, for it is scarcely supposable that they would, by a corporate vote, direct an act which should prove unlawful. Certainly they would seldom do this. Most of the acts of railway companies in their construction and operation, are done by their servants and agents, without any corporate vote. It would be absurd to conjecture for a moment, that the multifarious detail of the business of such a company came even before the board of directors. It is almost of necessity, in order to secure efficiency and dispatch with any tolerable degree of safety, intrusted, almost without restriction, to one directing and controlling mind. All the acts then of this superintendent, and of his subordinates, which are from necessity the merest instruments, and the more so the better, as railroad men tell us, should be regarded as the acts of the company. (*The Vt. C. R. Co.* vs. *Baxter*, 22 Vt. R., 365.)

The case of *Dodge* vs. *The County Commissioners*, 3 Met. R., 380, goes to the full extent of the decision we here make, possibly further. And the Mass. Statute in regard to appraisal of damages to the owner of land, a portion of which is taken, is the same as the statute of this state.

The result is, the judgment of the court below must be reversed, as to all the damages awarded upon this latter point; and if the party chooses to waive this portion of his claim here, the judgment for the remainder will be affirmed in this court.

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### FIXTURES.—MACHINERY.

**The criterion of fixtures—what kinds of machinery in woollen manufacturing are fixtures?**

(*Teaff* vs. *Hewitt;* 1 Ohio State R., 311.)

This was a bill in chancery, filed by Teaff against Hewitt, and sundry others, as creditors of Hewitt, to obtain appraisement and sale of certain mortgaged premises, and to restrain the creditors made defendants, from detaching certain parts of the mortgaged premises, and selling them on execution as chattel property.

The mortgage described the mortgaged premises as lot No. 322, "on which is erected a woollen manufactory." It conveyed the lot with the appurtenances, upon condition that if Hewitt paid certain notes at their maturity, then the mortgage was to be void, otherwise to be of full force, &c.

The bill also represented, that the creditors who were made defendants, claiming to have recovered judgment against Hewitt, had issued executions, and placed them in the hands of the sheriff, and that the sheriff had levied upon certain machinery in the manufactory, viz. the steam engine, boilers and fixtures belonging to it, carding machines, wool-picker, spinning jacks, power looms, &c., &c.

It appeared from the pleadings, that the boilers were planted upon timbers, which were planted in the earth, with a brick furnace built under

them, and adapted to their use; but that they rested upon the timbers to which they were bolted, and by which they were supported, rather than upon the brickwork. The steam engine was fastened upon timbers, which rested their foundation upon a stone wall laid in the earth. The other machinery, the carding and spinning machines, power looms, &c., were connected with the motive power of a steam engine only so far as to confine the different parts in their proper places for use. It was also stated in the answers, that such machinery, as carding and spinning machines, power looms, &c., is generally fastened to the floor by cleats, or other similar modes of attachment, for the purpose of keeping the various parts steady, and in a suitable position for use; but that they are easily detached, as were these, without injury to the machinery itself, or the building; and that such machinery is usually subject to be removed from one part of the building to another, to suit convenience, and sometimes sold, and other machinery supplied to take its place, whenever the interest of the business for which it is used may require.

The plaintiff contended that the articles of the machinery were attached to the realty, and made part of the freehold; and that they were embraced in the mortgage held by him. The defendants maintained that the machinery was chattel property. The court below enjoined the sale of the steam engine and boilers upon the executions, but considered the carding and spinning machines, power looms, and other appendages thereof, were chattel property, and refused to enjoin their sale. From this judgment Teaff, the complainant, appealed.

Bartley, C. J.—Was the property in controversy covered by the mortgage on the realty, or was it chattel property?

The doctrine of fixtures, by which the nature and legal incidents of this property must be determined, is involved in no inconsiderable degree of uncertainty, and not settled by consistent and clearly defined principles of general application. It rests upon a long course of judicial decisions, made at different periods of time, and under a variety of circumstances, and running into numerous complex and conflicting distinctions, arising out of the peculiar relation of the parties, and the peculiar circumstances of each particular case, so that it has been found extremely difficult to reduce this branch of the law to any consistent and uniform system.

According to the decisions, an article may be a fixture, constituting a part of the realty, as between vendor and vendee, which would not under like circumstances be such as between landlord and tenant; so, also, an article may be such fixture as between heir and executor, which, under like circumstances of annexation, would not be such as between tenant for life and the remainder-man or reversioner. And also, according to the decisions, an article affixed to the premises for purposes merely agricultural, may pass by a conveyance of the freehold as a fixture, which would not be such fixture under like annexation, if erected or affixed for the purpose of trade or manufacture; and an article attached to the realty may be removable at one period of time as a chattel, which with the same annexation at another period, would not be removable, because it constituted a part of the realty. In some cases it has been determined that in order to constitute a fixture, the article should be so united by physi-

cal annexation to the land, or to some substance previously belonging thereto, that it cannot be detached without injury to the property; while in other cases, articles have been determined to be fixtures, and as such to pass by a conveyance of the freehold, with but a slight attachment to the realty, and in some instances without any actual, but by simply a constructive attachment.

The term fixture itself, although always applied to articles of the nature of personal property which have been affixed to land, has been used with different significations, until it has become a term of ambiguous meaning. And this ambiguity, which has attended the use of this word in various adjudications, and by different writers, has been productive of much of the uncertainty which has perplexed investigations falling under this branch of the law. The term fixture has been used by various writers, and in numerous reported decisions, as denoting personal chattels annexed to land, which may be severed and removed against the will of the owner of the freehold, by the party who has annexed them, or his personal representatives. (Amos & Ferard, on the Law of Fixtures; 2 Gibbon's Manual of the Law of Fixtures; 2 Grady's Law of Fixtures, 1; 2 Bouvier's Institutes of American Law, 162; 2 Kent's Com., 344.)

There may be some propriety in this definition of the term when confined in its application to the relation of landlord and tenant, or tenant for life, or years, and remainderman or reversioner, to which several of the elementary authors have chiefly confined their attention. But it does not appear to express the accurate meaning of the term in its general application. An article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property, passes to the executor, and not to the heir, on the death of the owner, and may be taken on execution and sold as other chattels, &c. A removable fixture as a term of general application, is a solecism—a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property. A tree growing upon the soil, or any other article belonging to the freehold, may be converted into a chattel, by a severance from the land.

It is an ancient maxim of the law, that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all the legal incidents and properties, and cannot be severed and removed without the consent of the owner. *Quidquid plantatur solo, solo cedit*, is the language of antiquity, in which the maxim has been expressed. The term fixture, in its ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and legal incidents of the property; and it appears to be not only appropriate, but necessary to distinguish this class of property from movable property possessing the nature and incidents of chattels. It is in this sense that the term is used, in far the greater part of the adjudicated cases. (Co. Lit. 53, a. 4; 2 Smith's Leading Cases, 114; Chancellor Kent's note (a); 2 Kent's Com., 345; *Dudley* vs. *Ward*, Amb., 113; *Elwes* vs.

*Mawe*, 3 East., 57.) It is said that this rule has been greatly relaxed by exceptions to it, established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject.

Amos & Ferard, in their treatise on the law of fixtures, mention the division of the subject into removable and irremovable fixtures, and give a definition of each class (Amos & Ferard on Fixtures, p. 11). This classification of fixtures may be essential to a correct understanding of the double sense in which the term has frequently been used in the authorities; but it would not seem to be needed for any other purpose.

The civil law has been recommended for its simple and natural classification of property into the obvious and universal distinction of things movable and things immovable, things tangible and things intangible. Whatever would be movable property by the civil law, would fall under the denomination of chattels personal by the common law. And everything attached to the freehold, *perpetui usus causa*, belonged to the *res immobiles* of the civil law (Taylor's Elements of the Civil Law, 475). This simple division of property seems to be founded in reason and the nature of things.

The great difficulty which has always perplexed investigation upon this subject, has been the want of some certain, settled, and unvarying standard, by which it could be determined what amounts to a fixture, or what connexion with the land will deprive a chattel of its peculiar legal qualities as such, and make it accessory to the freehold. Fixtures belong to that class of property which stands upon the boundary line between the two grand divisions of things real and things personal, into which the law has classified property; a distinction not merely artificial, but founded on reason and the nature of things—regarding not only the natural qualities of immobility on the one hand, and mobility on the other, but also the legal constitution and incidents to which each class respectively is subject. In the great order of nature, when we compare a thing at the extremity of one class, with a thing at the extremity of another, the difference is glaring; but when we approach the connecting link between the two great divisions, it is often difficult to discover the precise point where the dividing line is drawn.

There are some matters having their foundation in things real, which are, nevertheless, by the principles of the common law, attended with some of the qualities of things personal, and therefore termed chattels real. Such are estates less than freehold, easements, rents, emblements, &c. These, however, are easily identified, and have no connexion with fixtures. And again, there are others which, though movable in their nature, and apparently falling within the definition of things personal, are, in respect of their legal qualities, of the nature of things real. Belonging to this class are heir-looms, and things in the nature of heir-looms, which by special custom pass with the inheritance; also, animals, *ferœ naturæ*, not domesticated, so as to fall under the denomination of chattels, yet so confined to the realty as to become appurtenant to it, such as deer in a park, pigeons in a pigeon house, conies in a warren, fish in a pond, &c.; also, articles sometimes called fixtures on the

principle of constructive attachment, such as the deeds and other papers which constitute the muniments of title to the land, the keys of a house, &c., which belong to the realty, and pass with it, not upon the principle of fixtures, but upon the principle of being necessary and essential incidents to it, and of no value abstracted from it. None of these articles acquire their legal qualities upon the principle of a fixture.

A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it, and part and parcel of it. But the precise point in the connexion with the realty, where the article loses the legal qualities of a chattel, and acquires those of the realty, often presents a question of great nicety and sometimes difficult determination. And a review of the authorities, from the time of the Year Books down to the present period, does not furnish any one established and certain criterion of universal application by which this line of demarcation can be clearly ascertained and pointed out. It may, however, be useful in the determination of this case, to examine the authorities and endeavor to extract from them the most uniform, reasonable, and consistent principle, as a standard by which a fixture can always be determined.

If there be anything well settled in the doctrine of fixtures, it is this—that to constitute a fixture it is an essential requisite that the article be actually affixed or annexed to the realty. The term itself imports this. (*Walker* vs. *Sherman*, 20 Wend., 636.) But the mode or degree of the annexation which is essential, is a matter about which the authorities are greatly in conflict. A number of the authorities, both English and American, decide, that to give chattels the character of fixtures and deprive them of that of personalty, they must be so firmly affixed to the real estate, that they cannot be removed without injury to the freehold, by the act of removal, and apart from the abstraction of the thing removed. (*Charrar* vs. *Chuffeete*, 5 Den., 337.) This doctrine, however, does not furnish a criterion of uniform application, or one which will bear the test of examination. Millstones in a mill, and even the water-wheel, and a great variety of other articles well established by authority and universally admitted to be fixtures, may often be removed without any actual injury to the structure or building, by the act of removal. Fences which are undeniably fixtures, and so admitted by all the authorities referring to them, although actually annexed to, and in connexion with the land, are yet not let into the ground or fastened to anything which is embedded into the earth. The doors, windows, window-shutters, &c., of a mansion-house, may be raised or removed without any actual or physical injury either to the building or to the article removed; so, also, in a mill, with the millstones, hoppers, and bolting apparatus, as usually fixed in a mill; yet it has never been questioned that these articles are fixtures.

There is another class of authorities in which it is laid down that the true test of a fixture is the adaptation of the article to the *use* or *purpose* to which the realty is appropriated, however slight its physical connexion with it. (*Farrar* vs. *Stackpole*, Green., 157; *Gray* vs. *Holdship*, 17 Serg. & R., 413.) And some cases have gone so far as to make this the only test, and even dispense with actual or physical annexation. (*Voorhis* vs. *Freeman*, 2 Watts, 114; *Pyle* vs. *Pinnock*, Ibid. 391.)

This rule is in conflict with those authorities which make the mode of the physical annexation *the test*, and it will not bear examination as a criterion of general application. If adaptation and necessity for the use and enjoyment of the realty, be the sole test of a fixture, then the implements and domestic animals necessary for the cultivation of a farm, and a great variety of other articles subject to the use of the land, or its appurtenances, which never have been, and never can be recognised as such, would be fixtures. It would utterly confound the rule by which the rights of the vendor and vendee, heir and executors, &c., have been heretofore governed.

In some of the authorities the *intention* of the party making the annexation, is laid down as the true test of a fixture. (*Winslow* vs. *The Merchants' Insurance Company*, 4 Metc. R. 304. Dane's Ab. 3, 156.)

From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture.

1. Actual annexation to the realty, or something appurtenant thereto.

2. Appropriation to the use or purpose of that part of the realty with which it is connected.

3. The intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the *party* making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

This criterion furnishes a test of general and uniform application, one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases; but it is believed to be at variance with the conclusion in but few of the well considered adjudications.

Adopting this as the criterion, there will be found no occasion for giving an ambiguous meaning to the term fixture; no occasion for denominating an article a fixture at one period of time, which, with the same annexation, would not be such at another period; no occasion for determining that to be a fixture as between vendor and vendee, which, under like circumstances, would not be such as between landlord and tenant: or finding that to be a fixture as between heir and executor which, under like circumstances of annexation, would not be such as between tenant for life and remainder-man or reversioner. (*Sturges* vs. *Warren*, 11 V. Rep., 433.)

It is true the time of the annexation and the relation and situation of the parties, may constitute very important considerations in ascertaining the intention and object of making the annexation? Why is a tenant for life or for years or at will, favored with the right of removing articles which he attaches to the land during his term. All that is required of a tenant, is to leave the land in as good condition as it was when he received it. When, therefore, a tenant erects expensive structures for carrying on his trade or business which can be removed without their destruction or

material injury to the freehold, the presumption is a rational one, that it was not the *intention* of the tenant to make them permanent accessions to the freehold, and thereby donations to the owner of it. The *intention* of the tenant, clearly inferable from his situation and relation to the landlord, is the real foundation of the right of removal with which he has been favored. It is true, other reasons of great subtlety and considerations of public policy have been frequently assigned for this right of removal, but they are doubtless attributable in some degree to a laudable desire on the part of courts to carry out the real intention of the party.

It is said that the right of removal must be exercised by the tenant before the expiration of his term, or in some cases within a reasonable time afterwards: that the tenant can remove things which he has attached to the land for the purpose of trade or manufacture where not contrary to some prevailing custom, or where it can be done without material and essential injury to the freehold, or where the erections in themselves were strictly chattels in their nature before they were put up, and can be removed without being entirely demolished or losing their essential character or value. (Amos & Ferard on Fixtures, pp. 40 & 44.) All these circumstances furnish considerations bearing upon the intention of the tenant in making the erections, and their temporary nature and want of adaptation to the permanent use and enjoyment of the freehold, and show the application of the criterion here adopted.

The rule requiring actual or physical annexation to the realty, is not affected by the few articles sometimes said to belong to the realty, upon the principle of constructive annexation, but which, as has already been observed, are not in fact fixtures, but mere incidents to the freehold, and pass with it upon a different principle from that of a fixture. But the extent and mode of the annexation must depend much upon the nature of the article itself, the use to which it is applied, and other attending circumstances.

The rule requiring adaptation to the use or purpose of the realty was recognised in some of the earliest authorities. (*Lawton* vs. *Salmon*, 1 H. Black, 259.) And it has been adjudged in numerous cases, that where an article attached to the realty is accessory to a matter of a personal nature, it should be considered itself as personalty and removable as such. (*Lawton* vs. *Lawton*, 3 Atk., 14; *Dudley* vs. *Ward*, Amb., 113.) Where articles were attached to the land for the purpose of trade or manufacture, which purposes were considered matters of a personal nature, the articles have been declared not to be fixtures.

Numerous exceptions to the rule, that whatever is attached to the realty becomes a part of it, have been adopted in favor not only of trade and manufacturing, but also in favor of matters of ornamental and domestic use. Some of these exceptions have been based upon public policy, some upon the nature of the article itself, and some upon the ground of the articles being accessory to matters of a personal nature, and not strictly subservient to the purposes of the freehold.

But if the third requisite of a fixture, here adopted, had been applied in the numerous cases of exceptions in favor of tenants, of trade and manufacture, and of matters of ornament and domestic convenience, there would have been but little difficulty in determining that they were not

fixtures. In all these cases, the article could have been removed without essential injury to the freehold or the article itself. In no case is a fixture created without the apparent intention of the party making the annexation, to make a permanent accession to the freehold. Therefore to change the nature and legal qualities of a chattel into those of a fixture, this intention must plainly appear; and if it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and it must be deemed a chattel. In some instances the intention to make the article a fixture may clearly appear from the mode of attachment alone, as where the removal cannot be made without injury to the property. But where the attachment is slight, this intention must be gathered from the nature of the article and other attending circumstances.

Our criterion of a fixture must, however, be subject to some other qualifications. The rights of parties connected with an article which has been attached to a realty, are liable to be controlled by an established custom, or the special agreement of the parties.

By an application of this criterion to the case before the court, there is no difficulty in determining the character of the property in controversy. There was here actual connexion with the realty, but it was slight. The bands and straps by which the machinery was attached to the motive power of the steam engine and boilers, could easily be thrown off, and the cleats used to keep the machinery steady were such as to admit of removal without injury to any property. The use to which the machinery was applied was that of a trade or the business of manufacturing, in favor of which the authorities have made numerous exceptions to the principle of fixtures.

It may be said that the building in which the machinery was placed was parcel of the freehold, erected and used for the purpose of manufacturing, and that the machinery was accessory to it, and therefore adapted to the use to which that part of the realty with which it was connected, was appropriated. But in truth the building itself was rather the accessory than the principal. It was in fact accessory to the business carried on by the machinery within it, and if not firmly affixed to the earth in such manner as to show it to be a permanent structure, and intended for a permanent appropriation of that part of the land to which it was attached, it would be movable property itself. This is supported by high authority. (*Elwes v. Maw*, 3 East., 38.) The business of manufacturing, it has been said, is a pursuit personal in its character, and not strictly subservient to real estate, or essential to the enjoyment of the freehold. Hence arose the distinction, for a time recognised by the courts, between articles for agricultural purposes, or those erected for the purpose of trade or manufacture.

I would not be understood as saying, that the use to which the property in this case was applied was decisive of its legal character. A manufacturing establishment may unite in the same pursuit portions of real estate with articles of personal property, retaining all the essential qualities of chattels. And in the various pursuits of man, real estate and chattels are frequently united for the same use, without either being made accessory to the other.

That this machinery was not *intended* as a permanent accession to the freehold, is so clear as scarcely to call for remark. Neither the mode of the annexation nor the use to which it was applied, indicated any design to change the character of the property. The nature of the property itself, the customary removal of it from place to place, its liability to be changed with other articles of the same kind, show that it was not intended to be made a permanent accession to the freehold, and therefore was not covered by the mortgage of the complainant.

It has been said that the description in complainant's mortgage covered this property even if it were personalty. It is true, that where a manufactory or mill is conveyed by any general name or description which embraces all its essential parts as such manufactory or mill, the machinery and all necessary parts of the establishment pass, whether affixed to the freehold or not. But in this case, the language in complainant's mortgage, "*on which is erected a woollen manufactory*," added to the description of the mortgaged premises by the number of the lot, &c., is descriptive of the realty merely.

It is claimed on the part of the complainant, that the common rule as to fixtures has been somewhat changed by the progress of society and the advancement in the application of machinery to the purposes of manufactures, so as to create a different criterion of a fixture in a manufactory from that which applies to articles attached to the realty under other circumstances. And upon this ground, it is claimed, that all the essential parts of a manufactory, whether actually attached to the realty or not, become fixtures, and as such pass by a conveyance of the freehold.

To what consequences would such a criterion lead if fully carried out! A cabinet maker erects a building for a cabinet shop, and furnishes it with all the necessary machinery, tools, &c., for an establishment for the manufacture of furniture, some of which may be attached to the building. All the machinery, tools, &c., necessary for the establishment, whether actually attached to the building or not, would be parcel of the freehold. The application of the same rule would convert the benches and essential implements of the shoemaker's shop, and the machinery of other mechanics and manufacturers, into realty. And inasmuch as some carry on their business on a much larger scale than others, a question of no little difficulty would arise, as to the quantity of machinery which should be deemed essential for a complete establishment, and what might be rejected as unessential, and therefore chattels.

Several decisions have been made in some of the States, recognising the doctrine, but the great weight of authority both in England and in the United States is against it. (*Lawton* v. *Lawton*, 3 Atk., 15.)

His Honor then reviewed the following cases, which in his opinion clearly sustained the doctrine that the machinery in question was chattel property. (*Swift* v. *Thompson*, 9 Conn., 63. *Gale* v. *Ward*, 14 Mass., 352. *Cresson* v. *Stout*, 17 Johns., 116. *Sturgis* v. *Warren*, 11 Vt., 433. *Trapps* v. *Harter*, 3 Tyrw., 604. *Duck* v. *Braddyl*, McClelland, 217; 13 Price, 455. *Walker* v. *Sherman*, 20 Wend., 636. *Vanderpoel* v. *Van Allen*, 10 Barb. S. Ct. R., 157. *Buckley* v. *Buckley et al.*, 11 Barb. S. Ct. R., 43. *Toffe* v. *Warnick*, 3 Blackf., 111. *Sparks* v. *The State Bank*, 7 ib., 469. *Alison* v. *McCune*, 15 Ohio, 729. *Powell* v. *Mon-*

*son & Brimfield Manufacturing Co.*, 3 Mason's R., 347.) He concluded the discussion of the question as follows.

Fixtures in a manufacturing establishment must be governed by the criterion which applies to fixtures in other situations. The machinery and implements in such an establishment, though necessary for the business carried on, which are not permanently affixed to the ground or to the building, and which can be removed without injury to the building or the articles themselves, and their places supplied with others of a similar kind, are not fixtures but personal property. But that portion of the machinery which is firmly affixed to the ground or to the building, and which from its nature, mode of attachment, use, and relative situation of the party placing it there, was plainly intended to be permanent, is parcel of the freehold.

The question as to the steam-engine and boilers is not directly involved in this case, the court not being called upon to interfere with the decree of the May term for the sale of the mortgaged premises, from which no appeal was taken. The application of our principle, however, plainly shows these articles to have been fixtures, and therefore parcel of the mortgaged premises. They were bolted and permanently fixed upon timbers, and stone and brick foundations laid in the earth. The building itself was permanent, and designed and used for a manufactory, and these articles of a ponderous character adapted to the production of the motive power of the establishment, were firmly affixed to the structure of that portion of the freehold appropriated to the purposes of the business, and clearly intended to be permanent.

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### PARENT AND CHILD.—LIABILITY FOR SUPPORT.

**Where upon a divorce the custody of the children had been assigned to the mother;—Held, that the father was not liable to the mother for her expenses incurred in their support.**

[*Finch* vs. *Finch*; Connecticut Supreme Court, 1853. Not yet Reported.]

The plaintiff and defendant in this case, had formerly been husband and wife; but were divorced by the Superior Court upon the application of the wife. Pursuant to the laws of Connecticut applicable to the case, the Court, in decreeing the divorce, assigned the care and custody of the minor children to their mother. The mother took them from the father, into her own charge; and now brought this action against the father for the support and maintenance of the children, furnished by her under these circumstances.

CHURCH, C. J.—We think that the principles of the common law afford no warrant for this claim.

It does not appear from this record that the defendant, the father of the children, has ability to support them, nor do we know but the plaintiff, the mother, is possessed of an ample estate for that purpose.

During the coverture, the husband is solely liable at law to support his dependent children. The wife has no ability to maintain them. Her separate existence is merged legally in her husband; her means and

ability are transferred to him. He is entitled to her personal estate and to the use of her real property. Her obligation, as parent, to maintain her children is suspended during the marriage-relation. By the divorce, the relation of husband and wife alone is terminated—the obligation of parents exists. By the laws of nature and by municipal laws, a parent is bound to support his or her helpless offspring; the duty and of course the obligation are mutual and common. It would seem to follow necessarily, that the parents standing in no other relation to their children and to each other, should contribute to the maintenance of their children according to their means and ability. Such contribution may be enforced in equity.

Besides, the facts in the case repel all inference of a contract or promise on the part of the father to support the children. They have been taken from him without his consent; he has no power to direct or control them; he cannot retain their services or obedience, nor even prescribe the kind or amount of necessaries suitable for them. A parent by the common law is not liable to an action by a third person, a stranger, as the mother now is, for necessaries furnished to his children, without some express or implied agreement. The natural or moral obligation does not constitute a promise on his part, it is only a strong consideration for a promise. (1 Bl. Comm., 488, Chitty's Notes. *Mortimer* v. *Wright*, 6 Mee. & W., 482. *Leaborne* v. *Maddy*, 38 Eng. Com. L. R., 449. *Gordon* v. *Potter*, 17 Vt. R., 350. *Cook* v. *Bradley*, 7 Conn., 57.)

Judgment for the defendant. Two of the judges dissented.

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RIGHTS OF COUNSEL.—READING AUTHORITIES.

**While arguing a cause, counsel have the right to read from books pertinent quotations, adopting them and making them part of their addresses; but this must be done in good faith, as a mode of *argument* or *illustration*.**

(*Legg* vs. *Drake*; 1 Ohio State R., 286.)

This action was brought by Drake, the plaintiff below, to recover for false warranty and deceit, in the trade of a horse.

In the argument of the cause, the counsel for defendant desired to read to the court and jury certain passages from Youatt's work on Veterinary Surgery. He had previously proved by a witness, that the work was a reputable and standard authority on the subject, but had not exhibited to the witness the particular book from which he proposed to read, nor offered it as evidence in the cause. The plaintiff objected, and the court refused to allow the counsel to read from the book in argument, and to this ruling counsel excepted. Other exceptions to ruling upon the trial not necessary to be noticed, were also taken.

Bartley, Ch. J.—The question presented is not whether standard books on matters of science and art, when pertinent, can be proven and given in evidence on the trial of the cause; but whether counsel, in their address to the jury, have a right, by way of argument or illustration, to read extracts from works on science not given in evidence. While the

right of a party to be heard by his counsel, on the trial of his cause, is not questioned, and is often of great service in the investigation of questions, both of law and of fact; yet inasmuch as this privilege may be liable to abuse, to the great hindrance and annoyance of courts in the progress of business, the extent and manner of its exercise must in some measure rest in the sound discretion of the court. Although unlimited license in range and extent is not allowed to counsel, in their addresses to the court and jury, yet no pertinent and legitimate process of argumentation should be restricted or prohibited. And it is not to be denied but that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical, or other publication, may, by way of argument or illustration, be not only admissible, but sometimes highly proper. And it would seem to make no difference whether it was repeated by counsel from recollection, or read from a book. It would be an abuse of this privilege, however, to make it the pretence of getting improper matters before the jury, as evidence in the cause.

In the case of *Rex* vs. *Courvoisier* (9 Carr. & P., 362), it was adjudged that counsel had a right to read to the jury the general observations of a learned judge, made in a case tried some years before, on the nature and effect of circumstantial evidence, if he adopted them as his own opinions, and made them part of his address to the jury.

But in the case before us, the bill of exceptions does not show that the passage of Youatt's work on veterinary surgery, which the counsel proposed to read, had any relevancy to the cause on trial, or came within the appropriate and legitimate scope of argument.

It is not, therefore, made to appear sufficiently, that any right of the party was interfered with to his injury in this respect; and a judgment will not be reversed on writ of error for the action of the court below, in regard to a matter resting within its discretion.

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### COMMON CARRIERS.—RESTRICTION OF LIABILITY.

**Although a carrier cannot (in New York) restrict his liability by mere *notice*, he may do so, by special contract with the owner.**

(*Moore* vs. *Evans;* 14 Barbour's (N. Y.) Supreme Court R., 524.)

This action was brought against the defendant as a common carrier, to recover the value of certain goods delivered to him for transportation.

On the trial the plaintiff showed that the defendant kept an office at Albany, and was engaged in the business of transporting goods upon the Erie canal, and occasionally west of Buffalo, on the lakes. On the 23rd September, 1848, the plaintiff, through his agent, applied to the defendant at his office in Albany, to know upon what terms he would transport the goods in question. He agreed to carry them from Buffalo to Milwaukie for $5, and the negotiation between the parties closed by giving the following receipt or memorandum, introduced in evidence on the trial by the plaintiff.

"Received, Albany, Sept. 23, 1848, from C. L. Moore, for J. L. Weaver, five dollars freight on 1435 lbs. from Buffalo to Milwaukie, by vessels on the lakes, *owner's risk*, 5 barrels, 5 sacks, 6 boxes.—1435 lbs.

"L. E. EVANS."

This receipt being given, and the money paid, the goods were accordingly delivered by the plaintiff on board the defendant's line of canal boats at Albany. The goods did not reach their place of destination; the vessel on which they were shipped at Buffalo, having been run into, upon Lake Huron, on a dark and stormy night, by a steam propeller, and sunk.

The judge who tried the cause, held that the defendant could not, by special agreement, restrict his liability as a carrier; and that, notwithstanding the agreement for the transportation of the goods, the common legal obligation rested on him. The principal question upon the trial was whether this ruling was correct.

WRIGHT, J.—Could the defendant, as a carrier, restrict the obligation which the law otherwise imposed upon him, by a special agreement? The plaintiff himself showed that the goods were undertaken to be transported under a special agreement, exonerating the carrier from the rigid liability imposed by the common law. The legal import of the contract in this case, was to carry the goods at the *risk of the owner*. Unless, being a carrier, the defendant was prohibited from entering into such an agreement with the owner of the goods, he incurred only the responsibility of an ordinary bailee for hire, and became answerable only for misconduct or negligence, of which there was no pretence.

At common law, a carrier is liable for all losses, except those occasioned by the act of God or the public enemies; unless there has been a fraud practised on him by the owner of the goods, in which case he will be absolved from the consequences of any loss not occasioned by negligence or misconduct.

In England, for about thirty years, the doctrine prevailed, that the carrier might restrict his liability by *notice;* and in one or two reported *nisi prius* cases, he was allowed to accept with the whole risk on the owner, restricting his own liability to that of an ordinary bailee for hire. Eventually parliament interfered, and restricted the liability of carriers to the common law rule. In this State, carriers have not been permitted by their own act to restrict their liability. Notwithstanding any attempt by notice to specially accept property for transportation, they have been rigidly held responsible for losses, except occurring by the act of God or the public enemies, or where there was fraud on the part of the bailor. (*Hollister* vs. *Nowlen*, 19 Wend., 234; *Cole* vs. *Goodwin*, Ib. 251.)

But may a carrier, by express contract, restrict his common law liability? In England, it had been assumed as good law that he might. (Aleyn. 93, 4 Co. 84; *note to Southcote's case*, 4 Burr., 2801; 1 Vent., 190, 238; 2 Taunt., 231; 8 Mees. & Welsb., 433.)

It is upon the whole an open question as yet, in this State. (His Honor quoted from the cases of *Hollister* vs. *Nowlen*, 19 Wend., 234; *Gould* vs. *Hill*, 2 Hill, 623; overruled in *Parsons* vs. *Monteath*, 13 Barb. 353, S. C.; 1 Liv. Law Mag.; *Cole* vs. *Goodwin*, 19 Wend., 151; to show the state of the authorities of this State on this question.)

In Pennsylvania, it has been held by the courts, that the common law responsibility may be limited or abridged by the special terms of the acceptance of the goods; and that this may even be effected by a general notice, clear and explicit, and brought home to the employer. (16 Penn. R., 67.) The Supreme Court of the United States, while denying the right of the carrier to restrict his obligation by a general notice, hold that it is competent for him to do so by a special agreement. (*New Jersey Steam Navigation Co.* vs. *Merchants' Bank*, 6 How., 382.)

The law declares the liability of the common carrier; and it has been said that it is not the form of the contract, but public policy, which determines its extent. When a duty or liability is imposed by law upon an individual acting in a particular capacity, he cannot of course, if he act in that capacity, make a valid contract to be discharged from such duty or liability. But there are no considerations, unless those of public policy, forbidding a person usually exercising the employment of a carrier, to drop his public employment, and specially to contract with the owner of the goods as a private person, incurring no responsibility beyond that of an ordinary bailee for hire. If the owner enter into a special contract, he virtually agrees that in respect to a single transaction, the carrier is not to be regarded in the exercise of his public employment.

It is urged that the carrier should not be permitted to contract, in any particular case, to incur a limited liability, as the tendency would be to encourage negligence, fraud, or crime. But other insurers of goods, with analogous obligations, are allowed to contract. And in any particular instance, the duties of the carrier's employment do not concern the public, but only the parties to the transaction. The tendency to encourage negligence, fraud, or crime, is no greater than in many other business occupations; and I do not see why public policy demands that this particular class of insurers of property should be prohibited from making such terms with their employers as shall mutually be agreed upon.

Were extraordinary privileges conferred by law on the carrier; were it an office that could be enjoyed by few, with the tendency to a monopoly of the peculiar business, there might be some show of reason to guard against imposition, by holding in all cases the carrier to the stringent obligations of the common law. But this is not so. The business is open to all who may choose to engage in it, and it is full to repletion. The owner of the goods is not to be imposed upon. He may still insist that they shall be carried, with the common law responsibilities attached; and there can be no such thing as a combination among those engaged in the business of carrying, by exacting special agreements, to throw off these responsibilities. The owner of the goods may contract with a private person, and the latter will be only answerable for misconduct or negligence. The law imposes upon the carrier, acting in his public capacity, certain obligations, which he cannot by his own act avoid. The employer knowing this, and desiring that the property shall be intrusted to his custody, is willing to enter into a special agreement whereby the carrier's common law liability is diminished. Why should he not be permitted to do so? I confess that I cannot perceive any stronger reasons against it than in the case of any other insurer of property. I am unable to appreciate those overwhelming considerations of

public policy which demand, that because an individual is usually engaged in the employment of a carrier, he should have the common law liabilities fixed on him in all cases, even though the owner of the goods be willing to contract specially with him as a private person.

In the present case, the agreement was a special one, and in writing. The goods were to be transported at the risk of the owner. The agreement exempted the defendant from losses arising out of events and accidents; he was answerable, as a private person, for his own negligence or misconduct, or that of his servants or agents. But the burden of proving that the loss was occasioned by a want of due care, or by gross negligence, was on the plaintiff. In the absence of any special agreement restricting liability, it is enough that the owner prove the undertaking of the carrier, and that the goods did not reach their destination. The law presumes against the carrier, until he proves that the loss was not the result of his own negligence. It is otherwise, when the carrier's liability is restricted by special agreement. If negligence or misconduct be alleged, the burden of the proof is on the employer. In this case, there was absence of proof to show negligence or misconduct on the part of the defendant. When the defendant proposed to prove the circumstances under which the loss occurred, with the view of showing that there had been no want of ordinary care, the judge excluded the evidence, holding the defendant to the strict liability of a carrier at common law, and virtually deciding, that although he showed affirmatively that the loss occurred without negligence on his part, as he could not restrict his common law liability, it was no defence.

We think the judge erred in holding, upon the whole case, that the defendant could not by special agreement restrict his liability as a carrier.

Judgment of circuit court reversed, and new trial ordered.

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BANKING.—POWERS OF CASHIER.

It is not within the powers of a cashier to assign a judgment rendered in favor of his bank.

(*Holt* vs. *Bacon*; 25 Miss., 567.)

The bill in this case alleged that the President, Directors, and Company of the Planters' Bank transferred to complainants a judgment recovered against Holt and others, the appellants, who were defendants below, and prayed a decree against them for the amount of the judgment and interest. The answer denied the transfer, and called for proof. The proof showed that whatever transfer was made was by act of the cashier.

The question was, whether a transfer by the cashier was sufficient to sustain the allegation of the bill.

FISHER, J.—*Primâ facie*, the cashier of a bank has no authority to transfer judgments in its favor, or to dispose of its property. His authority, in this respect, extends only to negotiable instruments. The president and directors were the only persons who could legally make the

transfer. If the cashier acted as their agent in the matter, this fact ought to have been shown in evidence.

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STATUTE OF LIMITATIONS.—PART PAYMENT BY CO-DEBTOR.

A part payment by one of several joint debtors, not partners at the time, does not justify the inference of a new promise by the other, so as to remove the bar of the statute. *Whitcomb* vs. *Whiting* (Doug. 629) is not law in Pennsylvania.

(*Coleman* vs. *Fobes*. Pennsylvania Supreme Court. Not yet Reported.*)

The facts sufficiently appear in the opinion.

LOWRIE, J.—Coleman and Sartwell (the latter as surety) gave their joint promissory note to Fobes, and within six years a small payment was made by Sartwell, and six years after the maturity of the note suit is brought, and the defendants rely on the statute of limitations. The court below ruled that the payment by one removed the bar of the statute as to both. Is this right? It is supported by *Zent* vs. *Hart* (8 Penn. State R., 337), which is founded on English authorities, but which is certainly inconsistent with the principles applied in this State to the statute of limitations.

We cannot but regard the case of *Whitcomb* vs. *Whiting* (Doug., 629), which declared that a payment by one joint debtor was a new promise by all, as being at the bottom of all the confusion that exists in the decisions in England and in this country on the subject of this statute in its relation to joint debtors. That case has often been questioned (*Atkins* vs. *Tredgold*, 2 Barn. & C., 23; 1 Barn. & Ald., 467), and it is contrary to the earlier case of *Bland* vs. *Haselring*, 2 Vent., 151. It sets an example which cannot be consistently followed out, because it violates the cardinal rule requiring a new promise, though it professes otherwise. It is therefore not surprising to find it carried to the extreme of sanctioning the judgment that a payment of part by the distribution of a bankrupt's estate (2 H. Bl., 340), or by a bankrupt debtor in fraud of his creditors (3 Ad. & E., N. S. 339), will revive the debt as to the others; and that payment by a principal on the principal security will revive a collateral engagement by a surety (11 Mees. & W., 329). In none of these cases is there anything like a new promise; for neither the party thus declared to be bound, nor any one constituted as his agent, had done any act from which a new promise by him could be inferred.

Several modern English cases fully sustain *Whitcomb* vs. *Whiting* (*Burleigh* vs. *Stott*, 8 Barn. & C., 36; 10 ib., 122; 2 Bing., 306). And because it seemed to be carrying the precedent too far to decide that, where one of two joint debtors is dead, either the survivor or administrator of the deceased could revive the debt against the others; therefore the distinction is attempted, that their liability is severed by the death of one of them, and consequently the power of each over the other is gone

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* This case is furnished us by Judge Lowrie.

(*Slater* vs. *Lawson*, 1 Barn. & Ad., 396). But this is an artificial distinction depending merely on the form of the remedy; not attempted in the analogous case of *Jackson* vs. *Fairbank*, 2 H. Bl., 340, and not at all affecting the substantial relations of the debtors to each other—a distinction good enough, perhaps, for breaking the influence of a bad precedent, but a very bad one, if allowed to affect real promises.

The distinction put forward in *Pitman* vs. *Foster*, 1 Barr. & C., 248, is no less artificial. There, where one of the joint debtors was a single woman, and had become married before the new promise by her co-debtor, it was held that, because a married woman could make no contract, no new promise could be implied as against her from that of her co-debtor. Why not? All these cases assume the principle that the power of co-debtors to act for each other is of the essence of the relation of co-debtors: and that could not be changed by her own act of contracting marriage. If it is not so, then the new promises were artificial and not real, being implied from a supposed duty in order to fit the form of action; and why not admit such an implication, even against a married woman?

All these exceptional cases are illogical evasions of the principle of *Whitcomb* vs. *Whiting*, a vice with which the case of *Wood* vs. *Braddick*, 1 Taunt., 104, is not chargeable, where one was allowed to bind his late co-partners; though, by their dissolution, they had revoked the power of each over the other, so far as a mutual agreement could have that effect.

Equally illogical is the conclusion in *Davies* vs. *Edwards* (7 Exch. Rep., 22), that a payment out of the bankrupt estate of one debtor does revive the debt as to the others: thus overruling the more logical judgment of *Jackson* vs. *Fairbank*.

We have said that the case of *Whitcomb* vs. *Whiting* violates the rule that requires a new promise; and yet it professes to follow it. But how? It declares that each joint debtor is the agent of the others, and thus makes the admission of one, the admission, and hence the promise of all. But in *Perham* vs. *Raynal* (2 Bing., 206), this principle seemed to need some aid; and there joint debtors are regarded as jointly concerned, and therefore as standing in a position analogous to that of co-trespassers, in the case where the declarations of one are evidence against the others. In a Georgia case, this idea takes another form of expression, and the right of one to affect all is put upon their "community of interest" (*Cox* vs. *Bailey*, 9 Ga. R., 467. S. C. 1 Liv. Law Mag., 19). It is evident that it would not do to enlarge the influence of this idea; for it would most seriously endanger the rights of property in all cases where there is a joint or common ownership or possession. It is an unsuccessful effort to justify the assumption that joint debtors have power over each other. It is not true that joint debtors, as such merely, are the agents of each other. Partners are so, while the relation continues, and this is part of the law and essence of that relation; but not so of joint debtors. The distinction is palpable, when it is noticed that a joint contract by persons not partners can have no inception, and cannot be changed in time, amount, subject, form, or substance, without the several acts of each of the joint contractors. Their interests are joined only in so far as the contract joins them; that is, in liability to the creditor. The contract or under-

standing by which they agree together to enter into the joint liability to the creditor is one thing, and the joint contract with the creditor another thing. Their relations to each other are defined by the former, and their joint relations to their creditor by the latter: and their relations in one aspect in no way define those in the other. Whether, as among themselves, one is to pay all, or half, or more, depends not upon the contract with the creditor, but on their own arrangement. One alone may be the real debtor, and may be so abundantly able to pay that the others may be said to have no real interest in the matter. And even if they are as among themselves equal debtors, there is no real community of interest, for by enforcing contribution each is made to answer for his true share.

To carry out the doctrine of *Whitcomb* vs. *Whiting*, would allow a debtor hopelessly bankrupt, to bind others by his new promise, and even to be hired to do it, and thus far the example has led in England (3 Ad. & E., N. S., 839.) And it would of course allow a surety to make a new promise that would bind his principal, though the principal alone would be affected by it, which appears to be the present case. A distinction has been attempted on the supposition that there is more virtue in a part payment, than in a new promise; but the supposition is groundless, and we know of no decision that gives it countenance. It is an act from which a new promise is inferred; but if such an inference is to be a thing of truth and not of fiction, it can only be of a promise by him who did the act. In *Whitcomb* vs. *Whiting*, it is said that the co-debtor has the advantage of a partial payment, and therefore must be bound by it. How had the advantage? In no way, if the fact of payment charges him, when without it he would have been discharged, or merely substitutes the duty of contribution for that of direct payment.

In Pennsylvania we have adhered more closely to the rule that there must be a new promise, or circumstances from which one can be properly implied, in order to remove the bar of the statute; and this has saved us from many errors into which others have fallen. Thus with us, a new promise by one late partner, as such merely, does not bind the others. (17 Serg. & R., 128. 5 Whart., 538. 1 Penn. R., 13. 3 Watts & S., 345. 7 Penn. State R., 438.) These decisions are in direct opposition to the case of *Whitcomb* vs. *Whiting;* for by the dissolution of a partnership, partner debtors became mere joint debtors; and the case of *Zent* vs. *Hart* is a plain departure from our own decisions. We hold that a general direction in a will to pay debts, and an acknowledgment to a stranger, do not remove the bar of the statute, because no new promise can be inferred from such acts. (1 Binney, 209. 8 Penn. R., 508. 4 ib. 55, 17 ib. 286 S. C. 1 Liv. Law Mag., 114.) Elsewhere all these points have had a contrary decision. (1 Taunt., 104. 4 Cow., 494. 1 Salk., 154. 1 Esq. Ab., 305. 4 Esp., 45.) In order, therefore, to preserve as nearly as possible the consistency of our own decisions, to avoid the evasion of the cardinal rule that requires a new promise, and to escape the confusion into which others have fallen, we must regard our case of *Zent* vs. *Hart* as a mistake.

We are of opinion that a partial payment by one of several joint debtors, not partners at the time, is not such an act as justifies an infer-

ence of a new promise by the others so as to remove the bar of the statute of limitation. Judgment reversed.

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PAYMENTS.—WHEN INVOLUNTARY.

A payment is only to be considered involuntary, when it is made to prevent the detention of person or property, or to procure their release from detention.

(*Mays* vs. *The City of Cincinnati*; 1 Ohio State R., 268.)

The plaintiff in error sued the city of Cincinnati, to recover back money paid by him for certain licenses to sell provisions in the markets of the city, which had been granted to him under certain ordinances passed by the city authorities providing for the licensing of hucksters. He maintained that the ordinances were in conflict with the charter of the city, inasmuch as they authorized a demand for payment for a license, whereas the charter forbade the taxing of the employment of selling provisions in the market. And on this ground he claimed to recover back the sum illegally charged him for his license. The counsel for the city maintained that whether or not the charge for licenses was illegally asked, it was voluntarily paid, and could not now be recovered back. The court of appeal first considered the question raised regarding the validity of the ordinances, which authorized the exaction of payment for licenses. They held that these were invalid; that the charge was illegal; and then proceeded to consider whether the plaintiff could recover back the sum paid. We give the substance of their remarks on this point.

RANNEY, J.—The ordinances being illegal and void, our remaining inquiry is, can the plaintiff recover the money he paid to obtain the licenses, in this action for money had and received? The bill of exceptions shows that the licenses were issued upon his own petition, and that the money was paid without protest, or any notice whatever that he intended to recover it back. Under these circumstances, it is claimed by the city that the payment was voluntary, and no implied promise arises to refund it. This claim is resisted by the plaintiff, and it is insisted that the payment might well be made to avoid prosecution for the penalties, and prevent interruption to his business; and such payment would not be considered voluntary; and one of his counsel says, he "makes the assertion, without fear of successful contradiction, that in all the authorities extant, not one can be adduced to contradict the plaintiff's right to recover." In this conflict of opinion between counsel, we must be guided by the law as we find it, in the settlement of this question. Was the payment in the legal sense voluntary or involuntary?

His honor then proceeded to review and quote from the following authorities, from which the rule laid down in the opinion was deduced. (*Brisbane* vs. *Dacres*, 5 Taunt., 143; *Wilson* vs. *Ray*, 10 Ad. & E., 82; *Attee* vs. *Backhouse*, 3 Mees. & W., 644; *Oates* vs. *Hudson*, 5 Law & Eq. R., 470; *Elliot* vs. *Swartwout*, 10 Pet., 150; *Boston and Sandwich Glass Comp.* vs. *The City of Boston*, 4 Metc., 181; *Clark* vs. *Dutcher*, 9 Cow., 674; *Silliman* vs. *Wing*, 7 Hill, 159; *Abell* vs. *Douglass*, 4

Den., 398.; *Fleetwood* vs. *The City of New York*, 2 Sand. Sup. Ch. R., 475; *Mayor of Baltimore* vs. *Lefferman*, 4 Gill, 425; *Morris* vs. *The Mayor of Baltimore*, 5 ib., 244; *Robinson* vs. *The City of Charleston*, 4 Rich., 317; *Smith* vs. *The Inhabitants of Readfield*, 27 Me. R., 145.) He summed up the doctrine of these cases as follows:

This unbroken chain of authority seems to warrant the conclusion, that a payment of money upon an illegal or unjust demand, when the party is apprised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where he can only be reached by a proceeding at law, he is bound to make his defence in the first instance; and he cannot postpone the litigation by paying the demand in silence, and afterwards suing to recover it back. We have carefully examined the cases cited by the plaintiff's counsel, and can find nothing in any of them that militates against these conclusions. We will not say that no case can be found that would warrant the plaintiff's recovery; but we can say that if any such exists we have been unable to find it. The justice of the case, no less than the law, is against him. He has enjoyed the monopoly which these illegal ordinances were calculated to afford; and it is fair to presume that he has got back the money paid for the licenses from his customers in the increased price of his commodities. To tax these same customers to pay it to him, and others similarly circumstanced, again, would not be right, if it was law; but most clearly it is neither.

Judgment affirmed.

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### WILLS.—DISHERISON OF HEIR.

A Testator cannot disinherit one of his lawful heirs in respect to property not disposed of by his will, by means of any words of exclusion in his will, though such be his evident intention.

[*Crane* vs. *Doty*; 1 Ohio State R., 279.]

This was a bill filed to obtain construction of the will of Daniel Doty. The will contained several specific bequests, among which was the following:—

"I will to my daughter Sarepta, who has had $854 already, for which I hold her note, and it is my will that she shall have $200 more, and her note for that she has already had, and no more of my estate."

There was no residuary clause; but after payment of debts and legacies, there remained real and personal property, to the value of above twenty thousand dollars, undisposed of by the will.

The bill was filed by Sarepta, admitted to be one of the testator's heirs at law, and her husband—Mr. and Mrs. Crane. It charged that as to this residuary property, Doty died intestate, and that Sarepta was entitled to an equal share with his other children, under the statutes of descent and distribution. The defendants claimed that the complainant had been expressly excluded, by the words of the will, from any portion of the estate, except the valued legacy of $200, and that the residuum was, by

necessary implication, carried to the other heirs, who are not excluded by the will.

RANNEY, J.—We have no doubt that the testator intended to exclude Sarepta from any further right, beyond the specific bequest, to any portion of his property. Whether we can give effect to this intention, consistently with the rules of law, is quite another question. It is very true that our law has always allowed to every person of mature age absolute dominion over all he may possess, to dispose of it by last will and testament, saving the rights of the widow and creditors, if any; and it is equally true, that, where such disposition is made, the will will be construed with great liberality for the purpose of arriving at the intention of the testator. But it is very clear that even the expressed intention of the testator cannot be regarded in the absence of such disposition; and this arises from the very nature and office of a will, which is defined to be "an instrument by which a person makes a disposition of his property, to take effect after his decease." If the owner, therefore, for any reason, fails in his lifetime to designate who shall succeed to it, the law steps in at his death, and supplies the omission, and casts it upon the heir at law. That the expressed intention of the testator that his heir should not take, cannot be regarded, in the absence of any other disposal of the property, seems to have been early settled in England. (*Den* v. *Gaskin*, Cowp., 657. 1 Jarm. on Wills, 294, 502.) Indeed it is admitted by defendant's counsel that the decisions in England are all against them on this point; but they insist that those decisions have their foundation in the disposition of the English courts to favor the law of primogeniture; and, for a still stronger reason, that the exclusion of the heir operates an exclusion of all who could claim the estate only through him, and would therefore leave no one capable of taking during his life. These considerations, they insist, have no application here; and that effect can consistently be given to the words of exclusion in the will of Doty, by allowing the estate to descend to his other children, excluding Sarepta, or by raising an estate by implication in their favor to this residuum.

The first inquiry is, Can Sarepta be excluded, and the other heirs take this property by descent? It may be that the considerations alluded to have had influence with the English courts; but, aside from them, an insurmountable obstacle exists to giving an affirmative answer. The property must be disposed of upon the death of the owner. It may be disposed of by will; but if it is not, the law disposes of it to all the children alike. All dominion of the owner over it ceases with his life. To allow a testator to leave his property undisposed of, and by will to control the course of descent and distribution, would be to allow him to repeal the law of the land. It must go by devise or descent; and, in either mode, it goes entirely uncontrolled by the other; and it is impossible to conceive of an estate created by a mixture of the two. This being impossible, the next inquiry arises, Can the other children take this property under the will by implication?

From a careful examination of all the authorities within our reach, bearing upon this question, we are led to the conclusion that, in order to raise an estate by implication, the two following circumstances must concur: First. An interest or estate in the property less than the whole,

must be created expressly by the will, in order that it may appear that the testator had the disposition of the property in his mind. Second, the person to take by implication must be named or described in connexion with the raising of such interest or estate. The familiar example put in the elementary books is a devise of lands by a man to his heir after the death of his wife. Here an evident intention appears to postpone the heir until the death of his wife, and she will therefore take a life estate by implication. But if the devise were to a stranger, instead of the heir, the same implication would not arise, for it would not sufficiently appear that he did not intend the heir to take the estate in the mean time. Indeed, it is always a question of intention to be derived from the words of the will; but it must appear from the will that the testator has attempted to dispose of the property, and in such disposition has used the name of the person to take by implication, so as to render it at least highly probable that he intended such person to take the interest in the same property that he has not disposed of by words.

We find these requisites entirely wanting in this case. No attempt to create any interest or estate in this property is found in this will. Not the most distant allusion is anywhere made to it, or to the persons that he desires to take it. Under such circumstances, to infer an intention to dispose of it by devise, would be to substitute the blindest conjecture for probability, and in effect to make a disposition for the party when he has attempted to make none for himself. We can find that he intended to exclude his daughter Sarepta from further participation in his estate; but we cannot find that he ever intended to dispose of this property by will. We have already seen that such intention, uncoupled with actual disposition, cannot be interposed to interrupt or control the regular course of descent and distribution. I have not particularly noticed the American authorities. If examined, however, they will be found fully to sustain the conclusions to which we have arrived. (4 Kent Com., 525; *Boiseau* vs. *Aldridge*, 5 Leigh, 222; *Myers* vs. *Myers*, 2 McCord's Chy. R., 214; 6 Paige R., 600. 2 Wend., 33.)

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BILLS OF EXCHANGE.—RIGHTS OF ENDORSEES.

Where a bill of exchange, drawn in fact by an agent upon his principal, did not fully disclose the agency, but sufficiently implied it to put a prudent man upon inquiry,—Held, that evidence to discharge the drawer, by showing that he was not indebted to his principal, the drawee, was admissible, even against an endorsee.

[*Davis* vs. *Henderson*; 25 Miss. R., 549.]

The facts in this case sufficiently appear in the opinion.

Fisher, J.—The defendant in error was sued as the drawer and endorser of the following bill of exchange:—

"Natchez, *March* 4th, 1846.

"Exchange for $2,000.

"Fifty days after sight of this only of exchange, pay to my own order two thousand dollars, value received, and charge the same to account of your agency at Natchez. "Jno. D. Henderson, *Agent.*

"To Stephen Franklin, Esq., New Orleans."

Endorsed, "Jno. D. Henderson, Agent."

The defence relied on is, that the bill was drawn and endorsed by the defendant, as the agent of the drawee, Stephen Franklin; and that it was not intended by either act to assume a personal responsibility. The counsel for the plaintiffs in error, on the contrary, insists, that the bill having passed into the hands of third parties, and not disclosing on its face the name of the agent's principal, no other evidence can be admitted for this purpose. If it were necessary that the bill itself should unequivocally disclose the name of the principal, in order to exonerate the agent, this position would probably be correct. But this is not required. It will be sufficient, if enough appears upon the face of the transaction, to put a prudent man, before taking the bill, upon inquiry. (*Mott* vs. *Hicks*, 1 Cow., 513.)

Where it can be done consistently with justice and sound policy, an endorsee ought, in all cases, to be confined to the contract as made and assented to by the immediate parties thereto. This rule is only relaxed in favor of innocent holders, who, from the language employed by the original parties, had good reason to believe that the contract was subject to no conditions or restrictions as to the liabilities of the parties appearing to be bound thereby. But the reason of the rule ceases the moment it appears that the endorsee could not, with ordinary prudence, have been misled in regard to the terms of the contract. The defendant, in drawing and endorsing the bill, attached to his name the word "agent." It was, moreover, to be charged to the drawee's own agency at Natchez. These facts appearing upon the bill itself, if not conclusive evidence that the defendant was acting in a representative capacity, were at least sufficient to put a prudent man, taking the bill from the drawee, upon inquiry. What was he to ascertain by this inquiry? The precise terms of the contract, of course, as assented to by the original parties. Having ascertained these terms, he at once learns that no one but the drawee is bound for the payment of the bill; for he is then informed that the defendant merely acted as the drawee's agent, and did not intend, by either the act of drawing or endorsing it, to bind himself personally.

Inasmuch as enough appeared upon the bill to enable the plaintiffs to learn the terms of the contract, and the extent of the defendant's undertaking, we are of opinion that the court committed no error in receiving the defendant's evidence, which shows that no liability existed on the part of the defendant to the drawee, from whom the plaintiffs received the bill; and as ordinary diligence would have placed them in possession of the terms of the contract, it is but right that they should be charged with notice of the facts as proved.

Under this view of the law, the judgment must be affirmed.

PARTNERSHIP.—BILL OF EXCHANGE.

**Where one draws a bill upon himself, in the name of the partnership of which he is a member, —accepts it,—and then negotiates it,—this is on its face an individual transaction, and the partnership is not liable, unless upon proof that the bill was drawn for its benefit.**

(*Cooper* vs. *McClurkan*; Pennsylvania Supreme Court. Official Report not yet published.*)

The material facts in this case sufficiently appear in the opinion.

Lowrie, J.—McClurkan and Fleming were co-partners in trade, and Fleming drew a bill of exchange of the partnership on himself, and negotiated it to plaintiff, and now in a suit upon it, McClurkan defends, on the ground that it was not a partnership transaction. This appears to be well taken; for the case without other evidence, stands just as if Fleming had given the endorsement of his partnership on his own note, as security for his own debt; which he could not do. (1 State R., 417.)

The plaintiff says he is a *bonâ fide* holder, without notice of the character of the paper. Is he without notice? He is not, if the proper inquiries usually made by a prudent man would have led him to the knowledge of the fact that the acceptor, or principal debtor, had himself drawn the bill, or, in other words, made the contract that is intended to pledge the partnership as surety for himself. Common prudence demanded that the authenticity of the signature of the drawers should be ascertained, and this led directly to the fact that it was made by Fleming himself; and common sense would indicate that Fleming had no right to bind his partner as his surety. It is urged that, in borrowing money, co-partners may give to their negotiable paper what form they please, and that therefore they ought to be liable notwithstanding the form. The premiss is true, but the conclusion needs, for its support, the proof that the copartners did borrow the money. If they did, then Fleming is an accommodation acceptor, and the drawers are bound as the real debtors. Without this proof we must take the apparent transaction to be the true one, and regard Fleming as borrowing money for himself, and attempting to pledge his partner as his surety; that is, we must decide the case according to the evidence.

Judgment affirmed.

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DEPOSIT.—MUTUUM.—SALE.

**Where wheat was delivered to a warehouseman upon the understanding that it might be put in mass with other wheat owned or received in store by the warehouseman, and should be at his disposal, and further that he should be bound, on demand from the owner, to return a like amount of wheat or to pay the highest market price at the time, at his own option,—Held, that this transaction was not a *deposit*, nor a *mutuum*, but a *contract of sale*.**

(*Chase* vs. *Washburn*; 1 Ohio State R., 244.)

This was an action of assumpsit, brought by Washburn to recover the

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* Received from Judge Lowrie.

value of a quantity of wheat, which he had delivered to the defendants, Chase & Co., who were warehousemen, engaged in the produce business, in the village of Milan, in Huron county.

On the trial, the plaintiff below put in evidence sundry warehouse receipts given by Chase & Co. for wheat delivered at various times, amounting to upwards of six hundred bushels. The receipts were of similar effect, the following being the first:

"MILAN, O., *Nov.* 5, 1847.

"Received in Store from J. C. Washburn, (by Son,) the following articles, to wit: Thirty bushels of wheat.

"H. CHASE & Co."

It appeared that Chase & Co. were accustomed to receive wheat in store from many owners; to store it all in one common mass; and to ship wheat from that mass, at their own pleasure, from time to time. Whenever the parties leaving wheat called for their pay, Chase & Co. would, at their own option, either deliver the amount of wheat mentioned in the receipts presented, or pay the highest market price at the time. This was not only their mode of dealing, but was the custom of their trade at Milan; and the wheat of Washburn was received upon this arrangement. After Washburn had proved his delivery of wheat, and his subsequent demand for either wheat or money, and the refusal to pay either, by Chase, the latter offered evidence to show that his warehouse was burnt in October, 1849, and that there was wheat enough then consumed in it, to answer all his outstanding receipts. Washburn offered rebutting evidence, tending to prove that Chase had not sufficient wheat at the time of the fire to answer all his receipts.

The counsel for defendant below asked the court to charge the jury that, if defendant had sufficient wheat on hand at the time of the fire to answer all his outstanding receipts, he was not liable; and that neither the mingling of the wheat, nor the shipment of it, would make him liable, if at the time of the fire he had enough on hand to answer all outstanding receipts. The court refused this charge, and instructed the jury, that if they should find that the wheat was received by the defendant on the agreement already explained, and if the wheat thus left had been shipped and disposed of, the defendant could not be excused, unless there was an agreement that the wheat subsequently purchased by defendant was to be substituted in place of that left by plaintiff, and to be his property. And the court further charged that where a warehouseman receives grain on deposit, with an understanding that he may if he choose dispose of it, and that he will on demand pay money for it, or return other grain—in case he disposes of it, he is bound to do the one or the other; a subsequent purchase of grain, for the purpose of meeting a demand for that first received, would not be sufficient to vest the property in the other party. To these charges, and to the refusal to charge, the defendant's counsel excepted.

BARTLEY, J.—To determine which of the parties in this case shall sustain the loss of the property in question occasioned by the accident, it becomes necessary to ascertain the true nature and character of the transaction between them, and the rights created and duties imposed thereby.

It was either a contract of sale, a mutuum, or a deposit. If a *contract of sale*, the right of property passed to the purchaser on delivery, and the article was thereafter held by him at his own risk. If a *mutuum*, the absolute property passed to the mutuary, it being a delivery to him for consumption or appropriation to his own use; he being bound to restore not the same thing, but other things of the same kind. Thus it is held, that if corn, wine, or money, or any other thing which is not intended to be delivered back, but only an equivalent in kind, be lost or destroyed by accident, it is the loss of the borrower or mutuary; for it is his property, inasmuch as he received it for his own consumption or use, on condition that he restored the equivalent in kind. And in this class of cases, the general rule is, *ejus est periculum, cujus est dominium*. (Story on Bailments, § 283; Jones on Bailments, 64; 2 Ld. Raym., 916.) But if the transaction here was a *deposit*, the property remained in the bailor, and was held by the bailee at the risk of the bailor, so long as he observed the terms of the contract in so doing. But if the bailee shipped the wheat and appropriated the same to his own use, in violation of the terms of the bailment, before the burning of his warehouse, he became liable to the bailor for the value of the property.

What, then, was the real character of the transaction between the parties? The receipt I suppose to be in the ordinary form of warehouse receipts, and such as would be proper to be delivered by a warehouse depositary of wheat to the owner, upon its being received into a warehouse, for temporary safe-keeping, and to be re-delivered to the owner on demand. The obligation or contract which the law would imply as against the warehouseman, on the face of such a receipt, would be, that he should use due diligence in the care of the property, and that he should re-deliver it to the owner, or to his order, on demand, upon being paid a reasonable compensation for his services; and if the warehouseman, under such circumstances, should without the consent of the owner mix the wheat with other wheat belonging to himself or other persons, and ship the same to market, for sale, he would be liable to the owner for the value of the wheat thus deposited with him.

The receipts themselves are silent as to the *time* the wheat was to be kept, the *price* paid for its custody, *when* or *how* to be paid, *whose property* it was to be after delivery into the warehouse, and what disposition was to be made of it. But it is claimed that, inasmuch as written receipts, whether for money or for other property, are always subject to explanation by parol, that the terms on which this wheat was delivered, can be explained by the declarations of the parties at the time of the delivery of the first load of wheat, and also by the custom of trade which prevailed among warehousemen at Milan; and that by such explanation it is shown that the real transaction was, that the wheat was received, and, with the consent of the depositor, put in mass with other wheat of the warehouseman, and that received of other persons, with the understanding that the wheat was to be at the disposal of the warehouseman, either to retain or ship it; and that when the receipts should be presented by the depositor, the warehouseman should either pay the market price therefor, or re-deliver the wheat, or deliver other wheat equal in amount and quality.

If these terms were incorporated into the contract, they could not have excused the liability of the warehouseman in this case. The distinction between an irregular deposit, or *mutuum*, and a *sale*, is sometimes drawn with great nicety, but it is clearly marked, and has been settled by high authority. In case of a regular deposit, the bailee is bound to return the specific article deposited; but where the depositary is to return another article of the same kind and value, or has an option to return the specific article, or another of the same kind and value, it is an irregular deposit or *mutuum*, and passes the property as fully as a case of ordinary sale or exchange. Sir William Jones says, "It may be proper to mention the distinction between an obligation to restore the *specific things*, and a *power or necessity of returning others of equal value*. In the first case, it is a regular bailment; in the second, it becomes a debt." In the latter case, he considers the whole property transferred.

Judge Story, in his commentaries on the law of bailment, says, "The distinction between the obligation to restore the specific things, and the obligation to restore other things of the like kind and equal in value, holds in case of hiring, as well as in cases of deposits and gratuitous loans. In the former cases, it is a regular bailment; in the latter, it becomes a debt or innominate contract. Thus, according to the famous laws of Alfenus, in the Digest, 'if an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employee is only a creditor of metal equally valuable, which the workman engages to pay in a certain shape, unless it is agreed that the specific silver, and none other, shall be wrought up in the urn.'" (Story on Bailments, § 439.)

In all this class of cases, the risk of loss by unavoidable accident attaches to the person who takes the control or dominion of the property. When, therefore, Washburn's wheat was delivered to Chase & Co., and became subject to their disposal, either to retain or ship it on their own account, the property passed, and the risk of loss by accident followed the dominion over it. (2 Kent's Com., 464. *Hurd* v. *West*, 7 Cow., 752; *Smith* v. *Clark*, 21 Wend., 83; *Norton* v. *Woodruff*, 2 Comst., 153; *Mallory* v. *Willis*, 4; ib. 77; *Pierce* v. *Skeuck*, 3 Hill, 28; *Baker* v. *Roberts*, 8 Greenl. R., 101; *Ewing* v. *French*, 1 Blackf., 354; *Buffum* v. *Merry*, 3 Mason, 478.)

When the owners of wheat consent to have their wheat, when delivered at a mill or warehouse, mixed with a common mass, each becomes the owner in common with others, of his respective share in the common stock. And this would not give the bailee any control over the property which he would not have, if the wheat of each one was kept separate and apart. If a part of the wheat held in common belong to the bailee himself, he could not abstract from the common stock any more than his own appropriate share, without a violation of the terms of the bailment; and such a breach of his engagement could not be cured by his procuring other wheat to be delivered to supply the place of that thus wrongfully taken. But if the wheat be thrown into the common heap, with the understanding or agreement that the person receiving it may take from it at pleasure, and appropriate the same to the use of himself or others, on the condition of his procuring other wheat to supply its place,

the dominion over the property passes to the depositary, and the transaction is a sale, and not a bailment.

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INSURANCE.—ASSIGNMENTS.—NOTICES.

An assignment by one partner to the other of his partnership interest in the insured property, is not within the clause which prohibits assignments without notice to the company. Notice to the agent of the company is notice to the company.

(*Wilson* v. *The Genesee Mutual Insurance Company.* New York Supreme Court, General Term; December, 1853. Not yet Reported.)

Two important questions in regard to insurance were raised in this case.

1. Is an assignment by one partner to another of an interest in insured partnership property, such an assignment as requires the consent of the company?

2. Is notice of additional insurance to an agent for effecting insurance, notice to the company?

The insurance policy upon which this action was brought had been issued by the defendants to the firm of A. H. Dixon and Co., on the goods, &c., in their store. The firm was composed of A. H. Dixon and Samuel G. Goss. Subsequent to the issuing of the policy, they dissolved partnership, and Goss sold out to Dixon all his interest in the concern, some time after which the property insured was destroyed by fire. Dixon, the surviving partner, assigned the claim upon the policy to the present plaintiff. The defendants contended that the assignment by Goss, one of the co-partners to Dixon, of his interest in the concern, having been made without the consent of the company in writing, rendered the policy void.

By the terms of the policy it was provided, as usual, that the policy should be void if the insured should obtain other insurance on the property without notifying defendants and obtaining their consent endorsed on the instrument. It appeared that Dixon had obtained a further insurance, and that he gave notice of it to Park, the agent of the defendants, who endorsed acceptance of the same on the policy in suit. The defendants contended that this was not notice to the company.

The verdict below was for the plaintiff, and defendants appealed.

Roosevelt, J.—In the contract of insurance perfect good faith is indispensable. To guard against fraud underwriters almost universally insist upon knowing who they insure and how much is insured, whether by themselves or others. Hence the policy cannot be transferred, nor the insurance increased, without their consent.

1. Is an assignment from one partner to another within the principle on which the prohibition is founded?

When underwriting for a firm, the insurers are presumed to know and to be satisfied with each and every of its members. They are also presumed to know that on the death of either of two partners the survivor becomes for all purposes the sole legal, and, on a favorable state of the account, the sole equitable owner of the partnership assets. They know,

too, that on a voluntary dissolution of the firm, if one partner has drawn out more than his share, the other will thereby have been made the sole owner of the assets remaining. They, therefore, agree in effect, for such is the legal inference, that a transfer of interest from one partner to another is within the original understanding, and that it shall form no objection to the right of recovery. It is an assent necessarily implied from the nature of the contract, and given in advance, and therefore requiring no subsequent notice.

2. The next difficulty in the case arises out of the alleged want of notice of the second insurance in the Columbus Company.

These Insurance Companies, it appears, are frequently and very naturally more anxious to obtain premiums than to pay losses. "Let each man," say they in the *nota bene* printed at the foot of every policy, "induce his neighbors to insure, and the security and business can speedily be doubled." And in pursuance of the same system there are established agencies in numerous and even distant placee, to such an extent that every person dealing with them would seem from their by-laws, to have an agent or rather *the* agent of the company, in his vicinity. Under the circumstances, is not notice to such an agent, notice to the principal?

Every agent is presumed by law, and may also be presumed by all persons innocently dealing with him, to possess every power necessary, or naturally incident, to his agency. In the case then of an insurance company systematically transacting, and even soliciting business, at points remote from its primary location, what power might reasonably be assumed to have been conferred by it upon a person permanently established and publicly held out to the world, as "The Agent of the Genesee Mutual Insurance Company," or rather, for that is the only point necessary to be considered, was the power of receiving notice of other insurances on the same property, and endorsing them on the policy, among the reasonably to be presumed powers? That Dixon, the insured, so supposed, is fully proved; and that Park, the agent, entertained the same belief, is shown by his endorsement on the policy, signed "G. L. M. Park, agent." The policy provides that "notice shall be given to the company," but specifies no particular agent through whom it is to be given. It also provides that the insured "shall have the same endorsed" on the instrument; but it does not say by whom the endorsement shall be made. In the absence, then, of all express indication on the part of the company, what more natural on the part of the dealer than to look to the agent in his vicinity, the person held out and publicly advertised as such, by the company itself?

There is no pretence of fraud, no attempt was made at concealment, no effort to recover from both companies in the aggregate, more than the actual loss. The defence, therefore, in this point is purely technical. Such defences, where there has been perfect dealing on the part of the assured, in modern times are not favored by either judges or jurors; nor are they in accordance, as I conceive, with the true interests of insurers themselves, or with the general sense of the community. That sense is usually common sense; and it cannot be too often repeated, that common sense and common honesty are the true sources of common law.

Judgment entered on the verdict for the plaintiff.

RECORDING OF DEEDS.—DEFECT IN INDEX.

Where a mortgage deed was left with the town clerk to be recorded, and was duly copied at length into the records, but through the neglect of the clerk was not indexed, and a subsequent purchaser thereby failed to obtain actual notice of the mortgage,—Held, that his title was subject to the mortgage.

[*Curtis* vs. *Lyman*; 24 Vt. R., 336.]

This was a bill filed for the foreclosure of a mortgage against Edgerton the mortgagor and Lyman, who was a purchaser under Edgerton. The facts were as follows:—

Edgerton being indebted to the plaintiffs, mortgaged to them the premises in question; the mortgage was transcribed upon the book of records of the town, on the 11th of June, 1835, and duly certified as recorded, but no reference to the record was entered upon the index. Subsequently the defendant Lyman, without actual notice of the mortgage, and before the record of it was indexed, purchased the same land of the mortgagor, his deed being recorded, Feb. 7, 1839. Both the mortgage and deed were received for record and certified as recorded by Edgerton himself, the mortgagor, who from March 1835, to March 1841, was the town clerk; and the reference to the mortgage was first entered on the index by the subsequent town clerk in 1844. There was no evidence that the mortgagees had any knowledge of the neglect of the town clerk to enter their mortgage on the alphabet. No objection was made to the record, except the want of an index to it.

HALL, J.—The question is, whether the neglect of the clerk to index the mortgage, shall render the record of it invalid, so as to postpone the title of the mortgages to that of the subsequent purchase.

The determination of this question must depend upon the construction of the statutes of 1797 in relation to the recording of conveyances, which statutes were in force when both deeds were lodged in the town clerk's office.

The 5th section of the act for regulating conveyances of real estate specifies the several requisites of such conveyances. It declares "that all deeds or other conveyances of any lands, tenements, or hereditaments, lying in this State, signed and sealed by the party granting the same, having good and lawful authority thereunto, and signed by two or more witnesses, and acknowledged by such grantor or grantors before a justice of the peace, and recorded, at length, in the clerk's office of the town in which such lands, tenements, or hereditaments lie, *shall be valid to pass the same* without any other act or ceremony in law whatever."

If the language of this statute were to be taken in its ordinary sense, and serve to control our decision, there would seem to be but little doubt of its effect. There would in regard to the mortgage appear to have been a full and literal compliance with the words of the statute. The mortgage had been *transcribed* at length in the town clerk's office, and by the proper officer, and duly certified as recorded; and that is what is commonly understood as constituting a record of it.

It is however said, that although the ordinary signification of the word

recorded may be satisfied by what was done in this case, yet, that the act regulating town meetings and the choice and duty of town officers, is to be construed as providing an additional requisite to the record of conveyance—in other words, as in effect declaring that a deed shall not be considered as recorded, until an index to it is entered upon the alphabet.

No such language is, however, found in that act, nor do we think any intention to engraft such additional requisite upon a deed can be fairly implied from the language used. The object of the act is to point out the duty of the clerk, not only in the making of a proper record of conveyances, *but also in furnishing facilities for their discovery*, examination, and use by all persons interested in them. And to secure the due performance of these duties the clerk is made liable to the party injured for the neglect of them, and to the security of the party injured is superadded, by a subsequent statute, the responsibility of the town. The index or alphabet, which it is the duty of the clerk to have annexed to his book, seems to be one of the facilities to be used in making search for the record, not a part of the record itself. It is his duty to have an index, and to enter upon it a proper reference to every record of a conveyance, and for any neglect to do so, he and the town are liable for the damages any person may suffer by it. But it is not certain that any one will be injured by the neglect, and therefore the record itself should nôt be void. The clerk may know the place of the record, and may point it out to all who may wish to examine it. A purchaser may take his deed relying alone upon the representations or covenants of his grantor, without desiring to examine the records. An index, or the want of it, would seem to be of no importance to him. So if without making any search, a purchaser should rely solely on the representations of the clerk, that the title was clear, and those representations should knowingly be false, it is perhaps questionable whether he could be said to be injured by the want of an index. The legitimate ground of complaint in such a case, would probably be the fraudulent representations of the clerk.

There are many practical difficulties in the way of making an index to the record an essential requisite to the validity of a title. The statute provides for an "index or alphabet." Are the two words used synonymously? Or have they here, as they often have, different meanings? Is it indispensable that the index should be in alphabetical order? If so, shall the name of the grantor or grantee be alphabeted? It is obvious, that if an index is held to be an essential part of the record, the way will at once be opened for an embarrassing course of litigation in settling by judicial construction, what shall constitute a sufficient index, and what departures from a prescribed form shall render the record invalid. And all this, perhaps, when there has been no real injury to any one in consequence of a defective index.

But if from the want of an index, or a proper entry upon it, the record is to be inoperative, shall it be held absolutely void? If the reference to it upon the index be not made the instant the record is completed, is the record a mere nullity? Or may the record be restored and made operative by a subsequent entry upon the index? If so, when does the record take effect? If from the entry on the index, how is the true time to be

shown? Shall the clerk certify upon the record the time of the entry? That has never been done. The true time the record takes effect, must then in all cases be left open to be proved by parol! In this case it appears that the plaintiff's mortgage was first alphabeted some time in August or September, 1844.

This evidence is quite too loose and uncertain, from which to determine when a record is to beome operative. It is obvious, that if an entry of a deed upon the index is held to be essential to the validity of the record, that it must lead to inextricable confusion and uncertainty in regard to the priority of conveyances. On the other hand, we do not perceive but that the object of the statutes providing for the recording of deeds will be fully answered by leaving anybody, actually sustaining an injury from the want of an index, or by a defective one, to his statute remedy against the clerk and the towns.

We are all agreed that the proper office of the index is, what its name imports, *to point to the record*, but that it constitutes no part of the record, and we must consequently hold that the plaintiffs' mortgage became an incumbrance upon the land from the time it was transcribed upon the record, and that the defendant took his title subject to it.

The result is, that the decree of the court of chancery is to be affirmed.

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RECORDING OF DEEDS.—DEFECT OF INDEX.

**Where a mortgage deed was left with the town clerk to be recorded, and was duly copied at length into the record, but through the neglect of the clerk was not indexed, and a subsequent purchaser thereby failed to obtain actual notice of the mortgage,—Held, that the town were liable to the purchaser for his damages incurred through his defect of title.**

[*Hunter* vs. *Windsor*; 24 Vt. R., 327.]

This was trespass on the case against the town of Windsor, for the default of their town clerk.

This case is a sort of sequel to that of *Curtis* vs. *Lyman*, *supra*.

The declaration alleged that Edgerton executed and delivered to George and Edward Curtis, a mortgage upon certain premises situated in the town of Windsor; that the Messrs. Curtis left the mortgage with Edgerton himself as town clerk of Windsor, for record; that Edgerton duly recorded the mortgage, but did not make, nor was there ever made until long after the 31st of March, 1845, any alphabet or index pointing to the mortgage, or the record thereof; that on the 31st of March, the plaintiff purchased a portion of the mortgaged premises from one White, who then held title thereto, derived by deed executed by Edgerton, subsequently to the mortgage; that before completing the purchase, the plaintiff examined the record of deeds in the town clerk's office of Windsor, and by reason of there being no index pointing to the mortgage, the plaintiff was led to believe that there was no incumbrance upon the premises, and thereupon closed his purchase; that the mortgage had been since foreclosed by the Curtises, and the plaintiff had been compelled to pay his portion of the amount due thereupon, and had sustained other damages, for which he claimed to recover from the town.

The defendants demurred to this declaration. The court below held the declaration sufficient, and rendered judgment for the plaintiff, to which the defendants excepted.

ISHAM, J.—The particular matter of default or negligence, of which the plaintiff complains, is the neglect of the clerk to make and keep an *alphabet* or *index* annexed to the book of records, and referring to such deeds or instruments as are on record therein. And for the neglect of the clerk in this particular, this action is brought.

It is insisted by the defendants that it was no part of the official duty of the clerk to make such index, and that in this case, his duties as town clerk were fully discharged in recording upon the records of the town, the mortgage deed of Edgerton to George and Edward Curtis, although he did omit to enter the same on any alphabet or index, belonging to this book of records. And the question presented on this demurrer is whether that is an official neglect on the part of the town clerk, for which the town is responsible.

The act of 1797 (Slade's Comp. 414, sec. 20) provides "That a book or books, *with an index or alphabet to the same*, suitable for registering deeds and other evidences of title to lands, and a book or books for recording the proceedings of town meetings, &c., shall be kept in each town in this State, and which are to be provided by the clerk at the expense of such town, and it is made the duty of the town clerk truly to record all deeds and conveyances, writs, and executions, where by law it becomes necessary." The intention of the Legislature in these provisions is very evident, and it is the duty of the court to give such construction to the act, as will carry such intention into effect.

Two different sets of books are to be kept; one exclusively for recording evidences respecting titles to lands, *with an index or alphabet to the same*, the other for recording the proceedings of town meetings, &c., and with which no index is required. The clerk certainly is not required to procure an index in connexion with the book of records, for the purpose of effecting *constructive notice* of the execution and record of deeds, for that object is accomplished by recording the deeds at length upon the records, although there has been a neglect to index the same. *Curtis* vs. *Lyman*.

Evidently, therefore, the Legislature intended that the *index or alphabet* should be kept in each town, for the definite purpose of furnishing an easy and accessible facility by which any person can discover and obtain *actual notice* of the existence of any deed, or mortgage, or evidences of title to real estate thereon, so that all persons who may become purchasers thereof, or who may wish to make advances on such security, may obtain actual knowledge of the title and condition of the property. Such an index or alphabet is of particular importance; and it is not to be presumed that such an important facility for the discovery of the true condition of real estate was overlooked by the Legislature.

The act therefore was designed to effect two objects. In the first place providing the means, and furnishing facilities for the discovery of, and obtaining *notice in fact*, of such deeds, mortgages, and evidences of title, as are placed on the records. And in the second place, to furnish the proper evidences of constructive notice, when all other means before pro-

vided have failed in giving actual notice; and when an injury has been sustained by any one for a neglect in either respect, the town is liable under the statute.

The statute imposes the duty upon the town clerk to record all deeds, conveyances, writs, and executions, and to keep *such books* within his town. It is true that in the specific enumeration of matters to be recorded, no mention is made of the index or alphabet. But the general provision is in these words; "It is made the duty of each town clerk in this state, to keep *such books* within his respective town." The words "*such books*" evidently refer to all *those* which it was made the duty of the town clerk to procure at the expense of the town. And in specifying those books, the *index or alphabet* is particularly mentioned.

On this subject, the intention of the Legislature is too obvious to be mistaken, and we conceive it would be a great departure from judicial duty to defeat that intention by an illiberal or technical construction. To carry into effect an intention so manifestly spread upon the face of the act, the court, if necessary, would be warranted in departing from the ordinary meaning and use of words, and would disregard grammatical construction, for the object of the act is salutary, and necessary for the safety of those who are interested in the evidences of title to real estate.

We have no hesitancy, therefore, in deciding that it was the duty of the town clerk to provide such an *alphabet or index*, and to keep and preserve the same for inspection and use, with the same truthfulness and care that he is required to exercise in keeping the books of record.

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### CONTRACTS.—NEGOTIATION BY MAIL.

**A contract negotiated by mail, is formed when notice of acceptance of the offer is duly deposited in the post-office, properly addressed.**
**This rule applies, although the party making the offer expressly requires that if it is accepted, speedy notice of acceptance shall be given him.**

[*Vassar* vs. *Camp*; 14 Barbour's (N. Y.) Supreme Court R., 341.]

This action was for a breach of a contract to furnish a quantity of barley to the plaintiffs.

It appeared upon the trial, that the contract upon which plaintiffs relied, was formed, if at all, by mail communication. On the 22d of August, 1850, the defendants, Messrs. E. and E. B. Camp, wrote to the plaintiffs, Messrs. M. Vassar & Co., offering to deliver to them at Albany, between the 1st and 20th of October following, from 5000 to 10,000 bushels of barley, of a certain description. Their letter terminated with the following sentence: "*It being understood that if this offer shall be accepted, speedy notice of the same be given us.*" To this letter Messrs. Vassar & Co. replied under date of 26th of August, accepting the offer of Messrs. Camp's letter, and inclosing a contract for the delivery of the barley, signed by themselves, with a duplicate, which they desired the Messrs. Camp to execute and return by next mail. In reply the Messrs. Camp wrote on the 30th of August, taking some exceptions to the terms

of the contract, and concluding as follows: "We have therefore inclosed the contracts you sent us, and sent you others, with our signature, and a duplicate for you to sign and send us. We have extended the period of delivery to the 30th October, as there will be at least ten days' delay from the date of your letter, before we can receive and act upon your reply. *As soon as received*, we shall send amongst the farmers, and secure the first lots, even at an extra price." Messrs. Vassar & Co. replied on the 4th September, returning the duplicate, signed by themselves.

The plaintiff further called as a witness, one Booth, who was, when this correspondence commenced, a clerk of Vassar & Co. He testified that on the 4th September, 1850, he took from the post-office in Poughkeepsie, where the plaintiffs carried on business, the letter of Messrs. Camp of the 30th of August, containing the amended contract and the duplicate; that Mr. Vassar on the same day executed the counterpart in firm name, and inclosed it in a letter directed to the defendants, the Messrs. Camp, at Sackett's Harbor, which letter the witness, the same evening, deposited in the post-office in Poughkeepsie.

The plaintiff then proved, by one Ostrander, a clerk in the Poughkeepsie post-office at the time, that a letter left in the office the afternoon or evening of the 4th September, would regularly have been mailed on the 5th; that upon the 5th one letter, unpaid, was sent from that office to Sackett's Harbor; and that no other went from the office to Sackett's Harbor on that day, or for some days before or after that date.

The plaintiff then proved by one Harris, postmaster at Sackett's Harbor, in September, as appeared by his books, that but one letter reached his office from Poughkeepsie on the 7th of the month, and that one was mailed the 5th, and was unpaid. This was the only letter received from Poughkeepsie for some days before and after, and was in the ordinary course of mail. The defendants received their letters from the office of this witness, and had a private drawer with a key which they kept, and to which they always had access from the outside, and into which all their correspondence was placed. Letters belonging to the boxes and drawers were always deposited in them, immediately upon the receipt of a mail. Witness had no specific recollection of this particular letter. Various messengers came for defendants' letters, and no notice was taken of those who came, as they helped themselves.

Upon this and other evidence, the judge charged the jury that the main question in the case was as to the existence of a contract. There was no dispute as to its breach, if one existed, and little as to the damages. The jury would therefore find the following facts: *First.* Did the plaintiffs send the defendants the counterpart of the contracts executed on or about the 4th of September, 1850? *Second.* Did that counterpart arrive at Sackett's Harbor, and was it put in the defendants' box or drawer? *Third.* Did that counterpart reach the defendants? The following written verdict was found by the jury: *First.* That a letter from the plaintiffs, containing a counterpart of the contract set forth in the pleadings, was deposited in the post-office in Poughkeepsie, on the 4th of September, 1850, directed to the defendants at Sackett's Harbor. *Second.* That said letter, containing said counterpart, was transmitted to the post-office at Sackett's Harbor, and was deposited in the box or drawer of the

defendants, by the postmaster or his clerk, on or about the 7th of September, 1850. *Third.* That they had not sufficient evidence that the defendants received the letter from the box in the post-office at Sackett's Harbor.

And thereupon the justice ordered and adjudged, that the plaintiffs recover against the defendants the sum of $2,000 damages; and that the plaintiffs be allowed five per cent. on that sum, amounting to $100, by way of additional costs.

S. B. STRONG, J.—The contract was, I think, perfected, so as to make it mutually obligatory upon the parties, when the duplicate executed by M. Vassar & Co. was deposited in the post-office at Poughkeepsie, on the 4th of September, 1850. The final proposal by the defendants was made when they deposited their letter, inclosing the contract signed by them, on the 30th of August. That proposal remained open and unchanged on the 4th of September, when it was accepted by the plaintiffs in the manner which I have indicated. The general proposition, that a bargain through the mail is closed when the party last agreeing binds himself by any appropriate paper deposited by him in the post-office, properly addressed to the other contracting party, was admitted on the argument. It is based on the principle, that an offer made by one party and accepted by the other, constitutes the contract. The assenting minds of the parties then meet. (*Mactier* vs. *Frith*, 6 Wend., 103.)

But the counsel for the defendants contended on the argument that the rule does not apply to this case, as their letters declared in effect that they did not intend to be bound until they received an answer from the plaintiffs, with a duplicate of the contract executed by them. In the letter written by the defendants on the 26th of August, they say, "it being understood that if this offer shall be accepted, speedy notice of the same be given us." That undoubtedly made it a condition precedent to their being bound, that their offer should be promptly accepted; and it was so. It was also necessary that speedy notice of the acceptance should be given to the defendants. But the latter does not designate the manner in which the notice should be given; and as the previous correspondence had been conducted by mail, it was reasonable to suppose that it was intended that the notice should be given through the same channel. Now what is giving notice by mail? Undoubtedly, depositing a letter containing the information properly addressed, in the post-office. This notice was promptly given. Their counsel also relied upon a passage contained in their letter, dated on the 30th of August, where they say in reference to an expected reply accepting their offer, "as soon as received, we shall send amongst the farmers, and secure the first lots" (of barley), as indicating that they did not intend to be bound until such reply should be received.

It seems to me, that this passage merely indicated what the defendants intended to do, in accordance with their contract, when they should ascertain that it had been perfected, and not the time when it should become obligatory upon them. Had they intended that their negotiation should differ from the ordinary rule, as to the commencement of their obligation, they should have said so, in explicit language. If there is

any doubt, it should upon the general principle be construed against the parties using the uncertain terms.

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CONTRACTS.—EQUITABLE RELIEF.

Where there is imbecility or weakness of mind, in one contracting party, and plain inadequacy of consideration in the contract, equity will relieve the injured party from his agreement, without strict proof of fraud or undue influence.

[*Tracey* vs. *Sacket;* 1 Ohio State R., 54.]

This was a bill of review, filed to obtain a reversal of a decree rendered in favor of Sacket against Tracey. The case upon the original bill was as follows:

Sacket, in 1841, being a man of about eighty years of age, and of infirm mind, conveyed his property, consisting of an eighty acre tract of land, three or four hundred dollars' worth of personal property, and a pension of ninety-six dollars per annum, to Tracey; in consideration of which Tracey gave a written obligation to provide Sacket and his wife with a comfortable support, during the remainder of their lives. He soon after removed them to a house near his own, where they continued to reside until 1843, when they abandoned it, and refused to be any longer dependent on Tracey for their maintenance, alleging that he had failed to provide them with a suitable support. The bill of Sacket was filed to procure the conveyance of his property to Tracey to be set aside.

It appeared from the testimony, that prior to his contract with Tracey, Sacket had made a similar arrangement with one Davis, which was rescinded by mutual consent. Sacket was somewhat indebted to Tracey, who, when the arrangement with Davis was rescinded, insisted upon receiving some security for his claim; and proposed that if no other person would do it, he would take Sacket's property, and engage to support him and his wife. The arrangement was accordingly made. During the eighteen months which Sacket lived under the arrangement with Tracey, he occupied a small log-house and lived frugally, himself and his wife performing certain work for Tracey. The provisions furnished by Tracey were supplied in small quantities at a time, and it appeared that the supply was at times wholly insufficient. Tracey neglected to pay certain debts of Sacket, according to his agreement. One witness testified that in a conversation with Tracey in 1841, Tracey stated that he had told witness's brother that his mind was so absorbed about making property that he had in some measure neglected his religious duties: and went on to state to the witness that he had made property fast, and should "make a thousand dollars out of Sacket, the worst way he could fix it."

Upon these and similar circumstances, the court set aside the conveyance from Sacket to Tracey, required Tracey to account for the personal property, and the rents and profits, gave him credit for the maintenance he had furnished, and adjusted the account generally. Tracey now filed

this bill for review and reversal of that decree. The error of most importance among those assigned, was: That the decree set aside the conveyance without any proof of fraud on the part of Tracey in procuring it, or of imbecility of mind on the part of Sacket.

BARTLEY, J.—The contract between Tracey and Sacket was of such a nature as would be properly regarded by a court of equity with scrutinizing jealousy. To maintain it on the part of Tracey, in a court of equity, even if divested of all circumstances of fraud or imposition, would require of him the utmost good faith in the making it, and a strict performance, characterized by a benevolent regard for the welfare of those who were committed to his charge.

Proof of actual fraud upon the part of Tracey, or of insanity upon that of Sacket, was not essential in order to set aside the contract. It appears to be a well settled general rule, that the acts and contracts of persons who are of weak understandings, and thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, or overcome by cunning or undue influence. (*Gartside* vs. *Isherwood*, 1 Brown Ch. R., 560. 1 Story Eq. Jur., § 238.) Mental imbecility not amounting to absolute disqualification, induces a vigilant and strict examination in chancery, of the contracts made by one laboring under it; and when it is coupled with inadequacy of consideration, the two constitute such evidence of fraud as may be sufficient to set aside a contract. (*Cruise* vs. *Christopher*, 5 Dana, 181; *Whiteburn* vs. *Hines*, 1 Munford, 557; *Buffalow* vs. *Buffalow*, 2 Dev. & B. Ch. R., 241; *Dunn* vs. *Chambers*, 4 Barb. Sup. Ch. R., 376.) It is said that a court of equity will not measure the size of men's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity; and that the law will not relieve a man who is capable of taking care of his own interest, except where he is imposed on by deceit, against which ordinary prudence could not protect him. But whatever weight this may be entitled to, and whatever may be its application, it is obvious that weakness of mind may constitute a very important circumstance to prove that a contract has been obtained through fraud, imposition, or undue influence. The strongest minds cannot always protect themselves against deceit and artifice. The law requires that good faith should be observed in all transactions between man and man. And those who from imbecility of mind are incapable of guarding themselves against fraud and imposition, are under the special protection of the law.

The rule to be collected from all authorities, I take to be this: Where there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration—or, where there is weakness of mind, and circumstances of undue influence and advantage,—a contract may be set aside in equity.

Applying this rule, there is no difficulty in sustaining this decree on the evidence in this case. There was great weakness of mind on the part of Sacket, arising from extreme old age, increased, perhaps, by intemperance and sickness. There was clearly an inadequacy of consideration, and an overreaching and undue influence on the part of Tracey, which in

a court of equity, fully justified the setting aside of the contract. Besides this, there was not that strict and full compliance with the terms of the contract on the part of Tracey, which good faith and the policy of the law required at his hands in a contract of this nature.

The terms of the contract required him not only to provide Sacket and his wife with food and raiment, "but everything for their very comfortable existence and support." And the nature of this contract required from him, in the performance on his part, a kind and benevolent regard for their dependent situation. He had no right to reduce them to a state of servitude. True, he claims they consented to, and even solicited the services imposed on them. This excuse is easily made by a person having the control he had, from his position, over aged and weak-minded persons.

The fiduciary situation assumed by him in the contract, enjoined upon him an entirely different course of treatment; and instead of having his mind fixed upon the matter of speculating and making property out of the arrangement, to the neglect of his "religious duties," his attention should have been directed to the making of a suitable provision for the dependent persons taken by him under his control.

The bill is therefore dismissed.

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### DISABILITIES.—INSANITY FROM DRUNKENNESS.

One who has lost his memory and understanding is entitled to legal protection, whether such loss is occasioned by his own misconduct or by an act of Providence.

[*Bliss* vs. *The Connecticut & Passumpsic Rivers Railroad Company;* 24 Vt. R., 424.]

This was a petition for a writ of *certiorari.*

It appears that the defendants had taken for their road, certain lands of the petitioner, his damages being assessed by the commissioners of appraisal as provided in the act by which they were incorporated. That act provided that the owner of real estate, who should feel aggrieved by the decision of the commissioners, might within ninety days from the making of their decision, or from the removal of certain disabilities previously mentioned, appeal to the county court. The disabilities specified were those of "married women, infants, idiots, and insane persons." The petitioner being dissatisfied with the award of the commissioners, appealed from their decision, but not within the ninety days. It was objected to the appeal that it was not taken in season; but it was contended on behalf of the petitioner, that he was insane at the time of the decision of the commissioners, and that the appeal was taken in season, after the removal of the disability. The facts were, that the petitioner had been, during the time referred to, deprived of the proper use of his mental faculties, as the result of continual intoxication. The county court dismissed the appeal, and the petitioner thereupon made the present application.

ISHAM, J.—In dismissing the appeal, the court evidently proceeded upon the ground that no case would fall within that provision, short of

settled frenzy, or positive distraction and delusion of mind, and when that state was not produced by the party's own voluntary act or excess. That provision of the act should evidently be liberally construed, and should include all cases that are within its spirit as well as its letter. Lunatics and persons *non compos* are not mentioned, and yet they would evidently come within its provisions. The term *insane*, by a distinct provision of our statute (p. 58, Sec. 6, and p. 407, Sec. 11), includes "idiots, persons *non compos*, lunatics, and distracted persons," and this definition of the term by statute is declaratory of the common law. In Co. Litt. 247, there is given a classification of the different cases of mental derangement, and in that, express mention is made of those who by inebriation have deprived themselves of their memory and understanding. And whatever may have been the rule formerly, that such a person was not within legal protection, yet the law is now well settled otherwise, and so far as legal capacity is concerned, it is immaterial from what causes such a state of mind arises. It is the state of the mind itself, the law will notice, and not the causes that produced it. (1 Story's Eq., 247, § 225. 2 Kent's Com., 563. 5 Mason's U. S. R, 28. 2 Aik. R, 167. 16 Vt. 335) And as the object of this provision of the act was to save the rights of those who have not legal capacity to protect them, those who are deprived of that capacity, from whatever cause it may arise, are included within its provisions.

It is not, however, every stage of inebriation that is attended with legal incapacity. It is not so when the individual is under a *mere temporary excitement*, unless it has been carried to an excessive degree, and the party is deprived of his reason (1 Eq. Juris., § 231). Yet if by such repeated practices his mind has become habitually diseased, his perceptive powers seriously affected, and he has become divested of reason, he has then assumed the character of one deranged, and has lost that legal capacity that renders him responsible for his acts. (3 Bac. Abr., 526, *a*. Co. Litt. 247. Dean's Med. Juris., 585. Jac. Law Dict., 371. 3 Amer. Jurist, 15.)

With these principles in view, we are led to the examination of the question, whether this petitioner was in that state of mind that places him within the saving provisions of this act. No one can read the depositions and have any misgivings on the subject, for they are full as to the extent of his inebriation, and the effect it had produced on his mind. We learn as facts in the case, that for a long time the petitioner was not only excessively intemperate, but to that extent as to render him unfit to transact business that required thought or memory. That for most of the time during the period in question, he was so crazy as to require close attention to prevent his doing mischief. That he was rapidly verging towards delirium tremens, and was incapable of deliberating upon those matters with which his interests were connected. And in relation to the subject-matter of this appeal, we also learn "that the members of his family often tried to talk with him about it, but could never communicate anything to him, or make him understand anything on the subject, until they were finally informed it was too late to do anything." Such was his condition *at the time the land was taken* by the commissioners, when it was *appraised, and notice given*, and when

the appeal was actually taken; for it was taken by his sons, when he was incapable of being consulted, but he was anxious to prosecute the same when afterwards he had in some measure recovered the proper exercise of his mind. It is difficult to conceive of a case, not merely of excessive inebriation, but of insanity and legal incapacity, arising therefrom, if this is not one. If an action had been brought upon a bond or contract executed during this period, no court would hesitate to find a total want of that assent of mind necessary to make a binding contract; for such assent implies a "free and serious exercise of the reasoning faculty, and the power, both physical and moral, of deliberating upon the matter, and weighing its consequences." (1 Paige R., 580. *Pitt* vs. *Smith*, 3 Camp. R, 33. *Fenton* vs. *Halloway*, 1 Stark. R., 126; 2 Aik. R., 167. *Conant* v. *Jackson*, 16 Vt., 335. 1 Story's Eq. Juris. Sec. 227, 8, 9. And a party will be relieved from any conveyance or contract made under such circumstances.

It would be exceedingly inconsistent to say, that the law under such circumstances will protect an individual from liabilities arising *ex contractu*, and yet will not protect him in his title and enjoyment of his real estate, or will suffer it to be taken from him by proceedings purely *in invitum* for a greatly inadequate consideration, by a neglect to take an appeal within a limited time, when, during that time, he was unable to understand the nature of the proceedings instituted for that purpose, or the consequences of his neglect. The right of the corporation to take this land is given by the legislature in the exercise of their right of sovereignty, and they are required by their charter, first, to negotiate with the landholder as to the amount of the compensation; this failing, the property is to be appraised, subject to the right of appeal. In all these proceedings there is required on the part of the landholder, the exercise of as sound and healthy a mind, and of reason as unimpaired, as is required in making any contract or disposition of his estate. And after the land has been taken by the corporation, and appropriated to their own use, it can but be regarded as a violation of moral duty to permit it to be taken from him for an inadequate consideration, or to deprive him, under such circumstances, of his right of appeal. We think, therefore, the appeal should not have been dismissed, and that the petitioner should have been permitted to prosecute the case under that provisionof the act giving ninety days for appealing, after the disabilities thereinmentioned are removed.

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EVIDENCE.—RES GESTÆ.

**Where, in an action for breach of promise of marriage, the plaintiff, a female, had introduced evidence tending to show an offer of marriage made to her by the defendant, and a preparation for the marriage on her part,—*Held*, that she was properly allowed to give evidence of her own declarations made to her friends at the time of her preparations, and explaining their purpose, as proof that her preparations were made in acceptance of defendant's offer.**

[*Whetmore* vs. *Mell*; 1 Ohio State R., 26.]

This was an action brought by a female for a breach of promise to marry.

On the trial it appears that a promise on the part of defendant was proved by circumstances; and evidence was also introduced by plaintiff, tending to show that the defendant had "kept her company" for three or four years, that the parties were then mutually attached, and that the plaintiff had made some preparations for marriage by purchasing bedding, &c. The plaintiff then offered evidence of her own declarations made to her sister during the preparations, but in the absence of the defendant, in order to show the mutuality of the contract. These declarations were objected to, but admitted by the Court, "not for the purpose of proving the contract of marriage, but for the purpose—if the jury were satisfied that a contract had been proven on the part of the defendant—of showing the mutuality of the contract."

Upon the evidence the jury found for the plaintiff. A motion for a new trial, founded partly upon the exception to the evidence above stated, having been overruled, the defendant appealed.

CORWIN, J.—It is undoubtedly true, as a general rule of evidence, that the statements of a party in regard to the subject-matter of his own suit are inadmissible, unless introduced by his adversary; but this rule is necessarily subject to many exceptions, and the admission or rejection of such testimony must in some measure depend upon, and be governed by, the nature of the case, and of the facts to be proven. Thus, it has been frequently held, that when one enters into land, in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin, or the like; or where one changes his residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or does any act material to be understood, his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts, leaving their effect to be governed by other rules of evidence (1 Greenl. Ev., sec. 108). So the state of mind, sentiments, or dispositions of a person, at any particular period, may be ascertained from his declarations and conversations at that time. (2 Hill, 248, 257.) And no objection can exist to the admissibility of such evidence, so long as the statements and declarations thus introduced are concomitant with, and explanatory of, the act or occurrence to which they relate. (*Sessions* vs. *Little*, 9 N. H., 271.) But the reason of this rule by no means applies to such statements as are merely narrative of a past occurrence, and they are clearly inadmissible.

In the case under consideration, the plaintiff's acts of preparation for the marriage were not objected to, and were properly admitted as evidence of her acceptance of defendant's promise to marry her. And why exclude her statements at the time, explanatory of such acts of preparation? The latter are no more likely to be deceptive than the former, but are the more reliable and satisfactory, because they are a distinct, express, and binding admission of what would only be otherwise ascertained by inference from unexplained acts.

Such statements, if made after a rupture between the parties, for obvious reasons, would be inadmissible; but the plaintiff in error has not shown by his bill of exceptions that the declarations so admitted

were made at such a time, or under such circumstances, and in the absence of such showing we will not presume that the court below admitted such improper declarations.

It is contended by counsel for plaintiff in error, that the statements of the party were admitted by the court to show the "mutuality of the contract;" and that as mutuality is an essential element of every contract, evidence to establish the "mutuality" is evidence to establish the contract itself, and that it was, therefore, improperly admitted. The language by which the object of the evidence is expressed in the bill of exceptions, may not be of the happiest selection, but the principle involved is quite clearly shown, and we do not stop to deal with the words in which it is set forth. The defendant's promise was shown by other distinct facts and circumstances; and it was proposed to show plaintiff's acceptance of it, by her preparation for marriage, together with her statements to her sister explanatory thereof, and for this purpose admitted by the court. The cases of *Hutton* vs. *Mansell* (6 Mod., 172), and *Peppinger* vs. *Low* (1 Halst., 384), are in point, and fully sustain the decision of the court below. The rule of evidence there established for this description of cases is so reasonable in itself, and the reasons by which it is maintained are so consistent with the habits and customs of society, and the obvious proprieties of life, and have for so long a time secured the sanction and approval of courts of justice, that we are unwilling to disturb it. And when we consider the peculiar nature of the contract thus sought to be established, and the circumstances of secresy and confidence with which it is usually made and observed in civilized life, such acts and declarations as were admitted in evidence in this case, are frequently the only, and ordinarily the best and most satisfactory evidence of the existence of such an engagement. We are unanimous in the opinion that there was no error in the ruling of the court below.

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BILL OF EXCEPTIONS.—INFORMALITY.

**On exceptions to the finding below, as "against the evidence," the Court of Appeal cannot say it is erroneous unless the evidence is *all* before them.**
**And it is *not* all before them where the only indication that the depositions and other papers laid before them with the bill of exceptions, are the same papers referred to in the bill, consists in a reference in the bill to the papers by artificial marks, as "A," "B," &c.**

[*Busby* vs. *Finn*; 1 Ohio State R., 409.]

This was an action of assumpsit on a promissory note. On the trial, judgment was rendered for the plaintiff, to reverse which this writ of error was brought. A bill of exceptions was taken at the trial, which was in the following words:—

"John R. Finn, Trustee of the late Stockholders of the Bank of Norwalk *vs.* George H. Busby and Madison W. Welsh: Be it remembered that at the trial of this cause at the March term, A. D. 1849, of said court, the plaintiff, to maintain the issue, gave in evidence the cognovit and proof of notice, and rested. Thereupon the defendants gave in evidence the record of the judgment in Marion county, hereto attached,

marked A, and also the statement of Mr. Finn, marked B, and rested. The plaintiff, the testimony of C. D. Boalt, hereto attached, marked C; the record from Wood county, marked D; the record of suit at law in Marion county, marked E, and the record of chancery case from Marion county, marked F. Upon which testimony the court found that the defendant did assume and promise, and assessed the plaintiff's damages at $2,624 26. Thereupon the defendant made his motion for a new trial, for the reasons therein assigned, which motion the court overruled; to which rulings and findings of the court the defendants excepted, and prayed the court to sign and seal this their bill of exceptions, which is accordingly done, and on their motion the same is made a part of the record in this case.

[SEAL.] "E. B. SADLER, *President Judge.*
[SEAL.] "F. SEARS.
[SEAL.] "F. WICKHAM.
[SEAL.] "E. STEWART.

THURMAN, J.—Among the papers before us are certain papers marked respectively, A, B, C, D, E, F, and H; but neither of them is, in any way, attached to the bill of exceptions, nor does either of them bear any file mark of any court, nor are they, nor either of them referred to in the pleadings, or verified, or even alluded to in any return or certificate of the clerk of common pleas; in a word, we have nothing whatever from which we can properly take notice that these papers are the same papers mentioned in the bill of exceptions. We do not mean to say that it is indispensable to copy into or actually attach to a bill of exceptions every paper making a part of it. (*Hicks* vs. *Person*, 19 R., 446. *Wells* vs. *Martin*, 1 Ohio State R., 386.) Such a description may be given of an exhibit as to leave no doubt of its identity when found among the papers; but, on the other hand, the description may be so loose, that of a number of papers each one will satisfy it just as well as any other. Thus, in the present case, the bill states that "the defendants gave in evidence the record of the judgment in Marion county hereto attached, and marked A;" but no such record is attached or marked as filed, or mentioned in the pleading, or referred to in any return or certificate of the clerk of the court. It is therefore manifest that *any* record of *any* judgment of *any* court in Marion county, and between *any* parties, satisfies the description in the bill of exceptions, provided it is marked A. The same thing may be said of the other exhibits. *Any* statement of Mr. Finn, marked B; *any* testimony of C. D. Boalt, marked C; *any* record from Wood county, marked D; *any* record of *any* law suit in Marion county, marked E; or *any* record of *any* chancery case in that county, marked F, will come within the description in the bill of exceptions; and one just as well as another.

As to the paper marked H, which purports to be a copy of a cognovit, we see no pretence for calling it a part of the bill. The bill simply states that the plaintiff below "gave in evidence the cognovit and proof of notice, and rested." What cognovit? The pleadings say nothing of such an instrument, and the bill does not refer to it by even an artificial mark, or speak of it as on file, or give its date, or say who were

the parties to it. This defect in the bill seems to have been subsequently discovered, for after the present writ of error had been sued out, and was pending in the court in bank, Busby & Welsh, at October term, 1851, of Huron Common Pleas, procured the latter court to make the following order:—

"On motion to the court, and it appearing that this court, in signing the bill of exceptions in said case, intended to make the cognovit filed in said case described in the declaration, and now remaining among the papers in the same, and marked H, a part of said bill of exceptions at the time the said bill of exceptions was signed and allowed: It is therefore ordered that said cognovit be hereby made a part of said bill of exceptions in the above entitled case, and that this order be entered as of the said March term, A. D. 1849, of this court, and certified to the court in bank as a part of said bill of exceptions."

This is certainly a curiosity in the history of judicial proceedings. The statute requires a bill of exceptions to be signed and sealed at the term at which the exception is taken, and it cannot be done afterwards. But the plan here attempted is permissible, signing and sealing are unnecessary, and a mere journal entry will answer for a bill of exceptions; and instead of the bill being perfected at the term in which the exception is taken, as is required by the statute, it may be completed at any subsequent term, even after the original papers are in the court of errors, by a *nunc pro tunc* order, and that made by different judges from those who signed and sealed the bill. Such a proceeding is wholly unauthorized, and the order in question is a nullity. And here we may remark, as showing how improvidently the order was granted, that it speaks of the cognovit as an instrument "described in the declaration," when in truth the declaration makes no mention whatever of it."

It is clear, then, that we cannot look at the paper marked H, and consequently we have nothing before us to show the contents of the cognovit mentioned in the bill of exceptions. In other words, we have not all the evidence given on the trial in the common pleas, if, indeed, we have any of it, in a form that we can notice. And here it is to be observed that the cognovit was a very material piece of testimony, for upon it, with proof of notice, the plaintiff below rested in chief, and no question appears to have been made but that he had thereby established, *primâ facie*, a right to recover.

The errors assigned amount in substance to this only, that the finding of the court was against the evidence; but as the evidence is not properly before us, we cannot say that the finding was erroneous.

We may add, however, that if the exhibits in question were all sufficiently made parts of the bill of exceptions, we should yet affirm the judgment of the common pleas.

His Honor gave the reasons for this conclusion somewhat at length, and the judgment was affirmed.

Engd. by H.B. Hall

Franklin Pierce

Engd by H.F. Hall

Franklin Pierce

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## CONDENSED REPORTS OF RECENT CASES.

LIVINGSTON'S
MONTHLY
LAW MAGAZINE.

VOL. II. APRIL, 1854. No. IV.

## CONDENSED REPORTS OF RECENT CASES.

### CRIMINAL TRIALS.—POWERS OF THE JURY.

**The jury are not judges of the law in criminal trials under the federal laws; they are bound to take the law from the court.**

[*The United States* vs. *Morris*; 1 Curtis' (U. S.) C. C. R., 23.]

THE defendant was indicted for a misdemeanor in aiding the escape of a fugitive slave, Shadrach, who was held by virtue of proceedings under the act of 1850.

While one of the counsel for the defendant was addressing the jury, he stated the proposition that, this being a criminal case, the jury were rightfully the judges of the law, as well as the fact; and if any of them conscientiously believed the act of 1850, commonly called the "Fugitive Slave Act," to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the court might give them; and he was about to address the jury in support of this assertion, when he was stopped by the court, and informed that he could not be permitted to argue this proposition to the jury; that the court would hear him, and if they should be of the opinion that the proposition was true, the jury would be so informed by the court; and the counsel then addressed the court in support of the position.

CURTIS, J.—The constitution of the United States, art. 3, sec. 2, provides, that "the trial of all crimes, except in cases of impeachment, shall be by jury." The counsel for the defendant maintains that, in every such trial of a crime, the jury are judges of the law, as well as of the fact; that they have not only the power, but the right to decide the law; that, though the court may give its opinion to the jury respecting any matter of law involved in the issue, yet the jury may and should allow to that opinion only just such weight as they may think it deserves; that, if it does not agree with their own convictions, they are bound to disregard it, the responsibility of deciding rightly all questions, both of law and fact, involved in the general issue, resting upon them, under the sanction of their oaths.

This is an important question, and it has been pressed upon the attention of the court with great earnestness, by one of the defendant's counsel. I have no right to avoid a decision of it. I proceed therefore to state the opinion which I hold concerning it. The true question is, What is meant by that clause of the constitution, "the trial of crimes shall be by jury?"

Assuming, what no one will controvert, that the tribunals for the trial of crimes were intended to be constituted, as all common-law tribunals in which trial by jury was practiced were constituted, having one or more judges, who were to preside at the trials, and a jury of twelve men, who were to form the other part, and that one or the other must authoritatively and finally determine the law, was it the meaning of the constitution that to the jury, and not to the judges, this power should be intrusted? There is no sounder rule of interpretation than that which requires us to look at the whole of an instrument, before we determine a question of construction of any particular part; and this rule is of the utmost importance when applied to an instrument, the object of which was to create a government for a great country, working harmoniously and efficiently through its several executive, legislative, and judicial departments. It is needful, therefore, before determining this question, to examine some other provisions of the constitution, which are parts of the same great whole to which the clause in question belongs. We find, in article 6, "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land." Nothing can be clearer than the intention to have the constitution, laws, and treaties of the United States in equal force throughout every part of the territory of the United States, alike in all places, at all times. To secure this necessary end, a judicial department was created, whose officers were to be appointed by the President, paid from the national treasury, responsible through the House of Representatives to the Senate of the United States, and so organized, by means of the supreme court, established by the constitution, and such inferior courts as Congress might establish, as to secure a uniform and consistent interpretation of the laws, and an unvarying enforcement of them, according to their just meaning and effect. That whatever was done by the government of the United States should be by standing laws, operating equally in all parts of the country, and binding on all citizens alike, was undoubtedly intended by the constitution; and any construction of any particular clause, which would tend to defeat this essential end, is, to say the least, open to very serious objection.

It seems to me, that what is contended for by the defendant's counsel would have something more than a mere tendency of this kind. *The Federalist*, in discussing the judicial power, remarks: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." But what is here insisted on is, that every jury impanelled in every court of the United States is the rightful judge of the existence, construction, and effect of every law

which may be material in the trial of any criminal case; and not only this, but every jury may, and, if it does its duty, must decide finally upon the constitutional power of Congress to enact every statute of the United States which on such a trial may be brought in question. So that we should have, not thirteen, but a vast number of courts, having final jurisdiction over the same causes arising under the same laws; and these courts chosen by lot out of the people, with no reference to their qualifications to decide questions of law, not sworn to decide the law, nor even to support the constitution; and yet possessing complete authority to determine that an act passed by the legislative department is inoperative and invalid. The consequences of such a state of things are too serious to be lightly encountered, and in my opinion the constitution did not design to recognize any such power by the clause in question.

Some light, as to its meaning, may be derived from other provisions in the same instrument. The sixth article, after declaring that the constitution, laws, and treaties of the United States shall be the supreme law of the land, proceeds, "and the *judges*, in every state, shall be bound thereby."

But was it not intended that the constitution, laws, and treaties of the United States should be the supreme law in *criminal* as well as *civil* cases? If a state law should make it penal for an officer to do what an act of Congress commands him to do, was not the latter to be supreme over the former? And if so, and in such cases, juries finally determine the law, why was this command laid on the judges alone, who are thus mere advisers of the jury, but have no real power in the matter?

It was evidently the intention of the constitution, that all persons engaged in making, expounding, and executing the laws, should be bound by oath to support the constitution. But no such oath is required of jurors, to whom it is alleged the constitution confides the power of expounding that instrument; and not only construing, but holding invalid any law which may come in question on a criminal trial.

I will state what is my own view of the rightful powers and duties of the jury and the court in criminal cases, and then see how far they are in conformity with the authorities, and consistent with what is admitted to be settled law.

It is the duty of the court to decide every question of law that arises in a criminal trial; if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no directions; they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they are to apply to the facts, and thus passing both on the law and the fact, they, from both, frame their verdict. Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England prior to the formation of the constitution, which conflicts with it.

Considering the intense interest excited, the talent and learning em-

ployed in England, near the close of the last century, when the law of libel was under discussion in the courts and in parliament, it can not be doubted that, if any decision, having the least weight, could have been produced in support of the general proposition, that juries are judges of the law in criminal cases, it would then have been brought forward. I am not aware that any such was produced. And the decision of the King's Bench (*Rex.* vs. *The Dean of St. Asaph*, 3 T. R., 428), and the answers of the twelve judges to the questions propounded by the House of Lords, assume, as a necessary postulate, what Lord Mansfield so clearly declares, that by the law of England, juries can not rightfully decide a question of law. It will be found that the great contest concerning what is known in history as Mr. Fox's Libel Bill, was carried on quite a different ground by its leading friends; a ground which, while it admits that the jury are not to decide the law, denies that the libellous intent is matter of law; and asserts that it is so mixed with the fact, that, under the general issue, it is for the jury to find it as a fact. Such I understand to be the effect of that famous declaratory law. (St. 32 Geo. III., c. 60.) The defendant's counsel argued that this law had declared that, on trials for libel, the jury should be allowed to pass on law and fact, *as in other criminal cases*. But this is erroneous. Language somewhat like this occurs in the statute, but in quite a different connection, and, as I think, with just the opposite meaning.

"The court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his *opinion and directions* to the jury, on the matter between the king and the defendant, *in like manner as in other criminal cases*."

This seems to me to carry the clearest implication that in this and in all criminal cases the jury may be *directed* by the judge; and that, while the object of the statute was to declare that there was other matter of fact besides publications and the inuendoes to be decided by the jury, it was not intended to interfere with the proper province of the judge, to decide all matters of law. This is the received opinion in England, and the general rule that juries can not rightfully decide the law in criminal cases, is still the law in England. (*Parmitier* vs. *Copeland*, 6 M. & W., 165; *Levi* vs. *Milne*, 4 Bing. R., 195.)

I conclude, then, that when the constitution of the United States was founded, it was a settled rule of the common law that in criminal as well as in civil cases, the court decided the law, and the jury the facts; and this must have an important effect in determining what is meant by the constitution when it adopts a trial by jury.

It is argued, however, that in passing the Sedition Law (St. 1798, c. 74, s. 3), Congress expressly provided that the jury should have the right to determine the law and the fact, under the direction of the court, as in other cases, and that this shows that in other cases juries may decide the law contrary to the direction of the court.

I draw from this the opposite inference; for where was the necessity of this provision if, by force of the constitution, juries have both the power and the right to determine all questions in criminal cases, and

why are they to be directed by the court? (*Montgomery* vs. *The State*, 11 O. R., 427.)

There is, however, another act of Congress which bears directly on this question. The act of the 29th of April, 1802, sec. 6, after enacting that, in case of a division of opinion between the judges of the circuit court, on any question, such question may be certified to the supreme court, proceeds, "and shall by the said court be *finally decided*. And the decision of the supreme court, and their order in the premises, shall be remitted to the circuit court, and be there entered of record, and have effect according to the nature of such judgment and order." The residue of this section proves that criminal as well as civil cases have been certified to and decided by the supreme court, and persons have been executed by reason of such decisions.

Now can it be that after a question arising in a criminal trial has been certified to the supreme court, and there finally decided, and their order remitted here and entered of record, that when the trial comes on the jury may rightfully revise and reverse this final decision? Suppose, in the course of this trial, the judges had divided in opinion upon the question of the constitutionality of the act of 1850, and that after a final decision thereon by the supreme court, and the receipt of its mandate here, the trial should come on before a jury, does the constitution of the United States, which established that supreme court, intend that a jury may, as a matter of right, revise and reverse that decision? And if not, what becomes of this supposed right? Are the decisions of the supreme court binding on juries, and not the decisions of inferior courts? This will hardly be pretended; and if it were, how it is to be determined whether the supreme court has or has not, in some former case, in effect settled a particular question of law? In my judgment, this act of Congress is in accordance with the constitution, and designed to effect one of its most important, and even necessary objects—a uniform exposition and interpretation of the law of the United States—by providing means for a final decision of any question of law; final as respects every tribunal, and every part of any tribunal in the country; and if so, it is not only wholly inconsistent with the alleged power of juries, to the extent of all questions so decided, but it tends strongly to prove that no such right as is claimed does or can exist.

An examination of the judicial decisions of courts of the United States since the organization of the government will show, I think, that the weight of authority is against the position taken by the defendant's counsel.

His Honor cited and commented upon the following authorities in support of his position. (3 Dall. R., 4; *United States* vs. *Shine*, Baldw. R., 510; *United States* vs. *Battiste*, 2 Sumner, 240; *People* vs. *Casswell*, 3 Johns. Cas., 337; *People* vs. *Price*, 1 Barb. S. C. R., 566.)

The question has been very carefully considered, and extremely able opinions upon it delivered by the highest courts in Indiana, New Hampshire, and Massachusetts. (*Townsend* vs. *The State*, 2 Blackf. (Ind.) R., 152; *Pierce* vs. *The State*, 13 N. H. R., 536; *Common-*

*wealth* vs. *Porter*, 10 Met. R., 263.) The reasoning of these opinions, so far as it is applicable to the question before me, has my entire assent. The question is not necessarily the same in the courts of the several States, and of the United States, though many of the elements which enter into it are alike in all courts of common law, not bound by some statute or constitutional provision.

It remains for me to notice briefly some of the arguments which are relied on by the defendant's counsel in support of his position. It is said that in rendering a general verdict of guilty, or not guilty, the jury have the power to pass, and do in fact pass, on every thing which enters into the crime. This is true; but it is just as true of a general verdict in trover or trespass; and yet I suppose the right of the jury to decide the law in those cases is not claimed. The jury have the power to go contrary to the law as decided by the court; but that the power is not the right, is plain, when we consider that they have also the like power to go contrary to the evidence, which they are sworn not to do.

It is supposed that the old common-law form of the oath of jurors in criminal cases indicates that they are not bound to take the law from the court. It does not so strike my mind; they are sworn to decide according to the evidence. This must mean that they are to decide the facts according to the evidence. But if they may also decide the law, they are wholly unsworn as to that, and act under no obligation of an oath at all in making such decision.

That it has been a familiar saying among the profession in this country, and an opinion entertained by highly respectable judges, that the jury are judges of the law as well as of the facts, I have no doubt. In some sense I believe it to be true, for they are the sole judges of the application of the law to the particular case. In this sense theirs is the duty to pass on the law—a most important and often difficult duty, which, when discharged, makes the difference between a general and a special verdict, which, although they may return, they are not bound to return. They are a co-ordinate branch of the tribunal, having their appropriate powers, and rights, and duties; but it is not their province to decide any question of law in criminal, any more than civil cases; and if they should intentionally fail to apply to the case the law given to them by the court, it would be, in my opinion, as much a violation of duty as if they were knowingly to return a verdict contrary to the evidence.

A strong appeal has been made to the court by one of the defendant's counsel, upon the ground that the exercise of this power by juries is important to the preservation of the rights and liberties of the citizen. If I thought so, I should pause long before I denied its existence. But a good deal of reflection has convinced me that the argument drawn from this quarter is really the other way. As long as the judges are obliged to express their opinions publicly, to give their reasons for them, when called upon, in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and

duty of the court, authoritatively to declare the law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons, or times, or the opinions of men. To enforce popular laws is easy; but when an unpopular cause is a just cause; when a law, unpopular in some locality, is to be enforced there, then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne.

I have entered thus at large into this important question, in the course of a jury trial, with unaffected reluctance. Having been directly and strongly appealed to, and finding that no judge of any court of the United States had, in any published opinion, examined it upon such grounds that I could feel I had a right to repose on his decision without more, I knew not how to avoid the duty thus thrown upon me. My firm conviction is, that under the constitution of the United States, juries, in criminal trials, have not the right to decide any question of law; and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court.

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STATUTORY CONSTRUCTION.—"ACADEMY."

A statutory provision, exempting from taxation "universities, colleges, *academies*, and school-houses, does not exempt an "Academy of the Fine Arts."—So held in Pennsylvania.

[*The Pennsylvania Academy of Fine Arts* vs. *The County of Philadelphia*. Pennsylvania Supreme Court, 1854. Not yet reported.]

The Legislature of Pennsylvania, by an act passed in 1838, relative to taxation, exempted from contributions to the support of government "all universities, colleges, academies, and school-houses belonging to any county, borough, or school district, or incorporation endowed or established by virtue of any law of this commonwealth, with the grounds thereto annexed. The Pennsylvania Academy of Fine Arts now claimed the benefit of this exemption. The court below decided against the claim, and the academy appealed. The single question discussed by the supreme court was whether this claim was well founded.

LEWIS, J.—This court has repeatedly declared it to be a rule of the public law that taxes shall be assessed in such manner that *all* the citizens may pay their quota in proportion to their abilities, and the advantages they derive from society. All laws exempting any portion of the people or property from bearing a proper share of the public burdens, unless in consideration of adequate contributions to the community in some other form, are therefore unjust. To create privileged classes, and to exempt them from the payment of their just proportion of the public taxes, is to lay increased taxes upon the other citizens; and, unless compensated for, by corresponding advantages to the public, is to violate the duties of government. For this reason, statutes

which strip the government of any portion of its prerogative, or give exemption from a general burden, should receive a strict interpretation. (11 Rep., 74; 8 Mod., 8; Cowper, 26.) No interests falling within the general description of taxable property can claim exemption from bearing their just proportion of the public charges, unless the exemption be so clearly expressed in the statute as to admit of no other construction. It is never to be presumed that the legislature intend to lay unequal burdens upon the people; and their enactments are not to be construed so as to produce that result, unless the intent is so plainly expressed as to render it unavoidable. (Dwarris on Statutes, 669, 749, 750.)

With these principles in view, we arrive at the question, Is the "Pennsylvania Academy of Fine Arts" one of the academies which the legislature, in the act of 1838, designed to exempt from taxation? An academy originally meant a garden, grove, or villa near Athens, where Plato and his followers held their philosophical conferences; but, of course, we are not to adopt this as the present meaning of the word. It has acquired, by the usage of modern times, a variety of meanings. It is sometimes used to designate a school for teaching *a particular art* or *science;* but it is most commonly understood to mean a school or seminary of learning (holding a rank between a university or college and a common school), in which the arts and sciences *in general* are taught.

The term college is likewise used in various senses, as, a college of electors, a college of surgeons, or a college of cardinals; but it is commonly used to describe an edifice appropriated to instruction in the languages and sciences *in general.* There is less diversity in the application of the term *university.* It is in common parlance and in legal acceptation, as the word imports, "a place where all kinds of literature are *universally* taught." (Jacob's Law Dic., Webster.) But the term school has been used in a variety of senses. The ancients had their *Socratic School,* their *Platonic School,* and their *Peripatetic* or *Ionic School.* In modern times we have singing schools, dancing schools, riding schools, swimming schools, fencing schools, and even boxing schools. But the term school-house, when used without qualification or restriction, is generally understood to mean a place in which primary instruction is given in arts, sciences, and language generally.

In which of these various senses did the legislature make use of the terms universities, colleges, academies, and school-houses? The principles of justice, and the well-established rules of construction, are in harmony in their response to this question. Where words in a statute admit of several significations, one of which is reasonable and just in its results, and another contrary to reason and justice, it is the duty of the courts to adopt the former. As the privileges granted by the statute necessarily impose an increase of the *general* burdens upon the property not thus exempt, it must be presumed that they were intended only for those institutions which compensated for the grant by contributing to the *general* benefit. The grant should not be carried by construction beyond the consideration to be received for it. It is true that the arts of painting and sculpture are refining and elevating in their tendencies. They advance the fame and fortunes of all who are

qualified for the beautiful creations which belong to them. Like the kindred arts of poetry and music, they furnish "a joy forever" to those whose tastes invite, and whose circumstances permit them to drink at the Castalian fountain. But we make but indifferent progress in the improvement of our moral sentiments if we desire to reap the pleasures and the profits of these refinements at the expense of others whose tastes lead in a different direction, or whose circumstances preclude them from participating in such gratifications. Every useful trade, art, and profession may lay equal claim to support from the public coffers; but until all are equally provided for, it is unjust to levy contributions upon the farmer, mechanic, and the laboring man for the support of any particular occupation. The Academy of Fine Arts presents us with pictures of life, *with action*. The Academy of Music, with its proposed opera, may furnish us with pictures of life, *without action*. We may differ in our estimates of the merits of these institutions; but we do not perceive much ground for any difference of opinion on the question whether it is just to wring from the labors of those who derive but little pleasure or profit from them, the taxes necessary for their support.

The public charges are already sufficiently onerous. We are not prepared to increase them, for purposes in which the people at large have but small interest, until the legislature shall direct us to do so, in language not to be misunderstood. As we have seen that the term *university* means a place where *all* kinds of literature are *universally* taught, and as it is plain that this was the sense in which the legislature used the word, it may serve as a key to unlock their meaning with respect to the other institutions for instruction enumerated in the same clause. We have no doubt that the exemption was intended only in favor of other institutions of inferior degree, but of the same *general* character, and that the Academy of Fine Arts was not designed to be embraced in the grant.

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### STATUTORY CONSTRUCTION.—"PERSON."

**In North Carolina, a penal statute does not embrace slaves for punishment, unless they are specified.**

[*The State of North Carolina* vs. *Tom*; 1 Busbee's (N. C.) R., 214.]

The Rev. Stats. of North Carolina (ch. 34, § 60), enact that if any *person* shall directly or indirectly pass or attempt to pass, etc., any false, forged, or counterfeit bill or note, etc., every such *person* shall be adjudged guilty of felony, and punished with fine, imprisonment, etc. Under this provision the defendant, a slave, was indicted for passing a counterfeit note. He demurred for want of jurisdiction in the county court, where the prosecution was commenced. His demurrer was overruled and he appealed to the superior court, where the judgment of the county court on the demurrer was affirmed. The defendant appealed from this judgment to the supreme court.

NASH, C. J.—The only question we are called on to decide is, whether the statute embraces a slave.

The word *person*, in its ordinary sense, is sufficiently comprehensive to have that effect. *In rerum natura* slaves are persons; they are human beings endowed with intelligence, and with the physical organization appertaining to humanity. With us, however, they have another being impressed upon them by the laws. They are a species of property, and are governed by a code of laws different in many respects from that which governs and regulates the conduct of the white man—laws in their general character mild and benevolent, looking as well to their protection as to their restraint. While, therefore, for most civil purposes, we regard them as property, at the same time we guard their lives, limbs, and members with the same care that we do those of the white population. In carrying out this humane policy, the courts in putting a construction upon penal statutes, have adopted the principle that slaves are not embraced, unless mentioned. They are not embraced for punishment, but they are for protection.

In looking over the acts of the general assembly, we find that in almost every instance when slaves are the object of legislation, they are called either slaves, negroes, or persons of color, the latter designation being mostly confined to free negroes. It is obvious that the legislature recognized the principle that to bring slaves within the sweep of a penal law, they must be mentioned. When it is said they are embraced for protection, though not named, it is meant that the law protects them from illegal violence. Many other statutes might be enumerated in which slaves are mentioned as slaves, where particular acts are made criminal. In our opinion, the word person, as used in the act of the assembly, under which this indictment is framed, does not extend to slaves.

The offense of the prisoner not being the proper subject of an indictment, neither the county nor the superior court had jurisdiction.

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### STATUTORY CONSTRUCTION.—"SUBSCRIBED."

**The New York statute of Frauds requires the memorandum of agreement to be "subscribed" by the party sought to be charged; instead of employing the word "signed"—*Held*, that it requires a subscription *underneath* or *at the end of*, the memorandum.**

[*James* vs. *Patten*; 2 Selden's (N. Y. Court of Appeals), R., 9.]

This action was brought on a special contract for the sale and delivery of a quantity of corn. The memorandum of the agreement was in the following terms.

"ALBANY, *March* 12, 1847.

Mr. THOMAS JAMES Bought of M. and S. PATTEN.

"For the relief committee, 3,000 bushels yellow corn (fifty-six pounds per bushel), to be delivered, at the opening of the Hudson river navigation, at our store in Albany, at 81 cents per bushel." $2,430.

This memorandum was in the handwriting of S. Patten, one of the defendants. The cause was tried by the court without a jury. The plaintiff proved the price of the corn, and the tender of the same, and the demand and refusal to deliver the corn; and rested his case. The defendants moved for a nonsuit on the ground that the contract was not subscribed by the defendants, and on the ground that it was a contract between the relief committee and the defendants. The judge overruled the motion and the defendant's counsel excepted. The judge rendered a judgment for the plaintiff for $541 45. The supreme court for the third district denied a motion for a new trial, and the defendants appealed to this court.

PAIGE, J.—The principal question to be decided in this case is, whether the memorandum of the contract entered into between the parties was a valid note or memorandum of such contract within the statute of frauds. The objection made to it is, that it was not subscribed by the defendants, the parties to be charged thereby. The section of the chapter of frauds contained in the revised statutes relative to contracts for the sale of goods and chattels declares that every contract for the sale of goods, etc., for the price of $50 or more, shall be void; unless, 1, a note or memorandum of such contract be made in writing and be *subscribed* by the parties to be charged; or, 2, unless the buyer shall accept and receive part of such goods, etc.; or, 3, unless the buyer shall at the time pay some part of the purchase money. (2 R. S., 136, sec. 3.) The old statute of frauds, passed February 26, 1787, as well as the British statute of 29 Charles II., ch. 3, were substantially in the same words, with the exception of the word "subscribed." (1 Rev. L. of 1813, p. 79, sec. 15; 1 Chit. on Con. 385.) Those statutes required the note or memorandum to be signed by the parties instead of being subscribed by them. Under the judicial construction of our old statute and of the British statute, it was not necessary to the validity of the contract or of the note or memorandum thereof, that it should be signed at the end. It was held to be a compliance with the statute, if the name of the party to be charged appeared in any part of the instrument, either at the top, in the middle, or at the bottom, provided it was placed there by the party himself or by his authority, and was applicable to the whole substance of the writing. (*Clason* vs. *Bailey*, 14 John., 486; 12 John., 106, 7.) Thus the law stood at the time of the revision. The revisers, in their notes to the 8th section of the 1st title of the chapter of frauds as reported by them, say it had been held under the former statute of frauds, "that the literal act of signing is not necessary, although the statute speaks of "signing." After setting out with this principle, the courts found themselves perfectly at large as to what should be considered a signing. To prevent difficulties of this sort hereafter, the revisers propose to require that these agreements shall be subscribed."

It is perfectly clear from the note of the revisers, that they intended by the word "*subscribed*," to require the manual signing of the agreement at the end thereof, by the party to be charged. The legislature under these circumstances retaining the word "subscribed," must be understood to have done so, for the purpose of requiring an actual sign-

ing in writing of the agreement or memorandum thereof, underneath the same. We can not now construe these sections of the chapter of frauds as to dispense with the necessity of an actual subscription, without disregarding the plainly declared will of the legislature. It is the office of the courts to administer the law as the legislature has declared it; not to alter the law by means of construction, in order to remedy an evil or inconvenience resulting from a fair interpretation of the law. The etymology and definition of the word *subscribe* show that its meaning, when applied to an instrument in writing, is the signature or writing of one's name beneath or at the end of the instrument. I am aware that the popular meaning of the word "signed," when applied to a contract or other instrument, is generally writing one's name at the bottom; and that this is sometimes its literary meaning. But this is not so emphatically and universally its meaning as is the meaning of the word "subscribed." The derivation of that word from the Latin word *subscribo*, shows that literally its meaning is, "to write under" or "underneath." But this is not the derivative meaning of the verb "to sign." Such meaning is, to write one's name on paper, or to show or declare assent or attestation by some sign or mark.

I concede we are not always in the construction of a statute to be controlled by the literary signification of words or their derivative sense; and that where they have not by long habitual construction received a peculiar or technical meaning, they are to receive their natural and ordinary signification. (*Wain* vs. *Warlters*, 5 East, 10.)

In all cases, the intention of the law-maker in using the words is to be sought after, and when that is ascertained, it must be followed with reason and discretion in the construction of the statute. Wherever any words are obscure or doubtful, the intention of the legislature must be resorted to, in order to find their meaning. (Bac. Ab. Stat., I. 5.) In the revision of the statute of frauds, no motive can be assigned for rejecting a word, the legal meaning of which had been established by a long line of adjudications, and substituting another, which had never received a judicial interpretation, but which had a known limited meaning; unless it was to change the law or the construction of the statute, so as to require an actual signing of the name of the party at the end of the contract or of the memorandum thereof, although in common parlance the word "signed" in reference to a contract or other instrument in writing is generally understood as a writing of the name at the bottom; yet now, neither in its ordinary or legal use is it confined to that office; but the word "subscribed" in its habitual use, and according to its signification, is limited to a signature at the end of an instrument. It seems to me, therefore, that the legislature, by the substitution of the word "subscribed" for the word "signed," intended a change in substance of the statute of frauds, and to attain a greater degree of certainty in contracts, by requiring an authentication, by an actual subscription of the contract, by the party to be charged. This alteration is more than a verbal one; it is an alteration in substance; the rejection of a word which, by means of judicial interpretation, had an extensive legal signification; and the adoption of another in its place, which had in its popular and literary use, and according to the

general popular understanding, a known limited meaning. According to the familiar rules of construction, this substituted word must receive its natural and ordinary signification. (5 East., 10; Bac. Ab. Stat., I. 2.) And if that is accorded to it, the contract must now be authenticated by a manual signature at the end. In neither a popular, literary, or legal sense are the words "subscribed" and "signed" synonymous. (*Merritt* vs. *Clason*, 12 John., 102.)

GARDINER, J.—The contract in question was not subscribed, within the meaning of the 3d section of the statute of frauds. The word sign, primarily means any written authentication of a contract, by the person to be charged. Business men, when speaking of the signature to a note, mean an undersigning, and most men out of the legal profession would consider a contract, with the contractor's name at the commencement instead of the close of the instrument, as unexecuted. The courts, in declaring that a signature might be in any part of the instrument, if the intention of the contractor was manifest, did not therefore depart from the primary signification of the word, but from the meaning in which it was generally accepted.

In the revision of the statutes, the legislature intended to substitute the popular meaning, for one adopted by judicial construction. They did this by a change of phraseology, in substituting "subscribed," which indicates the making of a particular kind of signature, for "signed," which applied to every species of written authentication. I do not doubt the intention in changing the phraseology of the statute.

The judgment of the court should be reversed.

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### STATUTE OF LIMITATIONS.—ACKNOWLEDGMENT OF DEBT.

**Where an acknowledgment of indebtedness merely referred in general terms to a claim, but did not specify any particular sum as due, and there was wanting other evidence of the amount of the debt—*Held*, that the acknowledgment was insufficient to take the case out of the statute.**

[*Sheeler* vs. *Suter*. Pennsylvania Supreme Court, 1854. Not yet reported.]

This action was brought in 1852 by Sheeler against William Suter, as administrator of Daniel Tarr, to recover for services rendered by Sheeler to Tarr, from 1831, when plaintiff commenced living with Tarr, until 1845, when he left. It appeared from the whole evidence that Sheeler lived with Tarr under a contract for monthly wages; and also, that during a considerable part of the period referred to, the plaintiff was in the employ of Holin Tarr, a son of Daniel.

The defendant pleaded the statute of limitations, to meet which the plaintiff relied upon an acknowledgment of the debt within six years. The testimony on this point was that of one Daniel Tarr, son of Colin, and grandson of defendant's intestate. The witness stated that after Sheeler left his grandfather's service, the latter desired him to come back. He thus described the interview:

"The fall before the old man died, two or three months before he died, he and Sheeler had a conversation at Tarr's house. Daniel Tarr

and Sheeler were out at the corner of the house; I was a couple of steps off; Tarr asked Sheeler to come back and live with him; Sheeler said he would see about it, probably he would come. The old man said, '*I know, John, the people are persuading you to sue me; you know, John, I have always promised to pay you.*' Old man said again he knew the people were trying to get him to sue; that he always promised to pay him for his labor; he said he was not able to pay him then, he did not expect to be here long, and he would leave enough after his death to pay him; I don't know whether Sheeler went back to work. Old Mr. Tarr died in January, 1852."

The defendant's counsel requested the court to charge that there was no evidence of such an acknowledgment of the debt within six years as would take the debt out of the statute. The court, in answer to this point, said, "The declarations of Daniel Tarr, junior, if he is believed, would be a sufficiently distinct acknowledgment. He spoke expressly of the pay for his labor."

Under this instruction, the jury found a verdict for the plaintiff for $2,079 75, and the defendant appealed from the judgment rendered thereupon. The question was whether the acknowledgment was sufficient.

WOODWARD, J.—Whether founded on presumption of payment, supposed loss of evidence, or the policy that would suppress litigation and promote repose, the statute of limitations is an express legislative offer to the debtor, of means, not to extinguish his debt, more than six years old, but to defeat any action for its recovery. But the offer must be accepted. The statute is a bar only when it is pleaded, and as it may be waived in pleading, so may it be by matter *in pais*. Inasmuch, however, as the indemnity offered to the debtor is based on a regard for individual and particular justice, and on considerations of public policy which long experience has sanctioned, the evidence of waiver ought to be clear on every point essential to constitute liability. Acknowledgments of a debt which are consistent with a promise to pay, are said to amount to a new promise, but that this is not true, is proved by our always suing on the original contract, and never on the new promise. Still, however, whether they be regarded as evidence of a *new* promise, or only as a waiver of the statutory defense against the *old one*, they manifestly ought to be so full and precise as to enable a court to apply them exactly as the party making them intended they should be applied. When a debtor waives the benefits of the statute in pleading, there is no doubt about his intention; but when he pleads it, and it is sought to strip him of its protection, by *evidence*, let it be shown when and where he surrendered it, and that the surrender had respect to *the very claim now in suit*. (See an essay on the Statute of Limitations in L. J., July, 1848, 63.)

If the evidence prove no recognition of an amount, or of the instrument of indebtedness, or of other circumstances of identification, how can a court and jury, sitting to administer *justice*, be expected to apply it to the specific debt in suit?

This case illustrates the difficulty. It was shown that for a considerable portion of the fourteen years, for the labor of which this suit was

brought, the plaintiff was not in the service of the intestate, but of his son, Colin Tarr. Did the acknowledgment of old Daniel Tarr, as proved by his grandson, relate to the time Sheeler had worked for both him and Colin, or only to the time he had wrought for himself? He acknowledged *his* indebtedness; but under the evidence it would be gross injustice to measure that by the whole fourteen years, because part of that time had been given to Colin. But how much? The evidence does not answer. What the relations between the three men were, and how much labor at $7 or $8 a month was performed for the old man, and how much for Colin, at that or some other agreed rates, are points on which the *acknowledgments* throw not a ray of light, and which are unascertained by all the evidence in the cause. It was not the purpose of the acknowledgments to *enlarge* the liability, but only to *revive* it. Its *extent* was doubtless well understood by the parties, but it was not shown on the trial, and therefore the plaintiff ought not to have recovered. Judging from its amount ($2,079 75), the verdict must have been for the whole period, with interest superadded, and that in a case where the only thing clear as to the *extent* of the parties' indebtedness is, that it did *not* cover the whole period.

The case, then, upon all the evidence, left the statute of limitations in full force—that is, to put it more clearly, the plaintiff having failed to prove that the defendant's intestate had acknowledged the *debt sued*, the statute barred the action, and the court ought so to have instructed the jury.

The judgment is reversed, and a *venire de novo* awarded.

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DEEDS.—RULES OF CONSTRUCTION.

The court will take pains to construe the words used in a deed in such a way as to effect the intention of the parties, however unskillfully the instrument may be drawn.
But a court of law can not exchange an intelligible word plainly employed in a deed, for another, however evident it may be that the word used was used by mistake for another.
Examples of lay conveyancing. Two cases.

[I. *Cobb* vs. *Hines*; 1 Busbee's (N. C.) R., 343.]

This was an action of ejectment.

In 1839, the lessor of the plaintiff, Cobb, upon the marriage of the defendant, Hines, with his daughter Cartha, had executed to him an instrument, of which the material portion was as follows:

"Know all men by these presents, at I. Enoch Cobb, for the inconsideration of the good will, favor and affection, that I bear to Rewards my son and law James M. Hines, I give to the said James M. Hines the following negroes, etc. In witness whereof I hereunto set my hand and seal this 23 February 1839.

(Signed) E. Cobb. [SEAL.]

"I also place and set over and appoint James M. Hines agent of the hereafter-named property, to be to use and benefit of my daughter Cartha, and the lawful heirs of her body to them and their successors, to wit, Patsy, Winny, Ellick, little Kedar, Abram, and Smithea, and

the following tracts of land (describing them) in witness whereof, I hereunto set my hand and seal this 23d day of February 1829.

Witness, (Signed) E. Cobb. [SEAL.]
A. G. Jernigan
his
Thomas + Dail
mark."

The deed was duly acknowledged and registered.

About ten years after the execution of this instrument, Cartha died, leaving three children living at the commencement of the suit. In May, 1852, Cobb, the real plaintiff, demanded from Hines possession of the land, and upon the refusal of the latter to surrender it, this action was commenced. It was tried upon an agreed statement of facts. The court below rendered a *pro forma* judgment for the plaintiff, and the defendant appealed.

BATTLE, J.—The deed under which the defendant claims, and by virtue of which he seeks to defeat the recovery of the plaintiff's lessor, is, as must be admitted, very informal. It is untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography, and yet it may be valid, if "there be sufficient words to declare clearly and legally the party's meaning." (2 Black. Com., 298.) It is now our duty to inquire whether the words contained in this deed be sufficient to enable us to pronounce what is the party's meaning. It may facilitate our inquiries to recur to fundamental principles, and ascertain what rules have been established by the sages of the law, for the construction of deeds. The three following, given by Blackstone (2 Black. Com., 379), and supported by many authorities, will be sufficient for our purposes:

1. "That the construction be *favorable*, and as near the minds and apparent intents of the parties as the rules of law will admit. For the maxims of the laws are, that *verba intentioni debent inservire;* and *benigne interpretamur chartas propter simplicitatem laicorum.* And therefore the construction must also be *reasonable*, and agreeable to common understanding."

2. "That *quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est;* but that where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words; nam qui hæret in litera, hæret in cortice.* And another maxim of law is, that *mala grammatica non vitiat chartam;* neither false English nor bad Latin will destroy a deed."

3. "That the construction be upon the entire deed, and not merely upon disjointed parts of it. *Nam ex antecedentibus et consequentibus fit interpretatio.* And therefore that every part of it be, if possible, made to take effect, and no word but what may operate in some shape or other. *Nam verba debent intelligi cum effectu, ut res margis valeat quam pereat.*" (See *Smith* vs. *Parkhurst*, 3 Atk. R., 135, Preston ed. of Shep. Touch., vol. i., p. 87; *Bronson* vs. *Paynter*, 4 Dev. & Bat. R., 393; *Armfield* vs. *Walker*, 5 Ire. R., 58; *Davenport* vs. *Wynne*, 6 Ire. R., 129; *Kea* vs. *Robeson*, 5 Ire. Eq. R., 373; *Brooks* vs. *Ratcliff*, 11 Ire. R., 321.)

Now if we apply these rules and principles, plainly deducible from them, to the deed under consideration, we think that the intention of the parties may easily be ascertained from the words which they have employed. In the first part of the instrument the donor gives, in language which admits of no doubt, certain slaves to his son-in-law, declaring that he so gives them, because of the good-will, favor, and affection which he bears toward him.

He then proceeds: "I also place, and set over, and appoint James M. Hines (the defendant, his son-in-law) agent of the hereafter-named property, to be to the use and benefit of my daughter Cartha, and the lawful heirs of her body to them and their successors, to wit," etc., naming certain slaves, and the tract of land now in dispute. The defendant's counsel contends that these words contain, in substance, an effect, a covenant by the plaintiff's lessor, to stand seized to the use of his son-in-law, or of his daughter, the defendant's wife; that the consideration is either expressed in the deed, by means of the reference to that recited in the first part, or that it is implied from the relationship of the parties apparent in the deed; that the relationship is a good consideration, sufficient to raise a use, and that therefore the deed is effectual to transfer the land either to the daughter or son-in-law, and in either case the plaintiff's lessor can not recover. For these positions the counsel cites the following authorities: (Bac. Ab., tit.; Cov. Letter, A. Platt, on Cov., 3; 3 Law Library, *Bedell's* case, 7 R., 40; 2 Saund. on Uses and Trusts, 81; *Milbourne* vs. *Simpson*, 2 Wils. R., 22; 2 Pres. Shep. Touch., 512, 31 Law Library.)

The counsel for the plaintiff's lessor, on the other hand, contends that the words relied on by the defendant are unmeaning, that no covenant is expressed, and that none can be implied, because it would be repugnant to the idea of an agency in the son-in-law, that no sufficient consideration appears to raise a use either to the daughter or son-in-law, and that the instrument is therefore void and of no effect; and he cites in support of his argument Co. Litt., 49, A.; *Spriggs* vs. *Hawks*, 5 Ire. R., 30. We think it is clear that the plaintiff's lessor *intended* to give to his daughter and the heirs of her body, or to his son-in-law for the use of his daughter and the heirs of her body, the land and slaves mentioned in the second part of the instrument in question. This appears plainly from the fact, that having given certain slaves to his son-in-law, in the first part of the deed, he commenced the second part with saying, "I also place, etc., James M. Hines, agent of the hereafter-named property, to be *to use and benefit* of my daughter Cartha," etc. What could he mean if he did not intend his daughter to have the use of the property which he proceeds to enumerate. The authorities cited clearly show that no particular words or form of expression are necessary to create a covenant. They show that the relationship of the parties, appearing on the face of the deed, is sufficient to manifest the consideration and raise a use; and that relationship by affinity to a son-in-law is a good consideration. Why, then, can not the deed operate according to the intention of the covenantor? The parties to the deed are certain; the property intended to be conveyed is certain; and yet we are told that because the son-in-law is ap-

pointed *agent* instead of *trustee* for the daughter, or because he stands between the father and his daughter, the property can not go to her use. To this objection we give an answer in the emphatic language of Lord Chief Justice Willes, in the case of *Smith* vs. *Parkhurst*: "Another maxim is, that such a construction should be made of the words of the deed as is most agreeable to the meaning of the grantor; the words are not the principal thing in a deed, but the design and intent of the grantor; we have no power, indeed, to alter the words, or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. These maxims are founded upon the greatest authority, Coke, Plowden, and Lord Chief Justice Hale; and the law commands the *astutia*, the cunning of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent, may show the ingenuity of, but is very ill-becoming, a judge." In the deed before us, the intent of the father to give property to the use of his daughter is plain, and that intent may be effectuated by construing the word *agent* to mean *trustee*, and it may be so construed without doing much violence to its proper meaning.

We think that we can do this, and that we ought to do it, and thus escape the condemnation pronounced upon judges who exercise their ingenuity in construing words so as to destroy, instead of to give effect to, the intention of the parties as manifested in their deeds. Whether the operation of the deed was to vest the legal estate in the defendant in trust for his wife and her heirs, or whether she took the legal estate so as to give him a life estate as tenant by the courtesy, the lessor of the plaintiff can not recover. The judgment in favor of the lessor must therefore be set aside, and judgment of nonsuit be entered according to the case agreed.

[II. *Hagler* vs. *Simpson*, 1 Busbee's (N. C.) R., 384.]

This was an action of covenant brought upon a deed of bargain and sale executed by the defendant in 1834, conveying to the plaintiff a tract of land.

Upon the trial, at the circuit, the plaintiff offered in evidence a grant from the state to one Samuel Smith, dated 30th September, 1829, embracing the greater part of the tract of land conveyed by the said deed of the defendant. The plaintiff further showed a deed from said Smith to one Brandon, and the record of a suit in ejectment against the plaintiff on the demise of said Brandon, and a verdict and judgment for the plaintiff's lessor therein, at September term, 1840. It appeared that Hagler, soon after this recovery, voluntarily abandoned the premises, no writ of possession ever having been issued.

The plaintiff relied on certain clauses in the deed as constituting covenants of seizin and quiet enjoyment. Those clauses were as follows: "And the said David Simpson now, at the time of *selling* and delivering these presents, is *signed* of a good, pure, perfect *rite*, free

and clear from all incumbrance whatever, to the said Paul Hagler or assigns forever, and that the said David Simpson doth oblige himself at all times, his heirs, executors, etc., power to warrant and defend said land and premises from any lawful claim of any person or persons whatever, but to the said Paul Hagler, his heirs," etc.

His Honor, the presiding judge, was of opinion that the words of the deed did not express a covenant of seizin, and could not be so construed, and that there was no eviction to warrant a recovery upon the covenant for quiet enjoyment. Instructions to this effect having been given to the jury, the defendant had a verdict, and from the judgment rendered thereon the plaintiff appealed.

PEARSON, J.—The question is, Does the deed contain a covenant of seizin? This depends upon whether "*signed*" can be made to be or to mean "*seized*."

We have a strong impression that "*signed*" was written instead of "*seized*," just as "*selling*" was written instead of "*sealing*," by reason of the ignorance of the draftsman who was copying from some old deed; and possibly the plaintiff can have relief in another forum, which "acts upon the person and applies itself to the conscience," and does not permit advantage to be taken of mistake or accident. But this court has no power to change one word of known and definite meaning into another. There are no statutes of "feofail and amendments" in regard to deeds, and we must take them as they were made by the parties.

Wrong spelling does not vitiate when there is *idem sonans*, and the letters used do not make some other word of known signification. But the difficulty here can not be removed on the idea of bad spelling; for there is not the *idem sonans*, and the letters (which are written in a plain hand) make the word "signed."

It is true, when a deed can not take effect in the mode it purports to have been intended to operate, but can take effect on another mode of conveyance, the court will so construe it, *ut res majis valeat;* but this rule does not bear upon the present case. So the conjunction "or" will be read "and," and *vice versa*, when the construction of the the sentence and the obvious meaning show that the intention was to connect and not to put apart the words or sentences.

In the case before us, no aid can be derived from the construction of the sentence, and there is no legitimate mode of ascertaining the meaning except from the words used; so it is the dry and naked question, Has this court power to change the word "signed" unto "seized," when it is called on to construe a deed?

There is no authority, and we can see no ground upon which such a power can be maintained.

His Honor also concurred with the judgment of the court below, that there was no evidence of eviction.

SEALS.—STAMPED IMPRESSION.

A stamp impressed upon an instrument by way of seal, is good as a seal, if it creates a durable impression in the texture of the paper.

[I. *Pillow* vs. *Roberts*; 7 English's (Ark.) R., 822.]

This was an action of ejectment. Upon the trial below, the defendant offered in evidence a deed conveying the land in dispute to himself. The deed purported to have been acknowledged before the clerk of a circuit court in Wisconsin. The defendant objected to the deed as evidence, because the seal of the circuit court, authenticating the acknowledgment, was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance." The court below admitted the instrument.

GRIER, J.—Formerly wax was the most convenient, and the only material used to receive and retain the impression of a seal. Hence it was said: "*Sigillum est cera impressa; quia cera, sine impressione, non est sigillum.*" But this is not an allegation that an impression made on wafers, or other adhesive substance capable of receiving an impression, will not come within the definition of "*cera impressa.*" If, then, wax be construed to be merely a general term, including within it any substance capable of receiving and retaining the impression of a seal, we can not perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed by vermin, accident, or intention, than that made by wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

[II. *Curtis* vs. *Leavitt*. New York Supreme Court, 1854. Not yet reported.]

The North American Trust and Banking Company having become embarrassed and insolvent, Mr. Leavitt was appointed receiver to wind up its affairs. Mr. Leavitt, representing the interest of both creditors and stockholders, deemed it his duty to deny the validity of some of the transactions of the company or its officers, and in particular that of certain bonds issued by the company. The bonds were fifteen hundred in number, each for £250 sterling, were made payable in London, and purported to be secured by two mortgages executed to

certain of the parties to the suit as trustees for the bondholders. The trustees and bondholders filed their bill to establish their rights under the bonds and mortgages, etc., and Mr. Leavitt filed a cross-bill, praying that the bonds, as well as certain notes, assignments, etc., complained of by him, might he declared illegal and void, and be given up to be canceled. One of the many objections taken to the bonds was this: that the company had no authority to issue bills or notes on time; that the instruments called bonds being merely stamped, and not impressed on wax or wafer, were not sealed instruments within the meaning of the law, but post bills, or notes, and therefore unlawful. We extract from the very long opinion rendered in the case, the remarks of the court on this question.

ROOSEVELT, J.—The statute of May, 1840, which went into operation on the 3d of June in that year, prohibited every "banking association" from issuing or putting in circulation "any *bill* or *note* of said association, unless made payable *on demand*, and *without interest*, and subjected the officer or member violating the law to the charge of misdemeanor, and to fine and imprisonment.

Negotiable securities, it is conceded, and not sealed instruments, are the subject of the prohibition. Now the bonds in question, in form at least, have not the slightest resemblance to bank-notes of this state. They commence, like all other bonds, with the technical introduction "Know all men by these presents," and, like other bonds, end with the equally technical conclusion, "In witness whereof, the said North American Trust and Banking Company have caused this *bond* to be attested in their behalf by their president and cashier, and *their seal to be thereunto affixed*, this first day of February, in the year of our Lord one thousand eight hundred and forty."

They are, besides, very long and special instruments, with fourteen coupons attached to each, and the whole contents, both capital and coupons, made payable, not in the United States, or in the currency of the United States, but in *sterling pounds*, and at the banking-house of Palmers, Mackillop, Dent & Co., *London*. And they purport, not only in words, to be sealed, but bear on their face an impression stamped like a seal into the very texture of the paper, which in this instance at least, whatever it may be ordinarily, is, as is obvious from inspection, a "tenacious substance," as susceptible of impression as either wafer or wax, or as clay, iron, or silver appended to the instrument.

We consider these bonds, therefore, as sealed instruments. At all events, it being perfectly incontrovertible that they were so intended, and that the omission, if it be one, of wax or wafer, was a mere oversight, the defect, as in the case of the indenture not indented, can now be supplied by the application by the court of a small quantity of wax, or according to the established rule in equity, by treating that as already done which it is so manifest was intended, and, if necessary, in justice and fair dealing, ought to be done.

CONSTRUCTION OF CONTRACTS.—TIME APPOINTED FOR DELIVERY.

Where plaintiff purchased of defendant, rosin, to be delivered "*when called for next week*," but failed to call for it during the week, and a few days after the time had expired the rosin was consumed in a fire, which destroyed defendant's establishment—*Held*, that the rosin stood at plaintiff's risk.

[*Willard* vs. *Perkins*; Busbee's (N. C.) R., 253.]

This was an action of *assumpsit*, in which the plaintiff claimed to recover from the defendant for his failure to perform a contract for the delivery of three hundred barrels of rosin.

The defendant was a distiller. The plaintiff purchased from the defendant, on the 24th Jan., 1851, three hundred barrels of rosin, "*to be delivered when called for next week*." At the time of the purchase the defendant had not the quantity of rosin on hand; but before the expiration of the "next week" he manufactured a much larger quantity. A few days after the expiration of the next week, mentioned in the contract, the defendant's still was accidentally burned down, and his stock of rosin consumed with it. This was before the plaintiff had called for his rosin, and the defendant had not set apart any particular three hundred barrels of it for the plaintiff. The latter made a demand subsequent to the fire, which was refused, and he thereupon commenced this action, declaring upon the special contract, and adding the common count for money had and received.

The judge who tried the cause instructed the jury that the plaintiff was entitled to recover, and they found a verdict accordingly. From the judgment rendered upon it the defendant appealed.

PEARSON, J.—The value of the rosin must be a dead loss to one of the parties; and the question is, Upon which of the two shall the loss fall? It must fall upon the defendant, although there was no default on his part, because it was in his possession when it was burnt, under the rule, "a loss by the act of God falls upon the owner," unless the plaintiff had, by a breach of the contract on his part, taken the risk upon himself.

If the plaintiff was bound by the terms of the contract to take away the rosin, at some time during the "next week," and violated the contract by not doing so, it was his fault that the rosin was left exposed to the fire, and he is not at liberty to put the loss upon the defendant, by force of the maxim, "No one shall take advantage of his own wrong." So the question turns upon the construction of the contract. Was it the duty of the plaintiff, according to the contract, to take away the rosin at some time during the "next week?" Was that a part of the bargain? Such is the import of the words made use of by the parties, and there is nothing growing out of the nature of the thing to call for a departure from the words. On the contrary, all collateral considerations which the court is at liberty to notice, tend to support that construction. The plaintiff paid the price down. This indicates an intention to take the article which he had paid for, as soon as he could get it. Rosin is of a highly inflammable nature, and no distiller will suffer it to accumulate on his premises longer than he can help it.

This affords an inference that, although the defendant not having the article then on hand, would not bind himself to deliver it until the "next week," still he required the plaintiff to take it away at some time during that week. If it was not to be taken away during the next week, how long did the defendant agree to keep it for the plaintiff? It is said for a reasonable time. It is difficult to say what would be a reasonable time, considering how much it would encumber the yard of the distillery, and add to the danger of fire. But the parties have not left this to conjecture; they have fixed on *some time during the next week.*

The plaintiff violated his contract in not calling for in that time, and it was left there at his risk. Had it not been burnt, he could have got it at any time; but he certainly would have been liable to pay the defendant storage for keeping it.

It was said, "that time is not of the essence of a contract." That is a maxim of a court of equity in regard to the payment of money; but it does not extend to other things even in that event, and no court can hold, that the time for the delivery of a large quantity of rosin or of gunpowder at the factory is not, from the nature of things, a very material part of the contract.

It is also said, the rosin was never set apart and identified as the property of the plaintiff. What right, or under what obligation, was the defendant to set apart the rosin before the plaintiff called for it? Who was to pay for the trouble of moving it? What good would it have done to set it apart, in the absence of the plaintiff, who, of course, would not be bound by it? Our decision is put on the ground, not that the rosin had become the property of the plaintiff, but by a violation of his contract in not calling for it, it remained there at his risk.

Having decided that the plaintiff can not recover upon the count on the special contract, by reason of the breach of the contract on his part, it follows as a matter of course that he can not recover on the common count for money had and received to his use. The proposition is self-evident, that where there is a special contract, one of the parties can not fall back upon the common counts, while the contract remains open and is not put an end to, either by mutual consent or by such a breach or default on the side of the other party as will give to the former a right to treat the contract as a nullity. This proposition is so fully sustained by its good sense, that no authority need be cited to support it. The idea that the plaintiff, who, by reason of a breach of the contract on his part, can not recover upon it, is, for that reason, at liberty to treat it as a nullity, and fall back upon the common count, can not be entertained for a moment.

CONDITIONS PRECEDENT.—EXCUSE.—WAIVER.

A party purchased a patent right, with the privilege to re-assign the right and receive back the consideration for it, if after having given the improvement patented a thorough trial for nine months, he should not be able to make it profitable. By the act of the other party, in promising, and then neglecting to furnish him with materials for making the trial, he was prevented from doing so. A year after the assignment, he offered, and the other parties accepted, a re-assignment of the right.

*Held*, 1. That the purchaser was excused from making the prescribed nine month's trial, by the neglect of the seller to perform the promise to provide materials.

2. That the acceptance of the re-assignment by the seller was a waiver of the condition.

[*Young* vs. *Hunter*; 2 Selden's (N. Y. Court of Appeals,) R., 203.]

This was an action to recover back the consideration paid by the plaintiff to the defendants, on the purchase of an interest in a patent for an improvement in wagon wheels.

The complaint set out an agreement between the parties, which provided that if Young, after giving the improvement a thorough trial for the term of nine months, should not be able to make it useful or profitable to him, he should be at liberty to re-assign the right and receive back the consideration. It also alleged that immediately after the sale was made, the defendants promised that for the purpose of enabling him to make the trial, they would furnish him with some wheels manufactured with the improvement, or some patterns of it; but that they neglected to do so; that after a year from the date of the agreement, the plaintiff, finding the improvement valueless, executed and delivered to the defendants a re-assignment of the right, which stated the above reasons why the trial of the improvement had not been made; and that the defendants had refused to repay the consideration.

To this complaint the defendants demurred chiefly on the ground that it did not aver any consideration for the promise of defendants to furnish wheels manufactured with the improvement, or patterns of it; and that it did not aver that the plaintiff gave the improvement a thorough trial for nine months.

Judgment was rendered for the defendants upon the demurrer; and this judgment was affirmed by the supreme court at general term. From their judgment the plaintiff appealed to the court of appeals.

WATSON, J.—It was a condition precedent on the part of the plaintiff, that he should give the patent a thorough trial for the term of nine months, before he could re-assign it to the defendants, and entitle himself to recover from them the amount of the consideration paid for it. If was therefore necessary for him to aver in his complaint, either a performance of this condition, an excuse for non-performance, or a waiver of the condition by the defendants. We find it accordingly alleged in the complaint, that after the written agreement was executed, the defendants promised the plaintiff, that they would, within a short time, deliver to him some wheels manufactured according to the plan of the patent, in order to enable him to carry out the object of the assignment and to make a trial of the improvement; but that they wholly neglected to deliver them, or to provide the plaintiff with any means for making a trial of the improvement, although requested so to do,

whereby he was wholly prevented from making such trial, and the assignment was rendered useless to him, and he therefore re-assigned the patent to the defendants, and they *accepted and received* the re-assignment.

The written agreement contains no provision binding the defendants to furnish the wheels to make the trial, nor is there any consideration for their promise to do so set forth in the complaint, and if this neglect on the part of the defendants was the *foundation of the action*, the complaint would be clearly bad, as no cause of action could arise against any party for the neglect to do an act he was not bound to perform. This was the view taken of the case by the learned justice who presided at the special term where it was first argued; and although we have not been furnished with any opinion at the general term, I presume that court entertained the same view. With great respect for these two tribunals, I am compelled to differ from their conclusion. Had the plaintiff performed the condition as to the trial of the improvement to the very letter, he would not by that act alone have laid the foundation for recovering back the consideration money from the defendants. It was not on the performance of that condition that the defendants promised to pay back the money, but on the re-assignment of the patent. It is true that without the performance of the condition, the defendants might have refused to accept the re-assignment, and then the plaintiff could not have sustained an action against them; but it is equally true that they could waive the performance, and accept the re-assignment without requiring it, and if they did so waive it, the plaintiff was excused from such performance, and could recover without alleging or proving it. And if the defendants by their acts prevented the performance by the plaintiff of the conditions of the contract, he was excused from such performance. It is a well-settled rule, that a party can not insist upon a condition precedent, when its non-performance has been caused by himself. (3 John., 531; 14 Wend., 219; 1 Barb. S. C. R., 338; 14 Mass. R., 266; 1 Pick., 287.)

Applying these principles to the complaint demurred to, let us proceed to examine whether it sets out facts sufficient to constitute a cause of action. It sets out the agreement entire, and then shows that the defendants, who alone had the right to insist that the trial should be made, promised the plaintiff that they would within a few days or weeks furnish him with the requisite materials to make the trial. Upon this promise he relied, and having waited in vain for the delivery of the materials through the whole time stipulated for the trial (a request for their delivery not having been complied with), he was prevented from making the trial, and could not ascertain whether the improvement would be useful or profitable. By the neglect of the defendants, the plaintiff was prevented from determining the fact, upon the determination of which he was bound to keep the right assigned to him. In this view of the case, I regard it of no importance that the promise of the defendants was without consideration. It is sufficient that the plaintiff in good faith relied on it, and was thus *by their act* induced to neglect the strict observance of the conditions of his contract. The defendants can not be permitted to allege that their promise should not

have been relied upon. The act of a party which prevents the performance of a condition in his favor, is not the less effectual for being gratuitous.

The complaint then further shows, that after the failure, *so induced*, to test the value of the patented improvement, the plaintiff executed and delivered to the defendants a re-assignment of the interest which had been assigned to him, which *they accepted*. By accepting it, with full knowledge that the trial had not been made, they waived the condition requiring it to be made. (1 Barb., 337, 338; 1 Saund., 287, note 16.) The defendants thus by their own consent became repossessed of all the interest which they had parted with, and by the terms of their agreement, the plaintiff's right to recover back the consideration which he had paid, became complete.

It might also with propriety be said, that by accepting the re-assignment with its recitals, the defendants admitted that the plaintiff was prevented by their acts from performing the conditions of his contract, and that his excuse for non-performance was sufficient. I think that the complaint sets forth a good cause of action, and that the plaintiff is entitled to judgment in his favor. This will do complete justice between the parties. The defendants have received back what they parted with, and the plaintiff will recover what he paid, the consideration for which has failed through the fault of the defendants. The judgments of the general and special term should be reversed, and judgment rendered in favor of the plaintiff.

JEWETT, J., dissented.

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BILLS OF EXCHANGE.—LIABILITIES OF PARTIES.

Where there was an open account between the drawer and acceptor of bills, and it was supposed at the time of the acceptance that the balance belonging to the drawer, in the hands of the acceptor, would, at the maturity of the bills, cover them, and in that belief the bills were received by an indorsee—*Held*, that the bills were bills for value, in the hands of the latter.
The liabilities of parties to accommodation bills considered.
The rules of equity relative to bills of exchange do not differ from those of law.

[*The Farmers' and Mechanics' Bank* vs. *Rathbone*. Vermont Supreme Court, 1852. Not yet reported.*]

This was an action of *assumpsit*, on two bills of exchange drawn by one Barton upon the defendant; they were dated October 5th and 25th respectively, were accepted October 11th and 30th, and were protested at maturity for non-payment.

Up to the time of the acceptance of the bills, Barton, the drawer, had been accustomed to consign cheese to the defendant, at New York, for sale on commission, and to draw upon him for the proceeds, and the defendant had accepted the several drafts so drawn, and charged them in the cheese account as they were accepted. The bills in suit were thus drawn and accepted, the defendant believing when he accepted them that he had sufficient funds of Barton's to meet them; but at their

* We have received the opinion and papers in this case from Judge Isham.

maturity, Barton was indebted to the defendant on account, apart from the bills in suit, and the latter had no funds in his hands of the former wherewith to meet them. From the account of sales, it appeared that a sum more than was due upon the bills was received after their acceptance, but that it had all been applied on account of Barton.

The plaintiffs discounted the bills to Barton under his representation that they were drawn on cheese thus consigned, and had no knowledge but that he had sufficient effects in the hands of the defendant to meet them at maturity, until after the commencement of this suit. After being informed that defendant had no funds of Barton's, they executed to Barton a release from all liability to them on the bills, upon payment of a portion of the amount. This release was given without defendant's knowledge or consent. The suit was now prosecuted against the defendant as acceptor, for the balance.

The defendant insisted that upon the above facts the bills were accommodation bills, that the drawer was the principal debtor, and the defendant liable only as his surety, and that the release of the drawer operated as a release of the defendant as acceptor. Judgment was rendered for the defendant, on which exceptions were taken.

Isham, J.—This action is on two bills of exchange drawn by Caleb E. Barton on the defendant, Henry Rathbone, of the city of New York, both of which were duly accepted, and before maturity were discounted, and transferred by indorsement to the plaintiffs. When the bills matured, they were dishonored, duly protested, and notice thereof given to the drawer.

On the trial of the case at the circuit, the defendant insisted that the bills were accommodation bills, and upon the facts stated in the exceptions, he now insists that the bills are of that character, that the drawer is the person primarily liable, that the acceptor stands as his surety, and that the release of the drawer by the plaintiffs operates as a discharge of the defendant as acceptor. If these bills, however, are not accommodation bills, but are really bills for value, it is not insisted that the release will in any way affect the liability of the acceptor. It will discharge all persons intermediate between the holders and drawer, but not those prior on the bill, or on whom rests a primary or absolute liability to pay them. (*English* vs. *Darley*, 2 Bos. & Pul., 61; *Claridge* vs. *Dalton*, 4 Maule, 226; Chitty on Bills, 451.)

We are not satisfied that these bills are to be treated as accommodation papers. It is true, the fact is found in the case, "that at the maturity of the bills, the drawer was indebted to the acceptor on account, apart from the bills in suit, and that the latter had no funds in his hands, of the former, wherewith to meet them." But in connection with this statement, it equally appears from the exceptions, that during the season of 1844, the drawer, at different times, consigned to the defendants as commission merchants, for sale on his account, a quantity of cheese, the gross proceeds of which amounted to $7,848 78, and from the statement in the account of sales, we perceive that a much larger amount than the sum of these bills was realized therefrom after these acceptances were given. The account arising from the sale of this property commenced in July, 1844, and closed in November of

that year; there has been no settlement of that account, or balance ascertained by the parties; as between them the whole account remains open, and subject to their future liquidation. While this account was accruing, these bills were drawn and accepted, with the understanding that they were to be paid by the defendant, and the amount so paid entered into their general account. During that period, they doubtless anticipated that the balance would be sufficient to pay these bills, and have been respectively disappointed in the amount finally realized therefrom, so that now there is a balance due the acceptor, as stated in the account of sales. But as these bills at first were drawn upon property consigned to the drawer, and he accepted the same, with the same means of knowledge which the drawer had, and thereby assumed the primary obligation to pay them, we can see no propriety in treating the bills otherwise than as creating obligations of that character, after they have passed in due course of business into the hands of an indorser. And in so treating them, we are manifestly carrying into effect their mutual intention when the bills were drawn and accepted; for it is distinctly stated in the case, that both the drawer and drawee supposed and believed that there were funds sufficient in the hands of the drawee to pay them at maturity, and under that belief the drawer made such representations to the plaintiffs at the time of their indorsement and discount. The legal effect and character of bills of exchange, so drawn and accepted, is not changed or affected by any alteration of the balance of their account, *nor even if it should be afterward ascertained that there was an indebtedness at the time of the acceptance from the drawer to the acceptor.* This principle is fully illustrated by the case of *Bagnall* vs. *Andrews* (7 Bing., 217); indeed, the facts in that case, and the principle there established, have such a direct application to this case, that we can not consider these bills otherwise than as bills for value, without entirely disregarding the authority and principles of that decision. In that case, *when the bill was drawn*, the drawer had *an open account with the acceptor for goods which he was in the course of sending to him for sale*, neither of them at that time *knew the state of the account*, "*and it afterward turned out that the drawer was at the time of the acceptance indebted to the acceptor, instead of the acceptor being indebted to the drawer.*" Before the bill became due, the drawer became bankrupt, and indorsed the bill to the plaintiff, who was ignorant that an act of bankruptcy had been committed. The drawer being called as a witness, was objected to, as being interested, on the ground that this was an accommodation bill, and that if the plaintiff recovered, he would be responsible to the defendant, not only for the amount of the bill, but for the costs of that suit. Tindal, Ch. J., after remarking that such consequences would follow if this was an accommodation bill, and that the witness would be incompetent, observed, "that we think, upon the facts in the case, the bill was not an accommodation bill. At the time it was drawn, the drawer had an open account with the defendants for goods sent, and which he was then in the course of sending to them for sale. The drawer might at that time reasonably expect that the acceptor would pay the bill out of funds that might be in his hands, when the bill arrived at maturity; for the evidence is

express that at the time the bill was drawn, neither the drawer nor acceptor knew the state of the account. A bill so drawn and accepted can not be treated as an accommodation bill; nor, consequently, is there any implied obligation on the part of the drawer to indemnify the acceptor against the costs of any action which may be brought against him." (1 Phil. Ev., 61; 9 Ser. & R., 237.)

If this case is to be regarded as sound in principle, it would seem to make a final disposition of this case; for under that authority, these bills can not be regarded as accommodation bills, but as bills for value, the acceptor being the party primarily liable, and the drawer only as his security or guarantor. In such case, it was properly remarked, that the release of the drawer was a relinquishment merely of so much security which the plaintiffs had for the payment of the debt, and which, in no event, can affect the liability of the acceptor.

It is very evident, also, that the plaintiffs could have sustained no action against the drawer of these bills, unless they had been duly protested, and notice given. This principle is founded on the consideration that a primary liability for their payment rests only on the acceptor, while that of the drawer is contingent and collateral, and arises upon the default of the acceptor. The necessity of protest and notice in such cases is not avoided by a fluctuating balance in their accounts, nor even by the fact, where there exists an open account, that there is an indebtedness from the drawer to the acceptor. (*Orr* vs. *Magennis*, 7 East., 359; *Blackham* vs. *Dosen*, 2 Camp., 503; in the matter of Brown, 2 Story, C. C. R., 521; Story on Bills, p. 311, 2 Smith's Lead Cas., 29; Smith's Mer. Law, 315; 15 Peters R., 393.)

But if these bills are to be regarded as strictly accommodation bills, the same result, we think, must follow. In such case, it is insisted, that the drawer is the person primarily liable, and the acceptor as his surety, and that the holder of the bills is bound so to regard and deal with them, notwithstanding the terms of the bill, whenever he has notice that the acceptance was for accommodation, whether that notice was received at the time he took the bills, or at any subsequent period. It is proper to observe, that this question does not now arise between the drawer and acceptor; as, between them, the consideration may be inquired into and the true relation of the parties shown; but the question is presented in a case between the *acceptor* and an *indorser for value, without notice* that the bills were for accommodation, *at the time he became the holder. When these bills were received by the plaintiffs* they were invested with those legal rights, and subject only to those duties that arose from what appeared on the face of the bills. Their legal effect, and the relative liability of the drawer and acceptor, could not be changed or altered by any fact not there appearing. These principles have a peculiar application to bills of exchange, as they are designed for commercial purposes, and their application is required to impart to them that credit and currency which is necessary to insure the purposes for which they were introduced. At the time the plaintiffs became indorsers, they could, on one hand, and were bound on the other, both at law and in equity, to regard the acceptor as primarily liable and the drawer as his surety;

they could have released, compounded with, or given time to the drawer, without in any way affecting their right to hold the ultimate liability of the acceptor. (Story on Bills, § 429, 430; 15 Peters' R., 393.)

Such being their right at the time they became the holders of the bills, there is no propriety or authority in saying, that that right can be subsequently changed or affected by a mere notice from the acceptor to the holder, that the drawer had neglected to provide funds for the payment of the bills, or by any act of the drawer and acceptor to which the plaintiffs were not a party, and to which they have never given their assent. (Throb. on Prin. and Surety, 216.) The plaintiffs as holders of these bills, were not subject to any of the equities existing between the original parties, and without their assent those equities can not be imposed upon them. The case of *Mallitt* vs. *Thompson* (5 Esp. R., 178), was an action by an indorsee against the maker of an accommodation note for the payee. The holder received part payment under a composition from the payee, and covenanted not to sue him, which is a virtual release, *knowing when he received the bill* that it was given for accommodation. Lord Ellenborough ruled, that the maker was liable, notwithstanding the payment and release, for his liability on the face of the note was primary and principal, and that of the indorsers was collateral and secondary; and whatever may be their liabilities between themselves, such was their liability to the holder. It was also held, that the release would have no effect between the maker and the payee, for whatever the maker was compelled to pay, he might call upon the payee for his repayment. The release in no way disturbed their relations. And on the application of the same rule to this case, whatever the acceptor may be compelled to pay, he can call upon the drawer for repayment, notwithstanding the release; for their relations are not disturbed by its execution, as it is evident from the case, as well as from the release itself, that a discharge of the bill was not intended by the parties, but simply a release of the drawer by the holders from any further claim *which they had personally on him*, and leaving the holders to pursue their remedy against the acceptor as the party primarily liable. (Story on Notes, § 423.)

In the case of *Laxton* vs. *Peat*, 2 Camp., 185, and *Collott* vs. *Haigh*, 3 Camp., 281, a different doctrine was applied to accommodation bills, when the holder, *at the time he received the bills, knew that they were for the accommodation* of the drawer. Lord Ellenborough remarked, "That as it was an accommodation bill, of which all parties had notice, the acceptor can only be considered as surety for the drawer;" and the acceptor was discharged by time having been given the drawer. If these cases can be sustained on principle, they have no application to this; for it may be said, with much appearance of justice and propriety, that if one takes a bill of exchange, *knowing at the time* that it was for accommodation, that the holder thereby assents to receive and hold the bill subject to that equity of the parties; while no such suggestions can be made in this case, as these plaintiffs had no such notice when the bills were received and discounted. The doctrine of those two cases was, however, subsequently shaken by Justice Gibbs in *Hennison* vs. *Cooke* (3 Camp., 362), and afterward

overruled in the Common Pleas in the case of *Fentum* vs. *Parock* (5 Taunt., 192), in which Mansfield, Ch. J., observed, "That the case of *Laxton* vs. *Peat* was the first in which it was held that the acceptor was not the first and last person compelled to pay the bill to the holder, and that they were compelled to differ, and hold, that it is impossible to consider the acceptor of an accommodation bill in the light of a surety for the drawer, and that if the holder had known, in the clearest manner possible, that at the time of giving the bill it was for accommodation, it would make no manner of difference; "and with this view of the case Heath and Chambre, J. J. agreed. It will be at once perceived that, in this case, the acceptor was held as the principal and primary debtor, on an accommodation bill, and known to be such by the holder when he received it; and that act of the holder, which would have discharged a surety, was held not to affect his liability. We are not called upon, in this case, to approve or disapprove of the doctrine of that case, to the extent in which it was carried. But it is a decided authority in saying, that an indorsee of a bill of exchange for value, *who became such before its maturity, and ignorant that it was given for accommodation*, has a right *to treat all parties thereon* as liable to him, according to their relative positions on the bills, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and that this right is unaffected by any subsequently acquired knowledge that the bill was given for accommodation. In such cases it is regarded as a mere truism to say, that a release of the drawer by the holder has no effect on the ultimate liability of the acceptor.

The case of *Fentum* v. *Parock* has been sustained and approved by the subsequent cases in England. (*Price* vs. *Edmonds*, 10 B. & Cress., 584; *Nichols* vs. *Norris*, 3 B. & Ad., 41; *Harrison* vs. *Caurtauld*, *ib.*, 36; *Rolfe* vs. *Wyatt*, 5 Car. & P., 181; 1 Moody & M., 14; *Tallop* vs. *Ebers*, 1 B. & Ad., 703.) And it is to be observed also, that the same view of the subject is entertained by the different elementary authors. (Chitty on Bills, 344; Smith Mer. Law, 332; 3 Kent's Com., 104; Bailey on Bills, 364; Story on Notes, § 418, 423.)

This subject has arisen before many of the courts in this country, and the judgment is generally sustained, "That the parties to a bill or note are bound by the character which they assume upon the face of the bill; if by that they are liable as *primary debtors or as principals*, then *as to the holder*, they are bound as such; and his knowledge at the time when he takes the bill, that they are, or either of them are, accommodation parties, will not vary the case." (*Montgomery Bank* vs. *Walker*, 9 Serg. & R., 229; S. C. 12, *ib.*, 382; *White* vs. *Hopkins*, 3 Watts & S., 99; *Lewis* vs. *Hanchman*. 2 Barr., 416; *Commercial Bank* vs. *Cumingham*, 24 Pick., 275; *Church* vs. *Barlow*, 9 Pick., 551. In the matter of Babruck, 2 Story, C. C. R., 398; *Sanford* vs. *Lambert*, 2 Blackf., 137; *Clopper* vs. *Union Bank of Maryland*, 7 Har. & J., Md. R., 92.)

In the case of *Clarmount Bank* vs. *Wood* (10 Vt., 582), where several signed a note, "each as principals," and promised to pay, it was held, that as to the holder, they were to be regarded as principals

and not as surety, and still the primary liability of the acceptor, and the secondary liability of the drawer, is as expressly set forth on these bills, as if it were written out in full over their respective signatures; and, in either case, to vary their respective liabilities, as they have assumed them on the face of the bills, would be to vary and control its intended operation, and in effect to enforce a contract which the parties never made.

On this subject it is important to observe a material distinction between joint and several promissory notes or obligations, and bills of exchange or notes on which the parties have assumed only successive liabilities. In the former case, as between the parties and the holder, who, at the time, received the note with notice of the circumstances under which it was given, the strict relation of principal and surety may exist, and evidence of that fact is not considered as contradicting its specific provisions, but as consistent with its terms; and the right of contribution arising out of that relation exists between them. (2 Amer. Law Cas., 289, 303, in notes.)

But the drawer, and acceptor, and indorsers of a bill or note have not assumed a joint and several liability, neither are they strictly sureties, but are liable to each other, in the order of their becoming parties; and when the action is on the bill or instrument creating such successive liabilities, by an indorser for value, without notice that the bill was given for accommodation, such testimony is inadmissible for the purpose of converting their successive liabilities into a joint and several obligation, or placing them in the relation of principal and surety. The testimony clearly contradicts the express provision of the bill, and materially changes its legal effect. Unquestionably these liabilities may be changed, as between the parties, by an express contract to that effect, and which may be enforced between them. But this in no way affects the rights of a holder, who at least became such ignorant of that arrangement. Under such circumstances the holder has only to look to the bill itself, and the genuineness of the signatures, to ascertain the nature and extent of the liability of the parties thereon, and they are liable to him in the successive order in which their names appear on the face of the bill. (*M'Donald* vs. *Magruder*, 3 Peters' R., 471; *Flint* vs. *Day*, 9 Vt., 328; *Brown* vs. *Mott*, 7 John., 360.) This doctrine is clearly sustained by Justice Story in his treatise on promissory notes, in which, § 418, he observes, "that the strong tendency of the more recent authorities is, to hold, that in all cases the holder has a right to treat all the parties to a bill as liable to him exactly to the same extent and in the same manner—whether he knows or not the note to be an accommodation note; for as to him all the parties agree to hold themselves primarily or secondarily liable, as they stand on the note, and that they are not at liberty, as to him, to treat their liability as at all affected by any accommodation between themselves." And in § 423 he further says, "nor would it make any difference in the case that *the released party* was, in point of fact, *the party ultimately bound to pay the note*, and that the other party was a mere accommodation-maker, payer, or indorser for his benefit; or, at least, it would not make any difference, unless the fact of its being such ac-

commodation note were *at the time of receiving the note, and not merely at the time of the release, known to the holder.*" (Story on Bills, sects. 191, 268, 432, 434. Chancellor Kent (3 Com., 104) also observes, "that the acceptor of a bill is the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment or a release. Accommodation paper is now governed by the same rules as other paper. This is the latest and best doctrine, both in England and in this country."

As these bills were *received and discounted* by the plaintiffs *before their maturity, without notice that they were for accommodation*, we are satisfied, from the authorities, that they had a right to treat the acceptor as the principal debtor, and the drawer liable only on his default, and that in such cases there is no difference between accommodation bills and bills for value; and that in either case a release of the drawer from any further liability to the holder will have no effect as a discharge of the acceptor from his primary liability on the bill. And this right so to treat the parties on the bill remains unaffected by any notice subsequently given that the bill was for accommodation.

It is insisted, however, that the release of the drawer will in equity discharge the acceptor; and the principles which prevail in that court are now equally available at law. From an examination of the cases in chancery, we entertain a decided conviction that the same principles on this subject prevail in equity as at law. And if any diversity of opinion exists in that court on this question, it has arisen more from a misapprehension of the rule at law, and a desire to conform to the principles there established, than from any rule prevailing in equity at variance with them. And there is much propriety in this; for the principles regulating bills of exchange have their origin in mercantile usage, and have been adopted to meet the exigencies and wants of commercial transactions. It is therefore equally the policy of courts of equity as of courts of law, to make the application of, and enforce those principles in relation to these securities which experience has found necessary to preserve their negotiability and credit. In the case of *The Bank of Ireland* vs. *Beresford* (6 Dow, 233), Lord Eldon expressed his opinion of the case of *Fentum* vs. *Parock*, and observed that "if it went on the principle that inquiry is not to be made into the knowledge of the party, but that all shall be taken as appearing on the face of the bill, I think it a most wholesome doctrine." The case is important only as showing the individual opinion of Lord Eldon on that question, and as showing that no different rule had then prevailed in chancery. In the case of *Glendinning, Ex parte* (1 Buck., 517), Lord Eldon refused to adopt the principle of the decision of *Fentum* vs. *Parock*, and recognized the general doctrine as held in *Laxton* vs. *Peat;* that was the case of an accommodation acceptance, *and known to be such by the holder when he received the bill.* We are therefore not called upon to approve or disapprove of the doctrine of that case; for in this case the plaintiffs had no notice, when the bills were received and discounted, that they were for accommodation. If the plaintiffs in this case had received the bills with the knowledge that they were given for accommodation, we do not say but that the de-

fense would be available; for when one takes a bill, even before maturity, with notice of a given fact, it is not unreasonable that he should be charged with the consequences that result therefrom as if the bill had been received overdue. But that principle does not apply where the bill is taken before maturity without notice, and for value; for the bill is then held independent of all equities existing between the original parties; and Lord Eldon, in that case, nowhere intimates that the principle would have such an application. It is only to the case of an accommodation bill, *and known to be such by the holder when he received the bill*, that he made the application of that rule. The case, however, which should and does exert a controlling influence in our decision of this case, is that of *Harrison* vs. *Courtauld* (3 Barn. & Ald., 36). That case, it will be perceived, was sent from chancery by the Master of the Rolls, for the opinion of the court of King's Bench. This circumstance alone creates the inference, that in relation to bills of exchange, on which the parties have assumed successive liabilities, that the principles of equity are the same as at law, and that if the acceptor of these bills is not discharged at law, he would not be in equity; for it would be an idle proceeding for chancery to refer a case to a court of law, to ascertain the principles prevailing there, unless those principles have equal application in chancery. In that case, as we have assumed in this, the bill was accepted for the accommodation of the drawer, and was indorsed for value before its maturity. In that case, as in this, the holder *was ignorant, at the time he received the bill*, that it was given for accommodation, but was *afterward informed* of that fact *before the act was done*, which, as the acceptor claimed, operated as his discharge. It will at once be perceived how very similar are the two cases in every important particular. On the hearing of that case, all the decisions at law and in equity were considered; and all the judges, Ch. J. Tenterden, and J. J. Parks, Taunton, and Patterson, certified to the court of chancery that the acceptor was liable on the bill as upon a bill for value.

Whether, therefore, we apply to this case the principles prevailing in equity or at law, the result is the same. The plaintiffs having no notice at the time they received the bills that they were given for accommodation, had a right to treat the drawer as collaterally liable thereon, and the acceptor as the principal and primary debtor. And this right of the holder remains unaffected by any subsequent knowledge which he may have that they were for the accommodation of the drawer. Under such circumstances, the release of the drawer in no way affects the liability of the defendant as acceptor. This view of the case renders it unnecessary to pass upon other questions which were urged in the argument of the case.

The result is, that the judgment of the county court must be reversed, and the case remanded.

SALES OF CHATTELS.—WHEN FRAUDULENT.

If the circumstances attendant upon a sale and delivery of personal property are such as usually and naturally accompany such a transaction, it can not be declared a legal fraud upon creditors.

[*Hugus* vs. *Robinson*. Pennsylvania Supreme Court. Not yet reported.]

This was an action against a sheriff for the seizure of certain goods as the property of one Charles J. Kenley. The goods seized were the contents of a drug store formerly kept by Kenley. It was alleged that the plaintiff, George Robinson, had bought the goods in question previous to the seizure. In defense it was insisted that the sale was under its circumstances a fraud upon creditors. The jury found that it was an honest and *bona fide* sale, in intention, and the only question discussed on the appeal was whether the circumstances proved were such as to require from the court a positive instruction that, as matter of law, the sale was void.

The evidence respecting the sale and delivery was, that the sale was completed on the 21st January, 1850; that Henry, the son of Robinson, had been in Kenley's employment as apprentice and clerk in the store, and his engagement had expired, and he had gone home two or three weeks before the sale; that the father made the purchase in order to set the son up in business; that the store was in the front room of Kenley's house, and continued there after the sale; that after the sale Henry, and sometimes his father, attended to the store, and that Kenley also attended very much as before, settling up his own business and assisting in selling goods; that Kenley's signs and show-boards, and the goods on the shelves, and other outward appearances, remained the same after as before the sale; that the son boarded with Kenley; that the sale was generally known during the taking of the inventory, and immediately after; that the sheriff was told of it before he levied; that new account books were opened by Robinson, and that Henry kept the key of the store. There was also evidence, that after the sale Kenley sold very few articles, and charged them in his own books, but that these were accounted for by him to Robinson.

Lowrie, J.—Taking the finding of the jury, and the evidence, we have the following case. Robinson made an honest purchase of this store of goods from Kenley, and the actual and exclusive possession of it was received and retained by him, and the purchase was generally known in the neighborhood; but he continued it in the same place, and allowed the signs and outward appearances to remain unchanged, and put in, to conduct it, his own son, who had, some time before, been clerk of Kenley, and suffered Kenley, who lived in part of the house, to be about the store, assisting in its business. Do these circumstances make out a case of what is called legal fraud? In other words, do they show such ambiguity of delivery as to be equivalent to no delivery? The learned judge who tried the cause thought not, and so do we.

What part of the transaction is contrary to public policy, and hence called a legal fraud? Is it contrary to public policy for one who buys a store of goods to continue the business in the same place? Then

every case of buying out a business is void. Was it illegal or contrary to public policy, as to former creditors of Kenley, for Robinson to keep up Kenley's signs? Then the general custom of the country is illegal, for that is the custom in all such cases, and the new-comer's sign is usually added as soon as convenient. Does the want of change in the outward appearances make it void? Why, if Robinson had busied himself in making changes with reference to such a consequence, this would have been brought forward as evidence of actual fraud. Want of change is evidence that the controlling power is unchanged, but it is not proof of it. Does the objection rest upon the fact that Henry had once been a clerk in the store? Then how short must the absence be in order to make a usual and honest transaction unlawful? If any absence at all is required, then no one in the employ of another or in partnership with him can safely buy out the business without first withdrawing for a length of time, yet to be defined by the courts. And this sort of illegality is practiced every day by very legal and honest men. Nothing is more common than for one who sells out a business to continue for some time to assist in its management. Not being able to comprehend the term public policy, except as indicating the very spirit of a people's general custom, laws, and institutions, we do not see how any one of these matters can be declared to be contrary to it. They all seem to be the natural and usual circumstances of such a sale. Surely it need not be proved that when the principal matter, the sale, is honest and allowed by law, the circumstances which naturally and usually attend it as its incidents, can not be treated as unlawful, or even looked upon with suspicion. (*Faunce* vs. *Lesley*, 6 State Rep., 121; *Forsythe* vs. *Matthews*, 14; *ib.*, 100.) That the natural and ordinary circumstances of an honest and lawful transaction are not to be treated as unlawful, is further illustrated by other cases. (6 Watts, 247; 3 State Rep., 224, 443; *ib.*, 89.)

We are always reminded, in such cases as this, that if the transaction complained of be allowed, a wide door is left open by which fraud may be perpetrated. Grant that it is so; how can we help it? In seeking to catch rogues we must not ensnare honest men. We may become so zealous against fraud as to restrain the free action of honesty, a result that would be most disastrous. Better is it that many frauds should go undetected than that the means of detection or prevention should treat honest men as guilty, or teach men to be always suspicious of their neighbors, and watchful that honest acts be precisely measured according to the standard of legal morality; to be strict as to the "tythe of mint, anise, and cummin," and forgetful of the "weightier matters" of social duty, or to clothe ordinary transactions in an unnatural formation, which, ever since Twyne's case, has been considered a badge of fraud.

There have, doubtless, been many judicial remarks tending to encumber the simplicity of the rules applicable to this subject, and even to lead us to forget them. A common, correct, and adequate expression of the principal idea is, that the sale must be accompanied by a corresponding change of possession within a reasonable time. (2 Whart., 307; 6 *ib.*, 53; 6 Watts, 29; 3 State Rep., 329; *ib.*, 443.) In other cases

however, the very same idea assumes the form that the possession must accompany and *follow* the sale. (1 Binney, 521; 4 *ib.*, 258; 5 S. & R., 287.) Presently it is thought that the delivery must follow *soon* or the sale is void, though no creditor's right has attached in the mean time. (5 Watts, 483.) How a creditor without writ could dispute sale, is not readily perceived. (7 *ib.*, 545.) Next we find "follow" changed into "continue," and it is held that the possession must be not only taken, but continued (2 W. & S., 150; 6 *ib.*, 95); how long, we are not told. These cases have not, however, changed the simple rule, that delivery must *bona fide* accompany the sale, or follow within a reasonable time afterward. (5 Watts, 485; 6 *ib.*, 29.)

There are, no doubt, cases wherein it is proper for the court to declare a delivery void, because on its face it is merely feigned or symbolical, and no account is given of its suspicious appearance. (2 Whart., 302; 10 S. & R., 201, 419.) But in most cases it must be a question of intention and of actual fraud, and therefore left to the jury; and a possession of even an hour or two is sufficient, if the transaction be all in good faith. (6 Whart., 53; 7 State Rep., 263.) And the time is usually short in cases of paying debts with goods by one in failing circumstances, if the creditors dispute the sale. And as a reasonable time is allowed for delivery, according to circumstances, a sale may be good against a levy even without delivery, when such reasonable time has not expired. (6 Watts, 29; 5 State Rep., 326.; 7 *ib.*, 89.)

Looking further, we find other accidental words growing into undue importance. A learned judge of the common pleas happened improperly, but without prejudice to any one, to apply the terms which qualify the adverse possession under the statute of limitations to a case of this sort, and declared that the possession following a sale of chattels must be "open, visible, and notorious." Next comes another expression, derived from the same source, "clear, unequivocal, and conclusive," and a delivery was held void, because of a return of the property to the vendor without the act or consent of the vendee. (6 Watts & Serg., 95.) It might be by theft or trespass. The contrary was afterward declared. (3 State Rep., 442.) The expressions "visible and open" (5 *ib.*, 320), and "open and manifest" (14 *ib.*, 103), would seem to be more accurate; but many of the cases show that a delivery according to the nature of the thing includes even these. *McVickar* vs. *May*, 3 St. R., 224; *Avery* vs. *Street*, 6 Watts, 247.) To require a delivery to be exclusive would be to declare void all sales of an undivided share; and to require it to be notorious would violate all the ordinary customs of business, for most of people make purchases in such a way that their acts never become notorious, except by the aid of a lawsuit.

With very few exceptions, and notwithstanding some rather vigorous expressions in some of the decisions, the administration of justice, in relation to transfers of chattels, has moved steadily on, guided by a few well understood rules. A sale or assignment of chattels is voidable by creditors, unless it be accompanied by such a corresponding change of possession as the thing is reasonably capable of; but a reasonable time after the sale is allowed for delivery. If an individual part of a thing is sold, a concurrent possession is proper, for it corresponds with

the sale. A mere symbolic, formal, or feigned delivery, where an actual and real one is reasonably practicable, is of no avail. It must be a delivery with a *bona fide* intention of really changing the possession, as well as the title. If upon the face of the transaction the attempt to delay or defraud creditors is apparent, or the delivery equivocal, the vendee must explain it by satisfactory evidence, or the court will declare it void, taking care, however, not to invade the province of the jury by deciding disputed facts. If the circumstances of the sale and delivery be in accordance with those that usually and naturally accompany such a transaction, it can not be declared a legal fraud. These principles were properly applied by the learned judge who tried the cause.

Judgment affirmed.

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LIABILITY OF CARRIERS—EFFECT OF DISCHARGE IN BANKRUPTCY.

A common carrier may be liable as such to a party injured by his negligence, though there be no privity of contract between the two.
The operation of a discharge in bankruptcy considered.

[*Campbell* vs. *Perkins*. New York Court of Appeals; June term, 1858. Official report not yet published.*]

The plaintiff entered into a contract with Chase & Co. to transport him and his effects from the city of New York to the city of Buffalo. On the arrival of the plaintiff at Albany, Chase & Co., not having any boat of their own in readiness, hired a boat of the defendants, who were carriers engaged in transportation between Albany and Buffalo, and agreed to pay them a specific sum for the use of their boat and services of the crew, for the purpose of conveying the plaintiff and his goods to Buffalo, in pursuance of their contract with him. The property of the plaintiff was shipped on board of the boat, and during the voyage to Buffalo a box belonging to the plaintiff, containing goods of the value of several hundred dollars, was lost.

The plaintiff brought an action on the case against the defendants to recover the value of the lost box and contents. The defendant, Perkins, gave notice of a discharge under the General Bankrupt Law. A judgment was rendered in the supreme court in favor of all the defendants, from which judgment the plaintiff appealed to the court of appeals.

Taggart, J., who delivered the only opinion which was delivered in the cause, held that there being no privity of contract between the plaintiff and defendants, the defendants were not liable to the plaintiff, as common carriers, for the loss of the goods, but he must look to Chase & Co., with whom he made his contract, for his indemnity. But it was held by all the other members of the court that the defendants, as owners of the boat, were liable to the plaintiff in their character of

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* This case is kindly furnished to us in MS. by his Honor Judge Taggart. We presume it will appear in 2 Selden's R.

common carriers, notwithstanding there was no privity of contract between them and the plaintiff; that they had a duty to perform as common carriers, and were liable for their failure to perform such duty. The judgment was therefore reversed as to all of the defendants except Perkins, and a new trial ordered.

The plaintiff objected on the trial to reading the certificate of discharge in bankruptcy, in question, on the following grounds, viz.: 1st. He has not pleaded his discharge, but has given notice with his plea of the general issue that he will prove it. 2d. The demand of the plaintiff is not such a one as can be discharged by the proceedings in bankruptcy. 3d. There is no proof of the publication of notice to creditors to show cause against the prayer of the petitioner being granted. 4th. There is no proof that Perkins ever petitioned to be discharged. 5th. There is no proof that any order to show cause against his petition to be discharged was ever granted. 6th. There is no proof that notice of any such order was published, or that notice thereof was served upon any of Perkins' creditors.

It was held, that inasmuch as sect. 4 of the Bankrupt Law made the certificate conclusive evidence of itself in favor of the bankrupt, unless the same should be impeached for some fraud or willful concealment by him of his property or rights of property, contrary to the provision of said act, it was not necessary for the bankrupt to prove either the publication of notice to creditors, or the bankrupt's petition to be discharged, or the granting of the order to show cause, or the publication or issue of such order.

It was also held, that it was not necessary to plead the discharge specially, but that the same might be given in questions under a notice given with the general issue. That, although sect. 4 of the Bankrupt Law provided that the certificate and discharge might be *pleaded* as a full and complete bar, etc., the section ought not to have so strict a construction as to require a departure from the ordinary practice of the state courts, and the certificate of discharge was properly received in evidence under the notice.

It was also held, that the demand of the plaintiff was such a one as might be discharged by the proceedings in bankruptcy; that the action, though in form for a wrong, was founded on a contract; that it was founded on an "engagement," and was technically a "claim;" that the bankrupt's discharge operates as well on unliquidated as liquidated demands; that there was nothing in the act confining it to a debt or to liquidated damages. It was sufficient within the language of the act if the claim or demand was founded upon "contract" or "engagement."

It was further held, that the plaintiff could not defeat the defendant's plea of bankruptcy by bringing his action in tort instead of contract. That he could not, by varying his words, change the legal rights of the defendant.

The judgment of the supreme court was therefore affirmed as to the defendant Perkins.

PATENTS.—INFRINGEMENT.

A sale of a patented article to an agent employed by the patentee to purchase it, is not, *per se*, an infringement, though it may tend to prove an infringement.

[*Byam* vs. *Bullard*; 1 Curtis' (U. S.) C. C. R., 101.]

This was an action on the case for an infringement of a patent right belonging to the plaintiffs for the manufacture of loco-foco matches.

It was heard on an agreed statement of facts, from which it appeared that the defendants sold to an agent of the plaintiffs, who was employed by the plaintiffs to make the purchase, matches, of the value of six cents; that such sale, if made to any other person than the plaintiff, or their agent, would have been an infringement of the patent; and the questions submitted were whether such a sale was an infringement, and if so, what was the measure of the damages.

CURTIS, J.—Two inquiries arise in this case. The first is, whether, upon the facts stated, the law imports either the damage or the injury, both which are necessary, by the common law, to support an action on this case. The second is, whether an action on the case, for the violation of a patent right, was intended to be given by the Patent Act, where there was neither damage nor injury received, according to the principles of the common law. As to the injury, the general rule of the common law is, *volenti non fit injuria*; and, in accordance with this maxim, no one can maintain an action for a wrong where he has consented or contributed to the act of which he complains. And this principle has been applied to numerous cases in which, though the defendant was in the wrong, the plaintiff's negligence had contributed to produce the consequential damages which were sought to be recovered in the action. Here the plaintiffs not only consented, but co-operated; for through their agents they were themselves the purchasers. As to the damage, it is true that in general the law imports damage from the violation of a right, but I am not aware that damage has ever been presumed by law from an act in which the plaintiff co-operated, and which, therefore, must be supposed to have been done for his own benefit, or, at least, not to have been to his loss.

It was argued that, *ex necessitate rei*, such a sale should be held to be an infringement, because it is only by such evidence that an infringement of many patents can be shown. This may be sufficient to prove that such a sale may be evidence of an infringement, and that from such a sale, accompanied by other circumstances likely to exist, and capable of being proved if the defendant does infringe, a jury would be warranted in finding an infringement by sales to others than the patentee. If the plaintiffs' agent purchased the matches at a shop where matches and similar articles may be expected to be found for sale, if they were sold to him in the usual course of the trade there, and if he saw others exposed for sale, it would be a natural inference for a jury to make, that this was not the only parcel sold; that in the course of the defendant's business he had sold what he showed him-

self desirous of selling, and what customers are in the habit of buying; and I know of no rule of law which would restrain them from drawing such an inference. (*Hall* vs. *Boot*, Webs. P. C., 100; *Huddart* vs. *Grimshaw*, Davies P. C., 290; *Keplinger* vs. *Youngs*, 10 Wheaton R., 358.) But it is a very different question whether such a sale is itself an infringement. The argument, *ex necessitate*, can extend no farther than the supposed necessity extends, and that is, at the utmost, only to make such a sale evidence of an infringement, which stops short of its being an infringement.

It was also argued that this was not a sale to the plaintiffs, except by construction of law, but only to their agent, and that, for the benefit of patentees, the law would not deem it the same as a sale to the plaintiffs. I can see no reason for making a distinction between patentees and other persons in this particular; and if I am at liberty to disregard a plain rule of law for the benefit of patentees, I should very much doubt whether it would be for their advantage to hold that the acts of their agents were not their own.

Nor can I find any solid foundation on which to rest the right of a patentee to support an action on the case for the violation of his exclusive right, except that settled and reasonable common-law basis of all such actions, injury and damage: injury, by a violation of the incorporeal right, and damage, at least nominal, presumed by the law to arise from such violation. (*Whittemore* vs. *Cutter*, 1 Gall. R., 429; *Sawin* vs. *Guild*, 1 Gall. R., 487; *Jones* vs. *Pearce*, Web. P. C., 125.) In these cases, inasmuch as there was supposed to be no damage, there was thought to be no action. And though I am rather disposed, with Mr. Justice Washington (*Watson* vs. *Bladen*, 4 Washington, 583), to doubt whether the assumption is correct, that in such cases there is no damage, yet if the assumption be correct, I think the inference is sound that no action lies.

It is true, some of the patent acts which were repealed by the act of 1836, gave an action for sale, if made without the consent, *in writing*, of the patentee, or of his assigns. But the law now in force contains no such provision; and if it did, I should still be of the opinion that a sale to the patentee himself was not such a sale as was intended by the statute; and that no sale was within its meaning, except one which would be within the terms of the grant contained in the letters-patent, which is a grant of an exclusive right to make, use, and *vend to others* to be used. In this case, I am of opinion that the sale to the plaintiffs' agent was a sale to them, and that such a sale is not, *per se*, an infringement. On a statement of facts, I am not at liberty to draw any inferences, and the judgment must be for the defendants.

PATENTS.—USE OF AN EQUIVALENT.

**The use of an equivalent is not an infringement of a patent where the use of the equivalent is expressly disclaimed in the specification and claim.**

[*Byam* vs. *Farr*; 1 Curtis' (U. S.) C. C. R., 260.]

This was a bill in equity charging an infringement of a patent right, belonging to the complainants, and praying for an injunction and account. The complainants moved for a preliminary injunction. The facts appear in the opinion.

CURTIS, J.—The complainants have shown that they are assignees of letters-patent for an improvement in the manufacture of friction matches. The real question is, whether the defendants have infringed this exclusive right, so as to subject themselves to an injunction.

The complainants allege that their exclusive right has been violated in two particulars.

1. In the use of the composition of matter claimed by the specification.

2. By putting up the matches in the manner described and claimed therein.

As to the first, it is proved and admitted that the defendants have used a composition of matter, consisting of phosphorus, sulphuret of antimony, and glue, into which, when in a fluid state, matches having sulphur on their ends are dipped.

The claim in the patent is in the following words: "What I claim as my invention is, the using of a paste or composition, to ignite by friction, consisting of phosphorus, and earthy material, and a glutinous substance only, without the addition of chlorate of potash, or of any highly combustible material, such as sulphuret of antimony, in addition to the phosphorus."

To make this claim intelligible, it should be stated, that it is declared by the specification, that the old method of making friction matches was to use a composition, consisting of phosphorus, chlorate of potash, sulphuret of antimony, and glue. So that the invention claimed by the patentee consists in rejecting two of the elements, namely, chlorate of potash and sulphuret of antimony, and substituting in their place chalk or some earthy matter. To compare the two methods of the patentee and the defendant, to a certain extent it may be said that the patentee has improved on the known compound, by omitting two substances previously used, and introducing one not used; while the defendants have merely omitted one substance previously used. It is insisted, however, that the sulphuret of antimony, used by the defendants, in point of fact has the same effect in their composition as the chalk or other earthy substance has in the plaintiff's composition. That both act mechanically only, and not chemically; the office of each being to surround the particles of phosphorus, and, aided by the glue, to retain them, and protect them from the air, and from the action of caloric, until the phosphorus is ignited by friction, and then to convey the heat to the sulphur, and thus cause the match to burn. In other words,

that in this compound sulphuret of antimony is a mere equivalent for the earthy matter employed by the patentee; and that though it is not, in the nomenclature of chemistry, an earthy matter, yet that the claim is not to be limited to substances strictly so termed, because while the specification declares chalk to be the best material, it also makes known that the ingredients may be varied, "and other absorbent earths or materials may be used instead of the carbonate of lime." And it is urged, that the substance of the invention does not consist in the use of the carbonate of lime in this composition, but in the use of a material suitable to protect the phosphorus, and convey its heat to the sulphur when ignited, and that the defendants use such a material.

There is certainly much force in this argument; but it is encountered by difficulties which I think are insuperable.

To substitute, in place of some one element in a composition of matter, a mere known equivalent, is an infringement; because although the patentee has not expressly mentioned such equivalent, he is in contemplation understood to embrace it. But he is not obliged to embrace equivalents in his claim. He may, if he choose, confine himself to the ingredients mentioned, and expressly exclude all others; or he may expressly exclude some, or one other. If he does so, it can not be maintained that what he has expressly disclaimed is, in point of law, claimed. Now this patentee declares that his composition is to be without the addition of sulphuret of antimony. It is said that he meant to exclude it, because he considered it, as he says in the claim, a highly combustible material; that he was under a mistake, as it is not so. This may be true, but the question is not what induced the patentee to exclude it, but whether he has excluded it. If he made a mistake, the Patent Law affords means of correcting it; but until corrected, the claim must be taken as it stands.

It is also urged, that it was the intention of the patentee to exclude sulphuret of antimony only when used with chlorate of potash. But this is not consistent with the plain meaning of the words, which are, "without the addition of chlorate of potash, or any highly combustible material, such as sulphuret of antimony." And when it is borne in mind what the composition previously known was, and how the patentee has described his invention, I think it can not be admitted that the patentee really intended to cover the composition used by the defendants. If the patentee intended to cover an improvement of the old method, consisting only in the omission of the chlorate of potash, as is now said, he might reasonably be expected so to declare. But instead of this, he declared that his invention did not extend to the use of this substance. So far as respects his own intent, there can be no question it was to make a claim which excluded the composition used by the defendants. And this is decisive. It must be remembered that one object of the Patent Law, in requiring the inventor to put on the public records a description of his invention, is to inform the public what may safely be done during the existence of the patent, without interfering with his claims; and upon the soundest principles, the patentee must be stopped from asserting a claim which is expressly waived on record.

It appeared, by the analysis of the composition on the defendants'

matches, that some oxide of antimony and some silver was found in it, and the evidence shows that when subjected to heat, in the process of manufacture, the sulphur, combined with the antimony, is partially given off, and oxygen is taken up from the atmosphere. And it is urged, that the use of oxide of antimony and silver are not excluded from, but are fairly included within the patent.

As to the silica, I am satisfied it is merely an impurity in the sulphuret of antimony of commerce, and that the right to use this is the right to use it in the state in which it is ordinarily bought and used. And in respect to the changes which it undergoes in any process of manufacturing the composition, the right to make such changes is inseparable from the right to use the thing. There is evidence, that for a short time the defendants heated the antimony separately, and so set free from it more sulphur, and combined with it more oxygen. Whether this would amount to an infringement, I have not thought best to determine; because as it was merely a temporary experiment, which has been abandoned, it can not afford ground for an injunction after the lapse of considerable time, even if it were free from doubt that it was an infringement.

In respect to the other claim, for the manner of putting up the matches in paper, I find it consists in sawing the matches in sheets so as to leave them united at one end, and wrapping them in strips of paper in the mode described. The defendants' matches are left attached at one end in the same way, but are not wrapped in strips of paper. I am of opinion that this claim must be construed to embrace only the entire and complete mode described; and consequently, as the defendants do not use that mode, but only a part of it, which the patentee does not claim to have separately invented, the defendants do not infringe on what is thus claimed.

The motion for an injunction is denied, with costs.

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EVIDENCE.—RES GESTÆ.

The defendant was indicted for larceny of a cow, and offered evidence that previous to killing the cow he had made various declarations to the effect that he was authorized by the owner of the cow to kill and sell her, and that he intended to do so, in pursuance of the authority—Held, that these declarations were admissible as part of the *res gestæ*.

[*Cornelius* vs. *The State of Arkansas*; 7 English's (Ark.) R., 782.]

The prisoner was tried upon an indictment for the larceny of a cow. The evidence against him was substantially comprised in the testimony of George Keesee and William Whitley. It appeared from their account that the neighbors of defendant had missed considerable live-stock from time to time, and suspicion had been aroused that defendant was concerned in their losses. There were reports current that defendant was accustomed to drive cattle of his own home from the woods where the cattle of a number of owners were used to graze in common, in such a way as to get a good fat beeve from some one else's

stock in among his own, and pen the whole drove up as if they were his own, and then kill the stolen one in the night, turning out his own stock alone in the morning. In consequence of these circumstances, the witnesses kept some watch upon the defendant, and hearing one Sunday night in November, 1848, that the defendant had been seen to drive home a cow belonging to one Joseph Clift, which was the one with the larceny of which defendant now stood charged, in the manner just mentioned, they went down to defendant's house to ascertain what he would do with her. They testified that after waiting some time in a concealed position near the cow-pen, the defendant and a negro came out of the house, the former carrying a rope, the latter a light. After ineffectual attempts to lasso the cow with the rope, the defendant returned and got his gun, and driving the cow into a smaller pen adjoining, shot her. Thereupon the witnesses leaped the fence and seized the defendant, telling him they had watched him a long time, but now had caught him. He asseverated that it was the first act of the kind he had ever committed. He asked if some arrangement could not be made which would satisfy witnesses, if he would leave the state in a month. He made strenuous attempts, according to the testimony, to induce witnesses to consent to some compromise of the affair, but they refused, and insisted that the law should take its course; and this prosecution was accordingly instituted.

On the part of defendant, evidence was offered tending to discredit the testimony of these witnesses. *Mrs. Seymour* was also called for the defendant, and testified as follows: "I was at the house of defendant at the time the cow was killed. I knew the cow in question. She ran with the cattle of defendant for some two winters before she was killed. On the evening before she was killed, I do not know whether she came up with his other cattle, or was driven up with them by some of the family. She was with the cattle on that evening. She had come up with them once before during the fall."

The defendant then proposed to prove by the witness that on the night the cow was killed, after the cattle of defendant were turned into the pen, and before the family and others at his house went to bed, he, the defendant, declared openly in his family, and in the presence of visitors, that he was going to kill the cow in question before day, and take her to Benton to market; and declared at the same time that he had received a message from Clift, the owner of the cow, which authorized him to kill the cow and pay for her. That these declarations were made to some three or four white persons who were at his house at the time, as well as directions given to the negroes in reference to the matter. To the introduction of which declarations of defendant the attorney for the state objected, the court excluded them, and defendant excepted.

The defendant's counsel then offered to prove by the witness that a short time before the cow in question was killed, she heard Marion Williams—who at that time was living at the defendant's—tell the defendant that he had been down to Clift's, the owner of the cow, and that Clift told him to tell defendant that the cow in question had been using about his, defendant's, place the winter before, and if she returned

he was at liberty to kill her, and pay him two cents a pound for her; and that, after getting said message, defendant openly declared his intention of killing the cow; but the court excluded said evidence on the objection of the state, and defendant excepted.

*Bradford Morris*, sworn for defendant, testified as follows: "Mr. Cornelius was at my house, in Benton, the day before the cow in question was killed, and came to get me to fill a wagon-wheel. He wanted it done next day, so he could use it day after in going to Little Rock. He told defendant if he wanted the wheel done in a day he must bring it soon in the morning; and told him that he wanted some beef, and if he would bring the wheel soon in the morning, and bring him some beef, he would fill the wheel. Defendant told him he had no beef killed, but he would get up long enough before day to kill one, and get into Benton by sun up, if he could get the beef up. Defendant then proposed to prove by the witness that, in this same conversation, defendant told him he had no beef of his own, but there was one at his house belonging to one of his neighbors which he would kill and pay for, that he had the liberty from the owner to do so. To the introduction of which evidence the state's attorney objected, the court excluded it, and defendant excepted.

It should be observed that Clift, the owner of the cow, was deceased before the trial. Other evidence to prove similar declarations of the defendant was also offered, but excluded. The prisoner was convicted, and moved for a new trial on several grounds—among others, that the court erred in excluding these declarations of the defendant. The new trial was refused, and defendant excepted to the refusal, and the case now came up upon the exceptions. We give so much of the opinion as relates to the question whether the declarations of defendant, that he was authorized to kill the cow by her owner, and was intending to do so in pursuance of his authority, were rightly excluded.

JOHNSON, J.—One ground of objection is, that the court excluded the declarations of the defendant, which, it is contended, constituted a part of the *res gestæ*. The question to be determined is, whether the matter proposed to be introduced to the jury was mere hearsay, or constituted a part of the *res gestæ*. Evidence of facts with which the witness is not acquainted of his own knowledge, but which he states merely from the relation of others, is inadmissible upon two grounds: First, that the party originally stating the facts does not make the statement under the sanctity of an oath; and secondly, that the party against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the party making the statement. Where, however, the particular circumstances of the case are such as to afford a presumption that the hearsay evidence is true, it is then admissible. Where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was said by both parties during the continuance of the transaction, is admissible; for to exclude this would be to exclude the most important evidence. In this case, it is not the relation of third persons, unconnected with the fact, which is received, but the declaration of the

parties to the facts themselves, or others connected with them in the transaction, which are admitted, for the purpose of illustrating its peculiar character and circumstances. Where evidence of an act done by a party is admissible, his declarations made at the time having a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*. (*Sessions* vs. *Little*, 9 N. H., 271.) There are some cases in which the declarations of a prisoner are admitted in his favor, mainly upon the principle of being part of the *res gestæ;* as to account for his silence, when that silence would operate against him. (*U. S.* vs. *Craig*, 4 W. C. C. Rep., 729.) So to explain and reconcile his conduct. (*State* vs. *Ridgely*, J. Har. and McHen., 120.) When the state of mind, sentiment, or disposition of a person at a given period become pertinent topics of inquiry, his declarations and conversations, being part of the *res gestæ*, may be resorted to. (*Bartholemy* vs. *The People*, 2 Hill, 248.) It is laid down by Starkie, that whenever the declaration or entry is in itself a fact, and is part of the *res gestæ*, the objection ceases. (1 Ev., 46.) The distinction between a mere recital, which is not evidence, and a declaration or entry, which is to be considered as a fact in the transaction, and therefore is evidence, frequently occasions much discussion, although the test by which the admissibility is to be tried seems to be simple. If the declaration or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the credit of the person who makes it, it is not admissible in evidence; but if, on the contrary, any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence. Hence it is, that when the nature of a particular act is questioned, a cotemporary declaration by the party who does the act is evidence to explain it. Where, for instance, in cases of bankruptcy, the question is with what intent the party absented himself from his house, his declaration, cotemporary with the fact of departure, is evidence to explain that intention. (*Thompkins* vs. *Saltmarsh*, 14 Serg. and Rawle, 275.) In Lord George Gordon's case it was held that the cry of the mob might be received in evidence as part of the transaction. (21st Howell's St. Tr., 542.) It is to be observed in such cases, the declaration does not depend so much on the credit due to the party who makes it, as to its connection with the circumstances. In the case of the bankrupt, the declaration which he makes at the time of leaving his house, if his intention of so doing is founded, not upon his character for veracity, but upon the presumption arising from experience, that where a man does an act his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting his real intention; its connection with the act gives the declaration greater importance than that which is due to a mere assertion of a fact by a stranger, or a declaration by the party himself at another time. Such evidence might be admissible, even

although the declarant, in ordinary cases, would not be believed upon his oath. (*Pool* vs. *Bridges*, 4 Pick., 378.)

In order to convict the defendant in the case at bar, two distinct facts were necessary to be found by the jury. First, that he took the cow; and secondly, that he did so take her with a felonious intent. Here he made declarations previously to, and almost in immediate connection with the act of killing, calculated to explain itself and to reconcile itself with common honesty. The declarations were just such as the experience of every one fully attests to be the natural result of honest intentions. The defendant knew that the cow belonged to Clift, and that this fact was well known to his family. Therefore it was natural that he, when he formed the design to kill and take her to market, in order to explain his conduct in so doing, should make known such determination in advance. His course therefore, in thus declaring the fact openly, was perfectly natural and just; such a one as a man conscious of the entire honesty of his motive would pursue under like circumstances. This being true, the declarations of the defendant do not depend upon the credit that might be awarded to him as a man, but solely upon the presumption arising from experience, that his cotemporary declarations accord with his real intentions. We are fully satisfied, therefore, that the declarations referred to, and which were excluded by the court, can not be regarded as mere hearsay evidence, but, on the contrary, they form facts in themselves as forming a part of the transaction under investigation, and as such were clearly admissible, and should have been placed before the jury, as tending to elucidate or explain the conduct of the defendant.

The court also erred in refusing permission to the witness to testify in relation to the message which the defendant claimed to have received from the owner of the cow, and by which he insisted he was authorized to do what he had done. The rejection of this testimony can not be justified either upon the ground of hearsay, or upon that principle of the law which requires the best evidence of which the nature of the case is susceptible. The evidence itself was clearly competent as tending to negative a felonious intent, and the party who bore the message would have been no better witness than one who was present and heard it delivered, as it was wholly immaterial whether the message was true or false in case the defendant acted in good faith, and under a belief that it was true. The fact of its delivery, not the truth of the message, was the only material matter, and that could be proven by the person who heard it delivered, as well as by him who actually bore and delivered it.

We think that the same doctrine which we have already held in relation to the defendant's declarations to his family, immediately preceding the act of killing, would clearly admit those which he made to Morris, since they were made with a direct reference to the transaction, and tend to explain the nature of it, and to negative the idea of a felonious intent arising from its having been in the night time. After having proved by Morris that the defendant had engaged to bring him beef on a particular morning, he offered to prove by him, that he told him (witness) that he had no beef of his own, but there was one at his

house belonging to one of his neighbors, which he would kill and pay for, and that he had permission from the owner to do so. Here was a declaration made by the defendant the day before the cow was killed, and thereby announcing his intention openly and without the least reserve. This, therefore, formed a fact in itself, which formed a part of the very transaction, and consequently was competent to go to the jury, to weigh more or less according as it should accord with the subsequent conduct of the defendant. These declarations should have been received, not as testimony going to disprove a felonious intent in the killing of the cow, but merely as a fact to rebut such a presumption arising from silence and secrecy in the movements of the defendant.

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DEGRADING QUESTIONS.—INFERENCE FROM REFUSAL TO ANSWER.

When a witness has been asked whether he has not been convicted of a certain infamous crime, and has been allowed to refuse to answer, counsel have the right to comment upon the refusal, in addressing the jury, and draw inference from it unfavorable to witness' credibility.

[*The State of North Carolina* vs. *Garrett*; 1 Busbee's (N. C.) R., 357.]

The defendant was tried upon an indictment for murder.

On the trial, a witness examined on behalf of the prisoner was asked, upon his cross-examination by the attorney-general, whether he had not been indicted, convicted, and whipped in the county court of Warren for stealing. The witness was informed by his Honor that he was not bound to answer the question, unless he chose to do so, and he declined to answer. The attorney-general, in his concluding argument to the jury, insisted, although the prisoner's counsel objected to his right to do so, that the witness was unworthy of belief, because of his refusal to answer the questions propounded to him by the state.

There was a verdict of guilty, and judgment against the prisoner. Rule for a new trial—rule discharged, and the prisoner appealed to the supreme court.

BATTLE, J.—The bill of exceptions presents fairly the point whether the attorney-general, after having asked the defendant's witness a question tending to his disgrace, and which on that account he refused to answer, had the right, in his argument to the jury, to infer from his silence that the witness was unworthy of credit. There is no subject connected with the examination of witnesses upon which there seems to have been more diversity of opinion and practice in the English courts than upon the one now under consideration. Judges of great eminence have refused to permit a question tending to degrade a witness to be put to him. Others have permitted the question to be put, but advised the witness that he was not bound to answer it; while most, but not all of them, have held that no inference to the discredit of the witness could be drawn from his refusal to answer. (1 Stark. on Ev., 172, in note; Roscoe's Crim. Ev., 175; *Rose* vs. *Blakemore*, 21 Eng. C. L. Rep., 465.) In this State we consider it settled by the case of *The State* vs. *Patterson* (2 Ire. R., 346), that such a question

may be asked; and the court in that case were inclined to the opinion that when the question tended only to the disparagement or disgrace of the witness, but not to expose him to a criminal prosecution, he was bound to answer it. Whether, supposing him not bound to answer it, any inference to his discredit arising from his silence can be urged in argument to the jury, is now for the first time, so far as we are aware, presented to the decision of this court. The question is one of much practical importance, and we have considered it with an anxious desire to settle it correctly. The difficulty arose from the wish of the court to protect the witness on the one hand, and on the other to protect the party against whom he was called from unreliable testimony. It is manifest that the only mode by which a complete protection can be afforded to the witness, is to prevent the question from being put at all. If that be not done, and he is protected only so far as not to be compelled to answer the question, his credibility will inevitably suffer *some* damage by his silence. It will then deserve serious consideration, whether the slight protection still afforded the witness be sufficient to countervail the necessity which every court must feel, of endeavoring to protect the parties to a cause from corrupt or suspicious testimony. It has been decided in this state, as we have seen, that the witness can not claim the only effectual protection of not having the disparaging question put to him; and we are inclined to think that it follows as a necessary consequence, that the witness is bound to answer. But if that be not so, and it is admitted that the witness may refuse to answer, we yet hold that such refusal is the proper subject of comment to the jury. It seems to us to be something very much like absurdity to permit the whole demeanor of a witness to be discussed and criticised by counsel, and yet deny them the privilege of remarking upon his refusal to answer a proper question, when that refusal may have more effect upon the jury than any thing else relating to his mere demeanor. We think that the silence of the witness under such circumstances is "a fact transpiring in the course of the trial brought before the jury by one of the parties, and in relation to the question under investigation," and is therefore a proper subject of remark to the jury, both by the counsel and the court. (*Bailey* vs. *Poole*, 13 Ire. R., 404.) The question put by the attorney-general to the witness, in this case, could not expose him to a criminal prosecution. The only effect it could have was to disparage him, and destroy his credibility before the jury. And whether he was bound to answer it or not, we think that no error was committed by the court in permitting the attorney-general to notice his refusal in the argument to the jury.

DOUBLE SUBPŒNA.—RIGHTS OF WITNESS.

Where two subpœnas are served upon a witness, requiring his attendance on the same day at different places, distant from each other, he is not bound, in the absence of statutory provision, to obey the one first served, but may make his election between them.

[*Icehour* vs. *Martin*; 1 Busbee's (N. C.), R., 478.]

This was a *scire facias* against the defendant to enforce the forfeiture imposed by statute in North Carolina for his non-attendance as a witness. It appeared that defendant was summoned as a witness for the plaintiff in a suit in the superior court of Mecklenburg county; and was also summoned as a witness in a suit in the county court of Surry county, and which was for trial the same week with that of the superior court of Mecklenburg. The subpœna from Mecklenburg was first served on the defendant. He attended as a witness under subpœna at Surry, and could not attend both courts the same week. The only question was, did his attendance at Surry excuse his non-attendance at Mecklenburg.

The judgment of the court below was for the defendant, and the plaintiff appealed.

PEARSON, J.—The defendant was under subpœna to attend as a witness at two places on the *same day*. To do so was impossible. He attended at one of the places, and shows this as a cause for not attending at the other.

The plaintiff says, "My subpœna was *first served*, and therefore I had the best claim to your attendance." The question is, Does the fact that the subpœna in the plaintiff's case was first served give him a paramount right, so as to entitle him to enforce the penalty of forty dollars given by statute, notwithstanding the cause shown?

The statute under which the plaintiff claims the penalty makes no provision for such a case, and it remains to be seen whether there is any principle of common law which sustains the plaintiff's right to enforce the penalty. The plaintiff says, by the principle of the common law, if A agrees for a consideration to sell to B a lot of cotton, and afterwards sells it to C, B may maintain an action against A for a breach of contract. Granted; but the principle does not apply to our case for two reasons: first, the defendant made no contract to attend as a witness. The obligation to attend was imposed on him by *his sovereign*; and this is not a question of damages for breach of contract, but one of forfeiture and penalty for not obeying *a command of the state*. Second, suppose the legal effect of the service of the subpœna to be a *quasi* contract, the common law gives no penalty for the breach of a contract, and the remedy at common law is not by *scire facias* for a penalty, but an action on the case for damages.

There being no statute, we are not able to see any principle by which the defendant was obliged to obey the subpœna first served, when by so doing he must disobey a subpœna afterward served. We therefore can see no reason why a witness in such a case may not make his election at which place to attend.

The inconvenience presented by this case has so seldom occurred, that no provision for it has been made by the legislature. It is the power of this court to declare what the law is, but it has no power to make law.

In the case of the governor, secretary of state, judges, solicitors for the state, etc., whose duty requires them to be at particular places at particular times, provision is made for taking their testimony by deposition. The position of these officers before the statute was similar to that of a witness subpœnaed to attend at two places on the same day. It is true the former were under a general obligation to be at certain places at certain times, whereas the latter was only under a special obligation; but the principle is the same. The legislature has provided for the one case because of the general inconvenience: whether it be necessary to provide for a case like the present, which may not happen again in five years, is a matter for the consideration of the general assembly. All we can do is, to say the case has not been provided by statute, and the common law does not give the plaintiff a right to enforce the penalty.

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### INDICTMENT.—PLEA BY ATTORNEY.

**In what cases a person indicted for misdemeanor may plead by attorney.**

[*The United States* vs. *Mayo*; 1 Curtis (U. S.), C. C. R., 483.]

The defendant was indicted for beating a seaman. Mr. Dodge moved to be allowed to plead to the indictment in the absence of the defendant. He produced a special power of attorney from the defendant authorizing him to do so, and an affidavit showing that when the defendant was arrested he was bound on a voyage and ready for sea, and that if he remained till the trial he would lose his voyage and be put to much inconvenience. The district attorney consented to the motion.

CURTIS, J.—I have considered this motion with some care, as affecting the practice of the court, and I have also conferred with the district judge, who has had occasion heretofore to pass on similar questions. I will state the results at which we have arrived.

1. To save his recognizance, even in case of a misdemeanor, the defendant must appear personally.

2. He is liable to be called on his recognizance at any time, either on the motion of the district attorney or by the order of the court on its own motion, if it sees cause to direct it.

3. It is in the direction of the court to allow one indicted for a misdemeanor to plead and defend, in his absence, by attorney. This direction will be regulated by the following circumstances:

1. That it is not an offense for which imprisonment *must* be inflicted.

2. The court must be satisfied that the nature of the case and its circumstances are such that imprisonment *will not* be inflicted.

3. The district attorney must consent, or it must appear to the court that he unreasonably and improperly withholds his consent.

4. Sufficient cause must be shown, on affidavit, to account for the absence of the defendant.

5. A special power of attorney to appear, and plead, and defend, in his absence, must be executed by the defendant, and filed in court by the attorney.

I have considered this case, and being of opinion that its facts bring it within these requirements, the attorney may be admitted to plead and defend.

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### PARDONS.—THEIR VALIDITY.

When it appears from the record, and the pardon itself, that the governor was misinformed, and executed the pardon under the impression that there was a subsisting judgment, when there was none, the pardon is void.

When it appears on the record that an appeal was taken merely for delay and to get time to apply for the pardon, and the governor was not apprised of the appeal, the pardon is void.

Where the pardon remits the "imprisonment, *provided the fine be first paid*," while no fine was in fact imposed, the pardon is void.

[*The State of North Carolina* vs. *M'Intyre*. North Carolina Supreme Court, 1854. Not yet reported.*]

The defendants were tried in the New Hanover superior court upon an indictment for assault and battery—were convicted and sentenced to imprisonment, no fine being imposed. An appeal was taken to the supreme court, where the judgment below was affirmed; but in the interval, and before judgment in the supreme court, an application was made to the governor, and a pardon granted. The pardon recited the conviction of the two defendants, James and David M. M'Intyre, and the sentence of James to three months' imprisonment, and of David to imprisonment for one month; and thus proceeded:

"I do by these presents pardon the said James and David M. M'Intyre the offense whereof they stand convicted, remitting so much of said judgment as extends to imprisonment, upon the express condition that they shall first pay the fines and all the costs incident to said judgment, upon the express stipulation and condition that this pardon shall not extend to any other offense of which either of them may have been guilty."

The case having been sent back to the superior court, the solicitor for the state prayed judgment upon the defendants, and moved that they be fined. The presiding judge was of opinion that he had no power to impose a fine, but stated that he would impose a fine if he had the power to do so, and thereupon discharged the defendants, upon the payment of costs—from which judgment the solicitor for the state appealed.

Pearson, J.—His Honor was of opinion, that by reason of the pardon, he had no power to impose a fine. We do not concur, and are of opinion that the pardon was inoperative. His Honor should have

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* We are indebted to Judge Pearson for a report of this case.

proceeded to judgment, and had power to imprison, as well as fine, one or both at his discretion, the pardon to the contrary notwithstanding.

The pardon recites the conviction and sentence of imprisonment, and then proceeds to "pardon the offense of which they stand convicted, remitting so much of *said judgment* as extends to imprisonment, upon the express condition that they shall *first* pay the *fines* and costs incident to *said judgment*, etc."

This is not a pardon of the offense, but of a portion of the punishment imposed by the judgment, for the general words first used are qualified, and the intention is declared to be only to remit the imprisonment on condition that the fine and costs are paid. "The king pardoneth a felony whereof A stands attainted; and in truth he is not attainted: this is *expressio falsi*, and maketh the pardon void." (3 Coke's Institutes, 238.) "If a man be attainted of felony by judgment, and afterward the king pardoneth generally the felony, it is naught worth, and the reason thereof is not because by the attainder the felony is extinct, but because the king is not truly informed (as he ought to be) of the true state of the case; for peradventure, if he had been informed of the truth, and of all the proceedings, he would not have pardoned." (6 Rep., 13 a.) "It seems to be laid down as a general rule in many books, that wherever it may be reasonably intended that the king, when he granted a pardon, was not fully apprised both of the heinousness of the crime, and also how far the party stands convicted thereof upon record, the pardon is void, as being gained by imposition upon the king. And this is very agreeable to the reason of the law, which seems to have intrusted the king with this high prerogative upon a special confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed to have excepted out of its general rules which the wit of man can not possibly make so perfect as to suit every particular case. (Hawkins, b. 2, c. 37, sec. 8.)

It is a general rule, that whenever it may reasonably be presumed the king is deceived, the pardon is void. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole, for the king was misinformed." (4 Black. Com., 398.)

We think it may reasonably be intended that the governor was not fully informed of the proceedings in the case of these defendants. We can look only at the record, of which a copy of the pardon is part, and can take notice of nothing *aliunde*. There are three grounds, either of which is sufficient to vitiate the pardon.

1st. The judgment is referred to in the pardon as subsisting, whereas, in fact, it was annulled by an appeal to the supreme court, and if that court should decide there was error, and direct a *venire de novo*, the conviction also would be annulled, and the defendants stand as if there had been no trial. If it should decide there was no error, the judge presiding at the next term of the superior court, would proceed to give judgment, and impose fines or imprisonment, or both, at his discretion. This would be a new judgment, and would have no connection with the judgment that had been annulled by the appeal. This is settled.

(*State* vs. *Manuel*, 4 Dev. & Bal., 38.) Indeed, the statute upon this subject sets forth the law as plainly as words can express it. "In criminal cases the decisions of the supreme court shall be certified to the superior court, from which the case was transmitted to the supreme court, which said superior court shall proceed to judgment and sentence agreeably to the decisions of the supreme court and the law of the state." (Rev. Stat., c. 33, sec. 6.)

As the governor, at the time he executed the pardon, acted upon the supposition that there was a judgment, it may reasonably be presumed that he was led into error by the suppression of the fact that the defendants had appealed. If it be said the defendants were ignorant of the effect of the appeal, the reply is, no man shall be heard to say that he is ignorant of the law. This is settled. Courts are compelled to act upon this rule, as well in criminal as in civil matters. It lies at the foundation of the administration of justice. There is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced into every trial by conflicting evidence upon the question of ignorance. (*State* vs. *Boyett*, 10 Ired., 336; *Hoit* vs. *Roper*, 6 Ired. Eq., 649.)

If it be suggested that the fact of the appeal was immaterial, so far as the action of the governor was concerned, and would not have influenced him in the premises, the reply is, without undertaking to say how far it would have had an influence on him, it is sufficient to say that it was well calculated to influence him to some extent. Every intendment is made against a party who is guilty of a suppression of a fact.

Had the governor been put in possession of the fact that there was an appeal, and, consequently, that there was no judgment, it is a reasonable presumption that he would either have taken the responsibility of granting an absolute pardon of the offense, as he had a clear right to do, either before or after judgment, or that the judge presiding at the next term of the superior court had felt it to be his duty to pronounce. This latter course would have recommended itself by the consideration, that if the supreme court directed a *venire de novo*, the defendant might be acquitted; or, if there was no error, the judge who imposed the sentence might not imprison the defendants, and so the pardon would be unnecessary; or, at all events, if the second judge should also think it to be his duty, under all the circumstances, to imprison the defendants, he would have the benefit of that additional fact in aid of the exercise of his own discretion. And it is an unreasonable presumption that he would, instead of pursuing one of the two courses above indicated, have attempted to do a thing *in futuro* by a present act, and to remit, at that time, by his charter of pardon, a part of a judgment which was not then *in esse* which might never have had an existence, and the existence of which would depend upon certain contingent events, which he had no right to anticipate.

The governor may pardon an offense after it is committed, but it does not follow that he has power to do so before it is committed. Other considerations are then involved, *e. g.*, it would be in effect a license to commit a crime. So the governor may pardon a portion of

the punishment after it is fixed by judgment, upon the ground that he has power to pardon the whole—the greater includes the less—but it does not follow that he has power to pardon a portion of the supposed judgment when it is discretionary, *before it is fixed by judgment*, for other considerations are there involved, *e. g.*, it would interfere with the due administration of the law, and be in effect a rod held over the judge, by giving him to know what the governor thought his judgment ought to be; or "a solicitation to deal favorably by the defendants." This the Queen of England can not rightfully do, and yet she may rightfully pardon the offense entirely; and the charter of pardon is a bar to all further proceedings. The pardoning power conferred by our constitution is derived from the laws of England.

We are not at liberty to decide at this time whether the governor has such a power, because it has not been exercised or claimed in this case. It is sufficient for our purpose to say, that the power is questionable, and if so, fairness requires that the fact of there being no judgment should have been disclosed when the pardon was applied for. And it is the extreme of unfairness to obtain a pardon upon the supposition that there is a judgment, and make use of it afterward, when the judgment is about to be rendered. If it had no other effect, it was calculated to influence the discretion of the judge, or to embarrass him, by letting him know what the governor thought of the matter. In the language of my Lord Coke, "Peradventure, if he had been informed of the truth, and of all the proceedings, he would not have pardoned."

2. As appears by the transcript sent to this court, the appeal was taken for the mere purpose of delay, no bill of exceptions being sent, and there being no motion in arrest. If this fact had been made known to the governor, it was well calculated to influence the exercise of his discretion. The appeal was in fact taken merely to get time to apply for the pardon. This was a perversion of the right of appeal, to a purpose entirely different from that for which it was conferred, and it can not be supposed that the governor would give countenance to an attempt to obtain an object by indirection. The inference is, that he believed that the defendants were in jail, and the intent of the pardon was, to remit the residue of the imprisonment.

The pardon sets out that the judgment was subsisting; it follows that the governor was not apprised of the appeal, and of course he did not know it was taken for delay.

If it be said, the defendants wished to avoid the disgrace of going to jail, and as the law had provided no mode by which they could be allowed time to apply for the pardon, they were compelled to adopt the contrivance of taking an appeal, as a *dernier* resort, and are therefore excusable. The law permits the presiding judge to postpone the time for carrying the sentence into execution, in order to give time to apply for a pardon, whenever, in his opinion, there are circumstances favorable to the defendants. (4 Black. Com., 392.) But it is suggested, this provision is of no avail in cases like the present, where the punishment is left to the discretion of the judge; for if he thinks there are favorable circumstances, he will himself take them into con-

sideration, and impose a punishment so mild as to make a pardon unnecessary. That is true, but the fact that the law has made no provision for allowing time to apply for a pardon in such cases, together with the consideration that they do not fall within the principle stated by Hawkins, in the passage cited above, as being the basis of the pardoning power, and the seeming inconsistency of allowing a discretion confided to the presiding judge, who hears the whole case upon sworn testimony, to be reviewed by the discretion of the governor, who acts upon *ex parte* statement, tends to show that it was contemplated that the power would be exercised sparingly, and only in extreme cases. For instance, if new matter should occur after the judgment.

We do not mean to be understood as intimating an opinion, that the executive has not a general power to pardon. But when he is called upon to abate, not the rigor of a punishment fixed by law upon general rules, but the rigor of a high judicial officer, on the ground that he has not sufficiently tempered his discretion with mercy, it is of the utmost importance that all of the facts should be fully disclosed.

3. The pardon was, "On condition that the defendants should first pay the fines and all costs incident to said judgment." It is apparent that the governor was under the belief that a fine had been imposed upon each of the defendants. By accepting the pardon with this construction on its face, they are fixed with notice that the governor was misinformed, and could not, in fairness, avail themselves of an error into which he had fallen. In reference to this there is another view: There was a condition precedent, which it was impossible for the defendants to perform, because there was no fine to be paid, and it is common learning that in such cases the deed never takes effect, and is void. "If the condition precedent be impossible, no state or interest shall grow thereupon." (Co. Litt., ch. 5, sec. 334.)

The governor, as appears upon the face of the pardon, supposed the defendants had each been fined as well as imprisoned, and intended to remit the imprisonment, provided they, in the first place, paid the fines; and yet, such use has been made of the pardon as to enable them to escape both fine and imprisonment. Every one will say, this is not right; and the fact that the law declares a pardon, obtained under such circumstances, to be void, is one among the many instances showing the truth of the maxim, "The common law is the perfection of reason."

This opinion will be certified, to the end that the superior court may proceed to judgment and sentence, agreeably to this opinion and the laws of the state.

CRIMINAL LAW—VERDICT BY IMPLICATION.

A verdict of "guilty," of a crime of inferior degree, implies a verdict of "not guilty" of every higher crime of which the prisoner might have been convicted under the indictment; and this implied verdict is not affected by the reversal of the conviction for the inferior crime.

[*Hurt* vs. *The State of Mississippi*; 25 Miss. R. 378.]

The defendant was indicted for murder. He appeared, and filed certain pleas in abatement to the indictment, alleging that the organization of the grand jury, who found the bill, was illegal. The district attorney demurred to the plea, and the court sustained the demurrer. The prisoner having pleaded not guilty, was put on trial, and found guilty of manslaughter in the third degree. From judgment rendered on this verdict, he obtained a writ of error, assigning as error the decision of the court below, in sustaining the demurrer to the plea in abatement. On this writ, the judgment of the court below was reversed, and judgment entered overruling the demurrer, and quashing the indictment.

But by this time twelve months, within which time, by the statute of limitations of Mississippi, a prosecution for manslaughter must be commenced, had expired; so that the prisoner could not again be indicted for that offence. It was now insisted on behalf of the prisoner that he was entitled to a complete discharge; —that a verdict of guilty of manslaughter was an acquittal of the charge of murder;—and that the prisoner could not now be held to answer either charge. The attorney general urged in opposition that the reversal of the judgment on the verdict of guilty of manslaughter, annulled the whole proceedings in the court below, and that the prisoner could now be held to answer an indictment for murder.

FISHER, J.—A verdict of a jury, finding a party put upon his trial for murder, guilty of manslaughter in the third degree, must of necessity operate as an acquittal of every crime of a higher grade, of which he might have been convicted under the indictment upon which the issue was made; otherwise the party, after undergoing the sentence for manslaughter, might be put upon his trial for the charge of murder, which would thus be only postponed, and not decided by the verdict of manslaughter. The jury in such case, in contemplation of law, render two verdicts; one acquitting the accused of the higher crime charged in the indictment; the other finding him guilty of an inferior crime. They must first determine his guilt or innocence, upon the charge made by the indictment, before proceeding to consider whether he is guilty of an inferior crime. The verdict of manslaughter is as much an acquittal of the charge of murder, as a verdict pronouncing his entire innocence would be; for the effect of both is to exempt him from the penalty of the law for such crime.

But it is said, that such verdict only operates as an acquittal, while it is permitted to stand as part of the action of the court below; and as it has been set aside by this court, upon the prisoner's own application, the cause must be treated, in all respects, as if no trial had taken place. In support of this position, authorities have been cited, holding that when

the judgment upon a trial for murder is arrested, the party may be remanded, and again indicted for the same crime. The authorities, doubtless, announce the law correctly, but they have no application to the question under consideration. The judgment is only arrested in any case, when the verdict is against the party. He would certainly never move, neither would the court for a moment entertain such motion, in arrest of the judgment, when the verdict was in his favor. Here the verdict of the jury acquitted the party of the crime expressly charged in the indictment, and at the same time exempted him from the penalty of the law for its supposed commission. He could not move in arrest of the judgment on this part of the verdict, because the judgment corresponding, in contemplation of law, with the verdict in this respect, must also have been one of acquittal of the charge of murder. Whether this judgment was in fact pronounced by the court, as ought to be the practice, or attached by mere operation of law to the verdict, it was bound to be in the party's favor, and it could not, therefore, be arrested or set aside on his motion.

The same may, in effect, be said with regard to the action of this court upon the writ of error, which brought to its consideration only the judgment and proceedings of the court below, prejudicial to the accused. This was the final sentence upon the verdict of manslaughter, as no other threatened his liberty or in any manner affected his rights. He sought relief against no other. The judgment of reversal could extend only to such judgment and matters as the writ of error brought to our consideration. A judgment acquitting the party of murder, not being one which could be embraced in his writ of error, for the same reason could not be embraced in our judgment. Hence it stands unaffected by our action, as the judgment of the court below on the charge of murder. It may be true, that no formal judgment of acquittal was entered; but we hold that the sentence of the court upon the verdict of manslaughter, was of itself a complete acquittal of all higher crimes of which the party might have been convicted under the indictment. It will not do to say that the reversal of the sentence against the party, also destroys the verdict and judgment by operation of law in his favor. The former being against the party, could be made the subject of revision upon a writ of error to this court. The latter being in the party's favor, was final, conclusive, and irreversible. Neither he nor the State could ask a revision of such judgment, upon a writ of error, to this court; and having no power to revise it, we have no authority to reverse or annul it. It still stands, therefore, wholly unaffected by our action upon the writ of error. To this our mind is clear upon principle; but the question has been directly adjudicated by the Supreme Court of the State of Tennessee, and settled in a well considered opinion, as we have stated the rule. (*Slaughter* vs. *The State*, 6 Humph. 410.)

It may be admitted, for the sake of the argument, that the indictment was avoidable; still, under the record, the prisoner would be entitled to his discharge. The indictment purports to have been found by a grand jury organized by the court. The record shows, that the prisoner was arraigned and regularly tried upon the charge therein contained, and that he was acquitted of the charge of murder upon the facts and testimony

introduced before the jury. The statute is decisive of the question, and was no doubt enacted to relieve against such cases. It is in these words, to wit: "No person shall be held to answer on a second indictment for any offence, of which he has been acquitted by the jury, upon the facts and merits on a former trial; but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offence, notwithstanding any defects in the form or the substance of the indictment on which he was acquitted." (*How. & Hutch.*, p. 670, 5; ib. 725, § 20.) An indictment is defective in substance when the court cannot pronounce the proper sentence of the law upon the verdict finding the accused guilty. In such case the judgment is arrested, and the party, according to the authorities, remanded for another indictment. While this may be the law, and the universal practice of the courts upon a verdict of guilty, it by no means follows that either the law or practice ought to be the same upon a verdict of not guilty. The party has gone through the legal form of a trial, and has established his innocence; and hence the wisdom of the statute in providing for such cases.

Let the prisoner be discharged.

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### INDICTMENT—REPUGNANT CHARGE.

**An indictment which charges the prisoner with uttering "a false, forged, altered, and counterfeit bank note," is "repugnant."**

[*Kirby* vs. *The State of Ohio;* 1 Ohio State R. 185.]

The plaintiff in error was indicted for having uttered and published, as true, to one Kinkhead, a certain "false, forged, altered, and counterfeit" bank bill, or note. An exception was taken to the indictment for repugnancy.

CORWIN, J.—The indictment was framed upon the twenty-second section of the Act "providing for the "punishment of crimes." (*Swan's Stats.* 233.)

Comparing the twenty-ninth section of the act with the twenty-second, it will be found that the legislature had in mind five descriptions of unlawful bank bills. 1. Counterfeit bills. 2. Forged bills. 3. Spurious bills. 4. Altered bills. 5. False bills. The twenty-second section embraces the first, second, fourth, and fifth of these. The twenty-ninth section embraces the first, second, third, and fifth.

1. A *counterfeit* bill is one printed from a false plate, and not a bill printed legitimately or illegitimately from the genuine plate.

2. A *forged* bill is one to which the signatures of the officers of the bank, whence it purports to have been issued, are forged, or otherwise falsely affixed. It may be a legitimate or an illegitimate impression from the genuine plate, or it may be an impression from a counterfeit plate.

3. A *spurious* bill may be a legitimate impression from the genuine plate, but it must have the signatures of persons not the officers of the

bank whence it purports to have issued, or else the names of fictitious persons. A spurious bill, also, may be an illegitimate impression from the genuine plate, or an impression from a counterfeit plate, but it must have such signatures or names as we have just indicated. A bill, therefore, may be both counterfeit and forged, or both counterfeit and spurious, but it cannot be both forged and spurious.

4. An altered bill can neither be a counterfeit, a forged, nor a spurious bill, according to the twenty-second section. It must be an authentic and genuine bill, legitimately printed from the genuine plate, and truly signed by the officers of the bank, but altered in its denomination, or in some other material part.

5. There may be, however, an illegitimate impression from the genuine plate; that is, a merely *false* bill. It may have forged signatures, or the signatures of persons not the officers of the bank, or the names of fictitious persons. In a larger sense, to be sure, a bill which is counterfeit alone, or counterfeit and forged, or counterfeit and spurious, or forged alone, or spurious alone, might be called a false bill; and an altered bill, in the same general sense, might be called a false bill; but such language is too loose, we think, to be employed in construing a statute for the definition of crimes.

The indictment charged the bill in question to have been false, forged, altered, and counterfeited, which is plainly a repugnant description. The judgment must therefore be reversed.

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JUDICIAL KNOWLEDGE.—PERSONAL IDENTITY.

**The court will not take judicial notice that A. B. G., a former prosecuting attorney, and A. B. G., the present judge of the court below, are one and the same person.**

[*Shropshire* vs. *The State of Arkansas.* 7 English's (Ark.) R. 190.]

This was a trial for murder, at which the prisoner was convicted. He appealed on several grounds, among which it was maintained that Judge *A. B. Greenwood*, who tried the cause, was incompetent to preside at such trial, being the same person with *A. B. Greenwood*, the prosecuting attorney, at the time the indictment was found, and by whom, as such attorney, it was signed.

The record showed that the indictment was signed by "A. B. Greenwood, Pros. Att'y," and that the trial was had before "Hon. A. B. Greenwood, presiding as judge." It did not show that any objection to the competency of the judge was made, or that it was waived.

The constitution of Arkansas declares that "No judge shall preside on the trial of any cause, &c., in which he may have been of counsel, &c., except by consent of all parties." It was urged that under this provision the judge was disqualified. There was no proof of the identity of the judge with the former prosecuting attorney; but it was contended that the identity of name was *primâ facie* evidence of identity of person, and that the court should take judicial notice of the fact.

WALKER, J.—One ground of the appeal is, that the judge who pre-

sided at the trial of the cause, was the attorney for the State at the time the indictment was found. Of this there is no proof. No objection was taken at the trial by plea, motion, or otherwise; nor is there any proof these are the same persons. The defendant's counsel contends that we should know judicially who the officers of the courts are. Concede this to be true, we know that at the time the indictment was found, A. B. Greenwood was attorney for that circuit. This knowledge only extends to him as an officer. Whether he is an intimate acquaintance, or an entire stranger in no respect changes the case. When he goes out of office, we cease to take judicial notice of him, or to know anything of the changes of pursuit which may engage his time, and when as an incumbent of a different office we recognise him as such, it is with no reference to, or connection with his former position; nor do the names add to or detract from such knowledge. This rule has its foundation in the necessity for its existence. Judicial notice of officers, and of their signatures, seals of office, &c., are all necessary starting points to be taken upon faith and credit due to them, as connected with the administration of justice. As incumbents on public trust, they are known for the time being, and in no other respect whatever.

The true mode of reaching objections of this kind is not altogether clear. This court, in the case of *Caldwell ad.* vs. *Bell & Graham* (1 Eng., 228), held that suggestion or motion was necessary in order to raise the question; and even that practice is involved in difficulty. There is no precedent for it in the English courts, and it is very questionable whether an attorney there would not be fined for a contempt, should he propose to a judge to decide whether he was a judge or not. But, however this may be, the question is not raised here; there was no objection to the competency of the judge. We judicially know that Judge Greenwood is the incumbent in office in that circuit; and in the absence of evidence of his disqualification we must hold him fully competent to preside.

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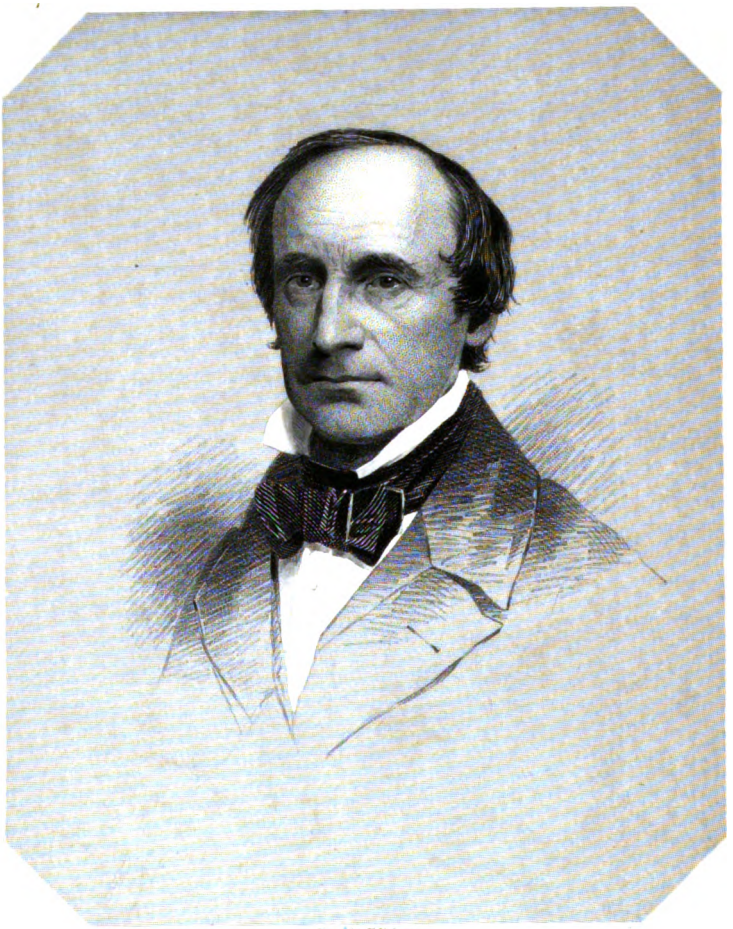

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# LIVINGSTON'S

## MONTHLY

# LAW MAGAZINE.

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LIVINGSTON'S

MONTHLY

# LAW MAGAZINE.

VOL. II. MAY, 1854. No. V.

## CONDENSED REPORTS OF RECENT CASES.

SURRENDER OF FUGITIVES FROM JUSTICE.—POWERS OF THE STATES.

A fugitive from the justice of one of the United States to another, may be arrested and detained in order to his surrender, by authority of the latter, without a previous demand for his surrender by the executive of the state whence he fled.

[*In the matter of William Fetter*; 3 Zabriskie's (N. J.) R., 311.]

THE prisoner was brought up on a writ of *habeas corpus*. The return showed that he was detained in custody as a fugitive from justice from California, by virtue of a commitment by a justice of the peace of Mercer county in New Jersey.

It further appeared on the hearing that the prisoner had been indicted for grand larceny committed in California, and that a requisition was made by the governor of California upon the governor of Pennsylvania for the surrender of the prisoner, he being at the time of making the requisition a resident of Pennsylvania. Before his arrest could be effected under the authority of the state of Pennsylvania, the prisoner came into New Jersey, where he was arrested under the authority of that state. The commitment directed that he should be detained in custody, to await the requisition of the governor of California, or until otherwise delivered by due course of law.

It was objected for the prisoner, that there existed no power to arrest an alleged fugitive from justice before the demand for his surrender was actually made upon the executive.

GREEN, CH. J.—The constitution of the United States (Art. iv. § 2) provides, that a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. It is insisted that the whole authority conferred by the constitution, or fairly deducible from it, is consequent upon the *demand* made for the surrender of the fugitive. That the prisoner has committed no offense against the sovereignty of this state which can justify his arrest, and that consequently any arrest by authority of this state for a

crime committed without its jurisdiction, prior to a demand actually made under the provision of the constitution for the surrender of a fugitive is unauthorized, and his detention illegal.

In considering this question, it is material to observe that this clause of the constitution does not contain a grant of power. It confers no right. It is the regulation of a previously existing right. It makes *obligatory* upon every member of the confederacy the performance of an act which previously was of doubtful obligation. All writers upon the law of nations agree that it is the *right* of every sovereign state to expel from its territory, or to surrender to another state in amity with it, an offender against the laws of such friendly nation. No state is bound to harbor criminals in its bosom, but may at its option surrender them to the government against whose laws they have offended. Whether any government is *bound* to make such surrender upon the demand of the sovereign of another nation in amity with it, upon the principle of the comity of nations, is another question upon which jurists and courts are not agreed. It is held by some writers of high authority upon the law of nations, that such duty does exist. (Vattel, B. 2, ch. 6, § 76; 2 Burlam., 179, § 23, 27; Story's Conf. of Laws, § 627; *Case of Washburn*, 4 John. Ch. R., 106; *Rex* vs. *Ball*, 1 Amer. Jurist, 297; 1 Kent's Com., 37.)

Other writers insist that the right, as between independent sovereign nations, to demand from each other fugitives from justice, does not exist independent of treaty obligations, and such appears to be the decided weight of authority in this country. The United States government have never recognized the right, unless under treaty stipulations. (*Commonwealth* vs. *Deacon*, 10 Serg. & R., 135; *Case of Jose Ferrara Dos Santos*, 2 Brock., 493; *United States* vs. *Davis*, 2 Sumner, 486; Story on Conf. of Laws, § 626; 8 Story's Com. on Con., § 1,802; Jefferson's Letter to Washington, 7 Nov., 1791; Jefferson's Letter to Genet, 1793; 1 Amer. State Papers, 175; Story's Letter to Gov. Everett, 6 June, 1835, cited in 2 Life of Story, 197; 1 Kent's Com., 37, note *c*.)

But whatever question may exist in regard to the *obligation*, there is no question as to the *right* of every sovereign nation to surrender fugitives within its territory upon the demand of another nation in amity with it. The whole effect of the constitution was to confer upon each member of the confederacy a *right to demand* fugitives from every other member of the confederacy, and to make *obligatory* the surrender which was before discretionary. If then there exists, independent of constitutional provision or treaty obligation, a right in every sovereign state to surrender criminals against the laws of other countries, there must also of necessity exist in every state the power of arresting and detaining such fugitives. The mere power of surrender, without the power of arrest and detention, would be nugatory. It is remarkable, indeed, that both the constitution and the act of Congress of 1793 assume that the one power is a necessary consequence of the other. Neither the constitution nor the law confers, except by implication, the power of arrest or imprisonment.

We find this right of arrest and imprisonment by the civil magistrates

of offenders against the laws of another government, recognized from a very early period. (*Rex* vs. *Hutchinson*, 29 Car. I., 3 Keble, 785; *Case of Col. Lundy*, 2 Vent., 314; *Rex* vs. *Kimberley*, 2 Stran., 848; *Mure* vs. *Kay*, 4 Taunt., 34; 1 Chit. Cr. Laws, 14, 46.)

If this principle be sound, as applied to the intercourse of independent foreign nations, in support of the right to reclaim fugitives from justice, it applies with far greater force and clearness in support of the express provision of the constitution, making the surrender of fugitives from justice obligatory upon every member of the confederacy. The denial of the power to arrest and detain an offender would, it is manifest, render this provision of the constitution well-nigh nugatory. If a person committing murder, robbery, or other high crime in one state, may, by crossing a river or an imaginary line, avoid arrest or detention until an executive requisition or order for his surrender may be obtained, the execution of the criminal law would be impotent indeed. Sound public policy, good faith, a fulfillment of the requirements of the constitution, all require that the arrest and detention of the offender be made, wherever he may be found, preparatory to a demand and surrender.

The exercise of the power has repeatedly been sanctioned by the American courts. (*The People* vs. *Schenck*, 2 John., 479; *Thomas F. Goodhue*, 1 Wheeler's Crim. Cas., 427; 1 Rogers' City Hall Recorder; 2 John. Ch. R., 198; S. C., 2 Wheeler's Crim. Cas., 17.)

I am of opinion that a fugitive from justice from either of the United States, may, under the provision of the constitution, be arrested and detained in this state preparatory to his surrender, before a requisition is actually made by the executive of the state where the crime was committed. It is an exercise of power essential to the full operation of the constitution, and has been sanctioned by a long and uniform course of practice.

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## THE LAW OF SUNDAY.—PUBLIC CONVEYANCES.

**Although traveling is not within a prohibition of prosecuting a worldly employment on Sunday, yet the running of a public conveyance, for the accommodation of travelers in general, is included in it.**

**Different judicial expositions of the law of Sunday.**

[*The Commonwealth* vs. *Johnston*. Pennsylvania Supreme Court. Not yet reported.]

By statute of Pennsylvania (Act of Assembly, 1794), the prosecution of "any worldly employment or business whatsoever," except works of charity and necessity, and certain kinds of labor specified in a proviso, is forbidden. The employments enumerated in the proviso are, the dressing of victuals, the landing of passengers by water, the ferrying over the water travelers or persons removing with their families, and the delivery of milk or other necessaries of life.

The defendant, Johnston, was convicted before an alderman of a breach of the statute, in driving a Sunday omnibus. The facts on which the charge was based were substantially as follows:

About three miles from the city of Pittsburg is the town of Lawrenceville, the semi-rural residence of many of the business men of Pittsburg, and also the site of the public cemetery. The defendant was employed as a driver by the proprietors of the Excelsior line of omnibuses running from Lawrenceville to Pittsburg, and in the course of that employment he had been accustomed not only to drive a week-day omnibus, but also to drive it on Sunday. The Sunday line made one trip less each day than the week-day line, and its trips were so arranged as to accommodate persons living in Lawrenceville, who preferred attending church in Pittsburg. Many such persons patronized the line, but it was run not exclusively for their convenience. It was a public conveyance, and was patronized by persons visiting the cemetery, and by others riding for recreation. It was ordinarily a well-conducted line.

The alderman having rendered judgment against the defendant, the latter sued out a writ of *certiorari* to the supreme court. A majority of the court affirmed the conviction, the chief justice and Lewis, J., however, dissenting. The opinions rendered are too long for publication entire. Many portions of them are occupied with discussions of the rules of proceeding applicable to the trial before the magistrate, and of the construction of the Pennsylvania statute above quoted. These discussions we omit, and give only those parts of the opinion which relate to the general legal obligations of the Sabbath day.

Woodward, J.—The driving of an omnibus is not within the proviso of the act of assembly, and therefore the only question is whether it is a work of charity or necessity. The exigencies of life which demand works of charity and necessity are so numerous and diversified as to defy classification, and to forbid any attempt to prescribe a general rule. The best we can do is to judge of cases as they arise, and to treat them according to the features of each.

Omnibuses are great conveniences in large towns and populous districts, and the driving them may, in many cases which it were easy to imagine, be both a necessity and a charity, and as such perfectly lawful on Sunday; but we are not now dealing with special cases or extraordinary occasions, but with an ordinary every-day employment. Not a circumstance is suggested on the record to distinguish the defendant's work on Sunday from what it was on any other day of the week. As it not pretended to have been a work of charity or necessity on other days, it could not have been on Sunday. Running omnibuses is a mere secular employment, established and maintained for private gain; ministering, and intended to minister, not to the *absolute* wants of our common nature, but to the *convenience of the public for a price*. No reason can be assigned in favor of such an employment on Sunday, which might not be urged in behalf of every other form of productive industry. If, on a day set apart by Divine command and human legislation as a day of rest, proprietors and drivers of omnibuses may prosecute their business, why may not farmers and mechanics pursue their equally useful, though less lucrative callings? These employments, like most other occupations, contribute more or less directly to the public convenience, and are followed on the same

motive precisely which establishes and maintains omnibuses. If we construe the statute so as to license the one employment, we must, for consistency's sake, pronounce that it does not forbid the others, and throw open the tavern, the store, the workshop, and the market-house on Sunday. If we decide that *necessity* and *charity* mean *convenience* (and this is the essence of the demand), we emasculate the statute, and sweep away the guards which the legislature threw around, not only the morals of society, but the physical health and well-being of both men and beasts. If Sunday be thus surrendered to the fierce rivalry of efforts for promoting the *convenience* of the public, it might as well be blotted from the calendar of days. But we have no *right* to give up this institution. Our duty requires us to construe the statute so as to accomplish its purpose, which was to enforce an *observance* of Sunday, instead of *obliterating* it. We therefore hold, that driving an omnibus as an ordinary public conveyance, is a work neither of necessity nor charity, within the meaning of the statute, and, consequently, that the defendant was properly convicted.

But the argument is, that though in the abstract running omnibuses on Sunday may not be a work of necessity within the meaning of the statute, yet inasmuch as this particular line furnishes people, otherwise unprovided, with means of attending churches and the cemetery at a cheap rate, it becomes a work of necessity, and is lawful.

It is not our business to discuss the obligations of Sunday any further than they enter into and are recognized by the law of the land. The common law adopted it, along with Christianity, of which it is one of the bulwarks. It is apparent from the authorities, as well as from the whole history of the instituted Sabbath, and particularly from the preamble to our old act of 1705, fully quoted in *The Commonwealth* vs. *Omit*, that *rest*, and the *public worship of Almighty God*, were the primary objects of the institution, both as a divine and civil appointment; and it seems to me to follow, as a necessary consequence, that no means reasonably necessary to these ends can be regarded as prohibited. Hence if an invalid, or a person immured for six days within the close walls of a city, requires a ride into the country as a means of recuperation, which is the true idea of rest, there is nothing in the act of '49 to forbid the employment of a driver, horses, and carriage on Sunday to accomplish it. Equally lawful is the employment of the same means to go to the church of one's choice, or to visit the grave of the loved and the lost to pay the tribute of a tear. In a very high sense, and perfectly compatible with the statute, these are works of necessity and charity, and had this defendant shown that he was employed for these purposes, and that he was merely engaged in accomplishing them, he ought not to have been convicted. But such was not the case. He was not engaged in executing a special undertaking for either of these innocent purposes, but in performing a contract, by the month, for the driving of a public conveyance. The labor for which he contracted was to be exactly the same on Sundays as on other days of the week. Some would no doubt avail themselves of the omnibus to ride for health and strength, to visit the cemetery, and to go to church, not only on Sunday, but on other days of the week; but he was, not-

withstanding, a *common carrier*, pursuing his ordinary occupation, which was a worldly employment as truly as merchandise is. The motives of an occasional customer do not determine the character of a man's business. Its character is acquired from its general aspects, and from the intention of the person *prosecuting* it, rather than from those of the person *patronizing* it. The argument amounts to this—omnibus-driving may be pursued on Sunday exactly as on other days of the week, if any body rides to church or the cemetery in it; though worldly employment in all its aspects, and actually contributing to idleness, dissipation and disorder, yet it is so sanctified by this casual patronage, as to become a work of charity and necessity within the high significance of those words as used in the act of '49. A precious pretext, to make the most of it, to cover up a palpable violation of that law.

Had the persons riding to church or the cemetery been prosecuted, *they* might have alleged a proper and necessary work, or had the defendant been engaged specifically in carrying them, and running his omnibus for no other purpose, he would have been blameless; but, according to his own showing, he was fulfilling a contract of another kind, and with other parties. The attempt to give his business a different aspect from that which it has worn from the beginning, is abortive. Something has been said about the indelicacy of prying into the motives of passengers travelling in a public conveyance, to which I fully subscribe; but it is apparent that it is the defense which is guilty of this indelicacy. The Commonwealth complains against a line of omnibuses for running on Sundays as on other days—the *defendant* makes inquisition of the motives with which his passengers ride, with a view of finding some ground to justify his apparent violation of the law; and this, I agree, is an example which ought not to be encouraged in the conductors of a public conveyance.

But, it is said, judicial construction has established that *traveling* on Sunday is not a violation of the act, and then it is argued, with an appearance of logical precision, that if the end be legitimate, and not forbidden by law, *all* the means which are appropriate, which are adapted to that end, may lawfully be employed to carry it into effect. This conclusion will be found, I think, to be too broadly stated. In the cases of *Jones* vs. *Hughes* (5 Serg. and R., 302) and *Logan* vs. *Matthews* (6 Barr.), the distinction is marked, which I suppose the legislature intended—traveling, *ipso facto*, is not forbidden, but public conveyances are, so that the conclusion that a lawful end includes *all* appropriate means, however sound in some cases, is too broad for this occasion. Nor has any case been cited which conflicts with the distinction; and seeing that it is created by *statute*, it is worthy to be maintained, even if supported by no good reason. But there is a reason. Public conveyances that run regularly on Sunday, whether there are passengers or not, are much more likely to interrupt the exercises of religious meetings and disturb the peace of neighborhoods than private conveyances are; and, besides, they are pursuing a *vocation* which, like all other secular callings, it is the policy of the law to suspend on that day. A *traveler*, on the other hand, is away from his

vocation. If traveling were a man's ordinary employment, it might well be doubted whether he would be within the protection of the statute, for the clause of exemption mentions *travelers, sojourners, strangers,* and *persons removing with their families;* titles all these, which indicate absence from vocation, as well as home.

It is not necessary to decide whether the persons riding in the defendant's omnibus between Pittsburg and Lawrenceville could be considered *travelers* within the meaning of the act, for they are not before us; and what is decisive against the defendant is, the confessed fact that he was driving, as his ordinary employment or vocation, a *public* conveyance. Granting that they were lawful travelers, he was engaged in furnishing them contraband means of conveyance. Doubtless some partial inconvenience will be experienced from stopping these omnibuses on Sunday, and if this prove too high a price for the good results that may accrue, the remedy must be sought, not in the courts, but in the legislature. While, however, this act of assembly remains unaltered by the legislature, it is not to be frittered away by judicial constructions. Our fathers, who planted in our fundamental law the assertion of those immortal truths, that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, that no man can be compelled to attend, erect, or support any place of public worship, and that no human authority can in any case whatever control or interfere with the rights of conscience, enacted, also, the statutes of 1705, 1786, and 1794 for the suppression of worldly employments on Sunday. So far from *conflicting* with those invaluable rights of conscience, they regarded such statutes as indispensable to *secure* them. It would be a small boon to the people of Pennsylvania to declare their indefeasible right to worship God according to the dictates of their consciences, amid the din and confusion of secular employments, and with desecrations on every hand of what they conscientiously believe to be hallowed time. These statutes were not designed to compel men to go to church, or to worship God in any manner inconsistent with personal preferences, but to compel a cessation of those employments which are calculated to interfere with the rights of those who choose to assemble for public worship. The day was set apart for a purpose, and the penal enactments guard it, but they leave every man free to use it for that purpose or not. If he wish to use it for the purpose designed, the law protects him from the annoyance of others—if he do not, it restrains him from annoying those who do so use it. Thus the law, without *oppressing* any body, becomes auxiliary to the rights of conscience. And there are other rights, intimately associated with the rights of conscience, which are worth preserving. The right to rear a family with a becoming regard to the institutions of Christianity, and without compelling them to witness hourly infractions of one of its fundamental laws—the right to enjoy the peace and good order of society and the increased securities of life and property which result from a decent observance of Sunday—the right of the poor to rest from labor, without diminution of wages or loss of employment—the right of beasts of burden to repose one seventh of their time from their unrequited toil—these are real and sub-

stantial interests which the legislature sought to secure by this enactment; and when has legislation aimed at higher objects? If we doubted the policy of the statute, it would nevertheless be our sworn duty to administer it faithfully; but with a profound conviction of its wisdom and value, we are resolutely opposed to a course of judicial construction that would cheapen its demands and impair its power for good.

The judgment is affirmed.

BLACK, CH. J., dissented. It is important that the laws which relate to the offense with which the defendant is charged should be properly administered. A general suspension of ordinary employments at regular recurring periods is universally admitted to have good effects on the physical, moral, and pecuniary conditions of the people. It is for these worldly reasons alone that the law of 1794 was made. No sane man can read the constitution and believe that the government has a right to enforce the observance of this or any other religious duty as such.

The statute is capable of being perverted by a loose construction to purposes for which it was never intended. Being the only point of possible contact between the Church and the State, it is natural enough that some who have not fully learned the important principle of toleration should desire to make it rule hard. Besides, it happens unfortunately that this is the very subject on which the opinions of the several sects are at the greatest variance. Some believe that the denunciations of the Old Testament against the violation of Saturday are in full force against those who do not rest on Sunday, and that a Christian is bound to keep the latter just as a Jew did the former. Others adopt this opinion only in part: they call the first day of the week by the Jewish name for the seventh, but think that the spirit of Christianity has much mitigated the severity of the old law. A third class treat it as a weekly festival of the Church at which the resurrection of its Founder is to be solemnly celebrated, but repudiate utterly the notion that it has any connection with or analogy to the Mosaic Sabbath. This latter party is subdivided between those who hold that the transcendently great event which the day commemorates should be honored by cessation from labor as well as by acts of special worship, and others who maintain that their duties are fulfilled by the appropriate religious ceremonials alone. There are many persons, again, who are clear that one day is not more holy than another, who profess to have traced the origin of the contrary custom to the decree of a Roman emperor in the third century, and who stoutly oppose themselves to all those doctrines and commandments of men by which the original purity of the divine revelation has, in their opinion, been corrupted. Besides all these, there is another numerous and respectable Christian sect, whose exemplary moral behavior and devoted piety give their feelings a fair claim to be considered. Their doctrine is, that the fourth commandment in the decalogue was never changed nor repealed. They teach (and as far as they are permitted, they practice what they teach) that Sunday is one of the six days on which they are commanded to labor and do all their work. To them the seventh day is the Sabbath of the Lord their God. The universal privilege of private judgment enjoyed in this country has not only created an endless

variety of opinions among Christians, but we have with us and of us still others (the Jews for instance) whose faith on this subject is neither derived from nor in accordance with that which is taught in the New Testament.

We are not to decide between these conflicting doctrines. The law protects them all, but adopts none as a favorite. It regards the sincere professors of every faith with equal eye, and leaves even the sin of hypocrisy to be punished by Him alone who knows the secrets of the heart. The government has no more authority on this question of observing the first day of the week than it has on other disputes of theology. It may as well attempt to make men unanimous on the duties of prayer, devout meditation, baptism, or the eucharist, as on this. It is no doubt very desirable that we should all be of one mind on subjects which interest us so deeply. But how shall such a consummation be effected? The experiment of legal force has been fully tried and is a flat failure. The world has been governed with very little wisdom. Its political history, until we come to that of our own country, is almost an unbroken record of errors and of wrongs. But of all blunders, the most preposterous is the effort to advance religious truth by state favor, and of all tyranny the most brutal, blind, and revolting is that which punishes a man for the sincere convictions of his heart. I admit that there is a great difference between burning a man to death at a slow fire, and compelling him to pay a fine so small, that a laborer, by diligence and self-denial, can make it up in a month. But the difference is only in *degree*. It was to extricate the principle of intolerance that our constitution provided that "No human authority can in any case whatever control or interfere with the rights of conscience, and no preference shall be given by law to any religious establishment or mode of worship."

Those among us who believe that the institution of the Jewish Sabbath has been engrafted on the Christian system, and changed from the seventh to the first day of the week, have a right to propagate their doctrine. But they must do it by moral means—by appeals to reason and conscience—by their own example of an upright walk and conversation in life—and by charity to those who differ from them. They must get their arguments from revelation (if they can), not from the statute book. Religious truth asks no favor except that of its natural freedom. The absurdity of planting an oak in a hot-house is not more palpable than that of sheltering Christianity under legal enactments. It needs no forcing-glass. It demands the stimulus of no artificial heat. By the power of its truth it will conquer the world; but it rejects the unworthy aid which the arm of flesh is so prone to offer.

*Non tali auxilio, nec defensoribus istis.*

If the act of 1794 be not construed according to the spirit of that religious liberty which the constitution guarantees, the construction must be inevitably wrong, and will lead to the worst consequences. We need not fear a union of Church and State: of that there is no danger. But the best interests of the country depend much on the reverence of the people for the religion which is taught among them. Any thing which is calculated to bring Christianity into contempt is a

deep public injury. And how can that be done more effectually than by clothing it in the coarse rags of human legislation, patched up and forced on by judicial decisions? Any advantage given by law to one sect over others is an irreparable injury to the party so favored. It will naturally be construed into an admission that it has no vital truth to sustain it. We live among a people who scorn all contrivances to fetter the mind. Statutes are necessary for some purposes, but nobody in this country believes them to be inspired. Justices of the peace, and aldermen, and judges, and sheriffs, and constables are useful in their way, but they are not called and sent to preach any system of theology whatever. Convictions and executions, fines and inprisonment, will never be accepted as arguments by any American who has sense enough to know his right hand from his left. It is far better, even for the denomination we may desire to help, that every man should be fully persuaded in his own mind, and then suffered to act according to his honest convictions. Of course, if his opinions prompt him to do what is injurious to his neighbor, the law should stop him.

But I hold that the essence of republican liberty consists in this: that every citizen may do as he pleases in regard to all those things which concern nobody but himself. And with due deference to the majority, who seem to think otherwise, I submit, that if I choose to go to church, or even to a heterodox meeting, in a three-cent omnibus instead of a carriage hired for three dollars, or bought for a thousand, it is nobody's business but mine, and neither I nor the man who drives me ought to be punished for it.

These are general principles which up to the present time have never been violated by this court. I am willing to go now as far as our predecessors have ever gone. But the affirmative of this judgment takes a wide leap beyond that mark. It clears the bounds of natural justice and leaves all precedent out of sight behind it. It fines a man for carrying decent and good citizens to religious meetings and to places, where, heretofore, it has been thought they had a right to go. It denounces as criminals, punishable by law, those men and women who go to church, or visit the graves of their friends, or take the air on Sunday, and whose poverty compels them to go by the cheapest mode of conveyance. It is true that those who rode in the omnibus are not convicted, but no sophistry can make a distinction between the sin of the agent and that of the persons who employ him and participate in his acts.

In the case before us, the alderman has very properly incorporated into his record of conviction the act which the defendant had done, so that we might review it. Let us see what it is. The defendant is accused and convicted of driving certain horses attached to an omnibus, in which certain persons were carried. This is the whole head and front of his offending. Whether this was a crime or not depends on other circumstances not stated. If he was carrying the passengers to a bull-bait or a horse race, it was a scandalous violation of law and morals; but if he was taking them to a camp meeting, or a funeral, or to some other proper place, he did no wrong, and to punish him would be an outrage on common justice. What are we to infer from a record like this?

Not guilty; for the presumption of law is in favor of innocence, and the record does not contradict it. Under the circumstances disclosed, it is not only the legal but the natural presumption, that those persons were about no guilty act, nor bent on any evil purpose. The inhabitants of Pittsburg and its environs are as moral and religious a people as any other on the globe, of equal number, and living within similar limits. A fair man of sound judgment (to say nothing of Christian charity), who should see a score of unknown persons passing in or out of the city on Sunday, would take it for granted, without any aid from the rules of law, that they were not going to perpetrate any crime.

Notwithstanding the necessity thus existing for a line of conveyances to carry the people back and forth between Lawrenceville and Pittsburg, all the drivers were prosecuted, as if they had been detected in the perpetration of some great enormity. When the prosecutions failed with one alderman, they were renewed before another. What motive prompted the effort to deprive the people of Lawrenceville of the means which had been previously at their command of worshiping God in the way their consciences told them was right, I do not pretend to judge. But whether it is done by infidels to injure the Christian congregations generally, it is equally a perversion of the law and of the gospel. If any portion of our people hold the privilege of going to church in an omnibus, when that is their only means of getting there, at the mercy of every profane scoffer or blinded sectarian who chooses to make an information, then freedom of conscience is in a worse condition than I thought it was.

It may be answered, that though it was proper enough for the passengers to go to church, or to the cemetery, or into the country for health and recreation, the defendant himself was engaged in his ordinary calling, and therefore is guilty. This mode of putting the case is very superficial, to say the least of it. When it is proper for one man to do an act which he can not accomplish without assistance, another may aid him. A person charged with doing worldly employment on Sunday may plead his neighbor's need for it as well as his own. A calling, profession, or trade may be exercised on the first day of the week for money, if the public welfare or private necessity demands it. Thus the apothecary sells drugs on that day, the physician attends the sick, the undertaker buries the dead, the sexton opens the church—all in pursuit of the business by which they earn their bread—and they justify their conduct because it is necessary, not to themselves, but to their customers.

If, therefore, it be lawful for men to go and come to church and elsewhere on the first day of the week, he who bears them over the mud or snow is as innocent as they are. In ministering to their necessities he brings himself within the exception of the statute, as clearly as if his own safety or convenience depended on it. The half dime which his customers pay him for carrying them to the church, is no greater sin than the contribution expected from them when they get there, to the preacher's salary.

I give the word necessity the broadest definition. Nothing is necessary which is not indispensable. But different things may be necessary as means to different ends; one thing is necessary to life, another

to health, another to decency, another to comfort, another to intellectual improvement, another to moral culture, another to spiritual progress, and all these ends being lawful, whatever is necessary to effect either of them is a necessity within the meaning of the law. To the health, comfort, and decency—to the moral, mental, and religious improvement of these people, a cheap, rapid, and ever ready mode of conveyance is an absolute necessity. To compel them to remain imprisoned within their houses on Sunday is odious tyranny. To allow them to go out only on condition that they trudge through the mud and endure the rains, is absurd as well as cruel. What would be thought of an order to close the bridges and tie up the boats, lest the people of Allegheny should commit the sin of going to church dry, instead of swimming across the river?

In *Jones* vs. *Hughes* (5 S. & R., 299) it was held, that traveling was not within the act of 1794. The correctness of this decision has never been questioned. There is more walking and riding done on the first day of the week than on any other. Persons who can not go out at any other time, go then.

The whole population is in motion. Not even one in ten thousand thinks it his duty to keep within doors, and perhaps no man in the commonwealth is so completely saturated with bigotry, that he would prevent the people from moving about from place to place, if he could. The worst that malice itself can allege against those who rode in omnibus No. 11, on the 1st of September, is, that they were going where they pleased in a decent and orderly manner, and for purposes of which the propriety and lawfulness have not been questioned. What the driver did, was to furnish them with the necessary means of doing so. If the authority of *Logan* vs. *Matthews* was not to be overturned, and common sense upset along with it, the driver and the passengers were alike innocent of every offense, except, perhaps, that of patronizing the wrong church.

Lewis, J.—It is admitted upon the record that persons who were traveling in the omnibus were engaged in a "work of necessity" and in "the performance of their religious and charitable duties." It follows that unless the act of traveling is so sinful or illegal in its nature as not to be justified by any "necessity" however urgent, or by any "religious or charitable duties" however sanctioned by the laws of God and man, the judgment ought to have been rendered in favor of the defendant below. But a different view of the case was taken by the alderman.

The Saviour, after his crucifixion and resurrection, gathered his eleven disciples together upon the mountain in Galilee, and commissioned them to "go and teach all nations." Considering that this was essentially the voice of God himself, it is not to be supposed that the Creator or his chosen missionaries were ignorant of the law of his own creation, by which the Sabbath can not commence and terminate with "all nations" at the same instant of time, but necessarily varies with the degrees of latitude and longitude. When it is Sunday morning at Jerusalem it is evening in the Sandwich Islands. When it is Sunday at noon in Philadelphia, it is midnight in China. The territory lying

between the Red Sea and the Persian Gulf, where the commandment to keep the Sabbath was delivered to the children of Israel, enjoys the alternations of day and night every twenty-four hours, while in some parts of the polar circles these alternations occur only once a year. His direction to "the children of Israel" to keep the seventh day of the week "for a covenant" and "as a sign between their Creator and themselves forever," therefore could not have been intended to exclude such modifications in the time and manner of observing the day as the necessities of other nations in different locations on the globe required. In view of this necessity the fundamental principle was affirmed by the Saviour that "the Sabbath was made for man, and not man for the Sabbath." The selection of any particular period of twenty-four hours was therefore not of vital importance. All that was required by the spirit of the institution was that one seventh part of the time should be set apart for worship and rest. The first day of the week was the day on which God created the heaven and the earth, and was also the day on which the Saviour arose from the dead. That this day was substituted for the seventh by those intrusted with full power to teach all nations the new dispensation is a fact established by the usage introduced by their authority and example, and continued for eighteen hundred years. It is therefore too late to raise a question in regard to the appropriate day. So far, at least, as this commonwealth is concerned, it has been settled so long that the "memory of man runneth not to the contrary." Those who had authority from God to deliver the glad tidings of salvation to mankind, and to change the day for the observance of the Sabbath, had also authority, from the same high source, to direct by precept and example the manner of keeping it. That they did make a change in the *manner* of keeping the Sabbath it is as well established as that they changed the *day*.

In the spirit of the Saviour's doctrine and practices, the act of 22d April, 1794, was passed, and it certainly ought to be expounded by the courts in the same spirit. In that spirit let us consider the question before us. The act prohibits "worldly employment or business, works of necessity and charity only excepted." Is traveling regarded as "worldly employment or business" within the meaning of the act? In *Jones* vs. *Hughes* (5 Serg. & R., 299) it was expressly decided that traveling was not "worldly employment," within the meaning of the act of 1794, although the transportation of merchandise, as a business, was. In *Logan* vs. *Matthews* (6 Barr., 417) it was held, in accordance with this principle, that the hiring of a carriage on Sunday was a legal contract. It is true that the hiring was by a son who intended to visit his father, but as his father was not sick, and no unusual necessity for a Sunday visit was shown, the case stands upon the general principle that traveling or locomotion is not "worldly employment" within the meaning of the prohibition.

There may be different degrees of urgency between the visit of a lover to his betrothed, and that of the clergyman who comes to unite them in marriage—between the visit of a physician to a sick patient, and that of a minister of the Gospel to a dying sinner—between the quiet and orderly movement of an industrious operative who has been

confined in a close shop all the week, and who takes a cheap ride in an omnibus into the country for the purpose of healthful recreation, and the Sunday ride of a dashing young student or clerk, who is able to hire a carriage for the purpose of paying a visit to his father. But the law has not authorized the arrest of travelers on their journeys, for the purpose of instituting an inquisition into their motives.

Such a proceeding has been regarded as so odious, if not so fruitless and impossible, that although the statute has been in existence more than half a century, the practice has never been sanctioned; but on the contrary, has been repudiated by the courts, and by the common usages of the people. The idea of stopping an omnibus, a stage-coach, a steamboat, or a train of railroad cars, for the purpose of ascertaining what number of the passengers are traveling for proper and necessary purposes, and arresting those who are not, is now, for the first time in the history of this commonwealth, suggested. I say that this idea is now suggested, because there is no reasonable way to enforce the principle of the decision without it. It is unreasonable to arrest in their progress those who are urged on by the duties of attending worship, or a funeral, or offering medical or clerical aid to the sick and dying, because others are in the same vehicle who have no such urgent reasons for their movements; and yet this must be done if the driver of an omnibus, or the engineer who has charge of a locomotive, is to be arrested and punished, as is proposed to be done in this case. It can not be pretended, in the face of these repeated decisions and the uninterrupted usage of the people and the government, that traveling is "worldly employment or business" within the meaning of the act of 1794. Fanaticism in her wildest phrensy has not been able to establish this position. The decisions of the court, the uninterrupted practice of the state government in the management of her canals and railroads, and the habits of her citizens have been in constant opposition to it.

But it is contended that, although the passengers in the omnibus have a right to proceed peaceably on their way to their churches for worship, to the cemetery to drop a tear over the remains of their friends, to the country to breathe the fresh air and recruit their health, or to any other place of destination, yet the driver, because it is his "worldly employment," has no right to drive the horses which draw the vehicle. And this is the pin's point on which this great question of moral reform is to be impaled by its own friends! Can any reasonable man be misled by such indirection as this? Can any one suppose it to be a sound and just administration of the law to subvert and destroy the acknowledged right of locomotion by such a construction? The right is established and acknowledged, but the means of enjoying it are cut off. If this principle were asserted by an obscure attorney in relation to any other subject, it would meet with nothing but derision. It is contrary to a rule as old and well established as the law itself—"Where the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same." Co. Litt., 56. The accessories go with the principal. As traveling is lawful, the agents who do no more than render the necessary aid in such lawful act, can not be guilty of

any crime. It is no answer whatever to this objection to say, that the agents are following their "worldly employment."

The same may be said of every person employed in supplying the necessary demands of humanity, from the physician who assists in bringing us into the world to the gravedigger who renders his aid as we go out of it. Where is this to end? The coachman who drives an aged or sickly family of females to church is pursuing his "worldly employment." The hired man who takes care of the horses and cattle of his employer is pursuing his "worldly employment." All the domestics who minister to the daily necessities of a family are pursuing their "worldly employment." Every one of these persons is as justly liable to punishment as is the present defendant. None of them, except those who dress victuals, are expressly mentioned in the exceptions of the statute, nor in the proviso. Their only justification is that which ought to sustain the defendant here. They are aiding in the performance of acts not within the meaning of the prohibition, and are therefore guilty of no crime.

Apply the principle contended for to the transportation of the United States mail. It is conceded that the state authorities have no power to stop it; but if it be true, as now alleged, that the lawfulness of the act does not sanction the use of the necessary means of performing it, we might punish the driver of the coach which contains it. And what would this be but obstructing the United States Government in the exercise of its legitimate functions? If we attempted this, our error would be corrected by the supreme judiciary of the Union without the least hesitation. We should soon be made to understand that the right to a thing carries with it the right to all the necessary means of enjoying it. Why, then, shall we not apply the same principle to the case before us? The right to go from Lawrenceville to Pittsburg is not denied. The right to the means of performing the journey must therefore be undeniable.

I would recommend it to every Christian to avoid all unnecessary traveling on Sunday; but if the steamboats, railroad cars, post-coaches, and private carriages are permitted to run on Sunday—if the national and state governments sanction the running of cars and coaches on that day, I see no reason for denying the owner of the omnibus the same privilege. Let equal and exact justice be administered to all. Let us not, in our zeal for the cause of religion and morals, run ahead of all knowledge and understanding. Let us not, by judicial legislation, enact a new law which never had any existence before. Let us give no countenance to a principle or construction which is unreasonable in itself, and which tends to favor the rich and to oppress the poor.

I concur with the chief justice in the opinion that the judgment of the alderman ought to be reversed.

MARTIAL LAW.—LIABILITIES OF MILITARY OFFICERS.

A military officer, acting under martial law, is justified by an order of his superior officer, if apparently within the scope of the latter's authority.

[*Despan* vs. *Olney*; 1 Curtis' (U. S.) C. C. R., 306.]

This was an action of trespass.

It appeared from the evidence that in June, 1842, at the time of the political troubles in Rhode Island, the defendant, who was a native of the State, but resided in Brooklyn, in New York, came to Providence as a volunteer. He received a commission as captain from the governor, and was ordered to Pawtucket. The plaintiff had commanded a military company raised to support what was called the people's constitution; but after the President of the United States recognized the government organized under the old charter to be the lawful one, the plaintiff took no active part against that government, but on the contrary used his influence to prevent others from doing so. However, soon after the defendant reached Pawtucket, an order was given to him by Major-general Anthony, who was the highest in military command there at the time, to arrest the plaintiff, who resided at Pawtucket; and he was accordingly arrested, conveyed to Providence, confined there for several days, and then permitted to return home. This took place while the act of the legislature declaring the state under martial law was in force. This arrest was the trespass complained of.

The defendant relied upon a statute of the state which bars all actions for acts done while the state was under martial law, provided such acts were intended to preserve the peace of the state; and the question was whether the arrest appeared to have been made with such intent. The charge to the jury reviewed the question how far a military officer is liable civilly for acts done in compliance with the order of his superior officer.

CURTIS, J.—The question for you to try is, whether the act of the defendant in arresting the plaintiff was intended by the defendant to preserve the peace of the state, and to aid the people and government thereof against the open or suspected hostility of the plaintiff. It appears by the act of assembly which has been read, that martial law then existed in Rhode Island. It has been determined by the supreme court of the United States, in a case which went up to that court from this district, that the legislature of a state has power to proclaim martial law, whenever in its discretion the public safety demands this extreme measure. And also, that as the executive department of the government of the United States had recognized the government of Rhode Island, organized under its charter, as the only lawfully existing government of the state, all other departments of the Union were bound thereby. You will therefore take it to be the law in this case, that martial law had been rightfully proclaimed, and did exist, at the time when the acts complained of were done. But the existence of martial law does not authorize general military license, or place the lives, lib-

erty, or property of the citizens of the state under the unlimited control of every holder of a military commission. It is not needful, in this case, to point out the limits of the authority which it confers. It is enough to say, that under the issue you are trying, the existence of martial law is not, of itself, a justification of the defendant. He must also satisfy you that the act done by him under that law was intended by him to preserve the peace of the state, and to aid the existing government, and not from recklessness, or a love of power, or to gratify any bad passion. Still the fact that martial law existed has a most important bearing on the question of the intent of the defendant. He held a commission as captain. He received an order from his commander. He was bound to obey all lawful orders. And if this order was one which, upon its face, was lawful, and he did no more than execute it, you will consider whether it would not be proper to conclude that he acted simply with an intent to do his duty, unless some other intent appears. Now, as martial law existed, and as Major-general Anthony had authority under that law, for sufficient cause known to him, to cause the arrest of the plaintiff, the order to do so was, upon its face, a lawful order. And I do not think the defendant was bound to go behind an order thus apparently lawful, and satisfy himself by inquiry that his commander proceeded upon sufficient grounds. To require this would be destructive of military discipline, and of the necessary promptness and efficiency of the service.

It is a general principle, that an executive officer is justified by his precept. If the court from which it issues has jurisdiction, and the precept is regular on its face, it is neither the right nor the duty of the civil officer to inquire further. Something like this is true of a military officer. If he receive an order from his superior, which from its nature is within the scope of his lawful authority, and nothing appears to show that that authority is not lawfully exerted in the particular case, he is bound to obey it; and if it turns out that his superior had secretly abused his power, the superior who is thus guilty must answer for it, and not the inferior, who reasonably supposed he was only doing his duty. And therefore if in this case you find as matter of fact that the defendant did receive from his commander an order to arrest the plaintiff, and that there was no fact known to the defendant which would have made the arrest an abuse of power by General Anthony, you will then take it that the defendant was bound to obey that order, and you will consider whether he did not act from that motive. If he did act simply from a desire to do his military duty, you will then consider whether his intent was to preserve the peace of the State, and aid the people and government thereof against the open or suspected hostility of the plaintiff.

CORPORATIONS.—RIGHT TO MAINTAIN LIBEL SUITS.

A corporation may maintain an action for libel, for words published of them, and relating to their trade or business, by which they have incurred special damage.

[*The Trenton Mutual Fire and Life Insurance Company* vs. *Perrine*; 3 Zabriskie's (N. J.) R., 402.]

The plaintiffs declared upon a libel said to have been published by defendant, and alleged to have injured the company in their business of insurance. The defendant demurred to the declaration.

GREEN, CH. J.—The most material question raised by the demurrer in this case is, whether an action for a libel may be maintained by a corporation aggregate. The question is, so far as I am aware, of first impression. No case was cited on the argument, nor have my subsequent researches led to one in which the point has been expressly decided. There is no precedent to be found in the books of a declaration in such an action. The weight to be attached to the mere absence of all precedents will, however, be materially diminished when it is remembered that the great body of the existing law in regard to corporations is the growth of the present century; that within the last fifty years it was decided in Westminster that a corporation was liable *civiliter* for its *torts;* and at a period still more recent it was there adjudged that a corporation is liable, like an individual, to indictment. Perhaps a stronger presumption against the right of a corporation to maintain an action for libel may be found in the fact that the prevailing sentiment of the profession is against it. All experience teaches that there are few more reliable tests of sound legal principle or correct practice than the pervading sentiment of an intelligent bar. These circumstances are grounds for caution in arriving at a different conclusion, though they certainly afford no reason for hesitating to tread where sound principles may lead the way, however new or untrodden the path.

It is not easy to say, upon principle, why an action may not be maintained by a corporation for libel. It can not be denied that a corporation may have a character for stability, soundness, and fair dealing, in the way of its trade or business; that this character is as essential, nay, more so, to its prosperity and success, than that of a private individual; that money corporations, whose operations enter largely into the business of every community, depend mainly upon their reputation in the community for their success, and often for their very existence. Nor can it be denied that the character of corporations is more easily and more deeply affected by false and malicious allegations than that of private individuals; nor that the business of a corporation is more prejudiced by an evil name, by distrust of its responsibility, or of the character of its officers, than that of an individual. If, then, a corporation may suffer pecuniary loss, and even the utter destruction of its pecuniary interests from false and malicious representations, why should it not be entitled to pecuniary redress? Wherever the common law

gives a right or prohibits an injury, it also gives a remedy by action. (3 Bl. Com., 23.) And in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages. (1 Com. Dig., 272. "Action upon the case," A.) And this general rule embraces all cases where any *special damage* is immediately occasioned by a false communication of noxious tendency. (1 Stark on Slander, 2d ed., 2.) It may be admitted without prejudice to the present inquiry, that no words spoken or written of a corporation are in themselves actionable, but that the corporation must always show *special damage* in order to recover. And the reason for the distinction may be found in the fact, that a corporation has no individual personal character in which it can suffer an injury independent of its pecuniary affairs; and therefore, in an action for libel which affects its trade or business, the corporation must show that the words, not being in themselves actionable, have occasioned a special pecuniary loss or damage.

Where the publication merely disparages the property, without affecting the individual character, as in the case of a libel upon a stage-coach or upon a school-book, it is not easy to see why the action should not be maintained by a corporation as well as by an individual. The *gravamen* of the action is the injury done to the plaintiff's property by the wrongful act of the defendant. No one but the owner of the property can maintain the action; and a corporation being the owner, the injury to them is just as great; and it would seem upon principle, that the right is just as clear in their behalf as it would be in case of an individual. Certainly, in case of an injury to their property by any other tortious act, the corporation would have a clear right of action, and why not in case of an injury inflicted by the publication of malicious falsehood? The *principle* upon which this action rests has been judicially recognized in several cases. Thus it has been held, notwithstanding the general rule that two can not unite in an action for slander, that a joint action may be maintained by two partners for defamatory words respecting their trade, if special damages are claimed by reason of the slander. (*Cook* vs. *Batchelor*, 3 Bos. & Pull., 150; 2 Saund. R., 116, C., note 2. *The Hope Assurance Company* vs. *Beaumont*, 10 Bing., N. C., 260.)

I am of opinion that upon principle an action may be maintained by a corporation aggregate for words falsely and maliciously spoken or written of the company, in the way of its trade or business, or of its property, or of its officers, servants, or members, by reason of which special damage is sustained by the corporation.

The tendency of modern adjudications has been, as far as practicable, to treat corporations as natural persons. They are now held liable for *torts* committed by their agents or servants, while they are held amenable to the law for all injuries inflicted by their wrongful acts. They should, upon principles of even-handed justice, be held entitled to its protection for all injuries suffered by them at the hands of others.

This conclusion is sustained by the well-settled principle that corporations may maintain an action for injuries done to the body corporate. And if an injury be done to one of the members, by which the body at

large is put to any damage, it may sue on that account. (1 Kyd. on Corp., 190; Angell & Ames, 4th ed., § 370.)

Nor is it perceived that there is any ground for apprehension that the freedom of discussion will be unduly restrained, or any principle of public policy trenched upon, by maintaining the right of a corporation to an action for libel. It is doubtless the dictate of a sound public policy that the conduct of all corporations, in whose faithful management the public are interested, the character of their officers and the management of their business should at all times be open to the keenest scrutiny and to the most free discussion. It constitutes the most effectual safeguard for the protection of the ignorant and unwary from fraud and imposition. But the necessity of free and fair discussion can constitute no justification for injury inflicted by wanton and malicious libel. It must ever be borne in mind that the plaintiffs, in order to recover in such an action, must prove not only that the statement is false, and that they have sustained special damage, but the jury must be satisfied that the defendant was actuated by malice. When the statement is false and injurious, it is still open for the defendant to show that the publication was prompted by proper motives, and made for justifiable ends. The question of malice is always a question of fact for the jury. (*Swan* vs. *Tappan*, 5 Cush., 111.*)

Under such protection there is no reason to apprehend that the limits of free discussion will be unduly trenched upon or narrowed, to the prejudice of public welfare.

There must be judgment for the plaintiffs.

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RIGHTS OF COUNSEL.—CONDITIONAL FEE.

**It is unprofessional and unconscientious for a lawyer, who has abandoned his cause without trying it, a term or two before trial, to claim a fee conditional upon the success of his client, although his client was successful.**

[*Potts* vs. *Francis*; 8 Iredell's (N. C.) Eq. R., 800.]

The defendant, a practicing lawyer, was applied to by the plaintiff to conduct two causes as his attorney and counsel, for which he received $30, and a bond for $250, as a conditional fee for his attention to the causes, to be paid in case of his succeeding in them. Before one of the causes came on for trial, the defendant left the bar, and the plaintiff was obliged to procure other counsel in his stead. They succeeding in the case, the defendant sued the plaintiff on his bond for the $250. The plaintiff, in equity, prays to be relieved against the bond.

Ruffin, Ch. J.—Supposing such contracts between attorney and client, as the present, to be sustainable in equity, it appears to the court that the defendant can not be allowed to enforce this, because he did not perform the services he engaged to perform, as the con-

* Reported 1 Liv. Law Mag., 124.

sideration of the bond. It is true he did some acts as plaintiff's attorney. But he received some compensation in the $30 paid him. The bond was conditional, and in its nature the condition must be deemed entire and as going to the whole bond. The money was to be paid in case the defendant brought the case to trial and tried it successfully. The plaintiff employed the defendant and agreed to give that fee, because of his estimation of both his fidelity and ability in his profession, and it can not be assumed that he would have engaged to give as much to another member of the bar. The great reliance in such cases is on the services of eminent counsel in the trial itself, and it is obviously almost impossible, when the counsel declines to appear on the trial, so to apportion a conditional fee as to remunerate instructions and services prior to the trial, in a manner to do justice to the expectations of the client and meet the intentions of the parties.

In this case, however, the defendant, for aught that appears, willfully withheld his services at the trial. He says, indeed, that he withdrew from the bar for domestic reasons, and that he engaged other counsel in all his business. But he gives no evidence of either, and therefore it can not be assumed if it would do him any good. The truth is, however, that the plaintiff was obliged to employ other counsel, and the cause was compromised about a year after the defendant had gone out of it. The terms of the compromise are not stated, but it is manifest that if the other party voluntarily abandoned the contest, the case was one in which the fees stipulated were inordinately high, and if the present plaintiff paid them any thing, *non constat*, that he would have done so, if the defendant in the performance of his engagement had been there to advise and act for him. In fine, it is unprofessional and unconscientious to claim a conditional fee, payable on succeeding in a cause which the counsel neglected and abandoned, without trying, and a term or two before trial.

Decree for the plaintiff.

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PARTNERSHIP.—LAW FIRMS.

A partnership formed for the purpose of carrying on the practice of law is legal; and the responsibilities and rights incident to other partnerships attach in general to a law partnership.

[*Smith* vs. *Hill*; 13 Ark. R., 178.]

The facts in this case are sufficiently implied in the opinion of the court.

Scott, J.—The complainant does not set up that he did not attain his object of having "the cause fairly presented to a jury of the country," which, he says, was the "end" he had in view in engaging the professional services of Isaac C. Tupper. Nor does he complain that he was in any way defrauded by any one, or in any respect injured to any extent whatever. But he complains simply, in substance, that Smith, the surviving partner of the law firm of Tupper & Smith, with which

firm he contracted for the services of Tupper, performed the services himself after the death of Tupper.

Had Tupper lived, the most that could have been required by the complainant was, that he should have performed the services in a sound, professional manner, and had he fallen short of his professional duty in the premises, not he alone, but the firm of Tupper & Smith, would have been responsible. Because a law firm is not only lawful, but as in other partnerships, the act of one partner, in the professional business which constitutes the subject matter of the partnership, is the act of all the partners. If one receives money for his client, and absconds, that is no defense for the other against the action of the client. So if one partner should unskillfully conduct a law suit for his client, the other would be equally responsible in damages. And this would be the case although the individual name of one of the partners was used in the conduct of the suit, and not that of the firm. In a word, every responsibility incident to other partnerships in general attaches to legal partnerships, as well as all corresponding rights. (*Warner & Post* vs. *Griswell*, Wend. R., 665, and cases cited.)

When professional business is intrusted to a law firm, there can be no sound reason why it should not be as lawfully attended to by one partner as another, provided it be conducted with due professional skill. Each partner in any partnership is but the agent of the firm, and the principal if not the only distinction between him as such and an ordinary agent is, that he has a community of interest with the other partners in the business and responsibilities of the firm, whereas a mere agent has no interest. But, at the same time, a partner is also a principal, in so far as his interest is concerned, and thus he embraces both characters. It follows then, necessarily, that there is nothing in the nature and essence of the professional function to forbid its being exercised by another than the party employed; otherwise legal partnerships could not be allowed. It is true that, although this is so, it would still be competent for a legal firm to contract with a client to afford him the personal services of one particular member of the firm whom he might fancy, and if the service was rendered by another member the contract would be broken. Nevertheless, if the business was transacted with due professional skill, and the client sustained no injury, the damages for such a breach would be but nominal, and could lay no foundation for equitable interposition.

In our day, at least, the professional employment is not only recognized as a legitimate and substantial business of life, but is regulated by fixed rules to insure due diligence and skill, and its appropriate reward. And although, in the services of its more illustrious members, the client may incidentally have his senses delighted by some of the touches that characterize the fine arts, yet if his cause is won, or even if it be lost, and the substituted attorney comes up to the standard of due professional skill and diligence, all that is lost by the substitution of the prosy partner is but unsubstantial matter of taste and fancy, in no way affecting injuriously the substantial purposes of the employment and the end in view. The contract for an attorney's services is therefore unlike that for a marble statue from the chisel of some eminent

sculptor, whose fame has given the chief value to his work, which at least is more agreeable than useful.

When, then, the nature of the attorney's employment is considered, and it is remembered that the engagement of the attorney, with its legal incidents, is the consideration of the contract for the fee (2 Tuck. Lec., p. 49), that every step thenceforward in the preparation of the cause for trial, either in examination of the law, consultation, or otherwise, is part performance of the contract, and that the firm was legally bound for due professional diligence and skill on the part of the individual partner whose services were contracted for, we are of opinion that, on the death of this partner, after the contract for his services, and before the trial term, it was not competent at that term—as was attempted in this case—for the client to refuse the services of the surviving partner without an actual tender of a fair compensation for the professional engagement made and aid already rendered under the responsibilities of the law; and consequently that the surviving partner, under such circumstances, had a right to tender and to render the services at his own risk, and if rendered, and they could not be justly assailed for falling below the standard of due professional skill and diligence—and they have not been thus assailed in this case—that he would be entitled to the entire fee.

We therefore hold, upon an application of these legal principles to the facts of this case, as they stand admitted by the demurrer, that the complainant did not show himself entitled to any relief, and therefore the court erred in overruling the demurrer and making the decree perpetuating the injunction. The decree must consequently be reversed, and the cause remanded, with instructions to the court below to sustain the demurrer and dissolve the injunction.

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### SURGERY.—PROFESSIONAL SKILL.

**Though a surgical operation be not performed with the highest degree of skill, or might have been performed more skillfully by others, yet, if it be of service to the patient, the surgeon is entitled to adequate compensation.**

[*Alder* vs. *Buckley*; 1 Swan's (Tenn.) R., 69.]

This was an action of assumpsit on a surgeon's bill. The facts sufficiently appear from the decision.

TOTTEN, J.—It appears that a son of Thomas McLain, whose administrator is the plaintiff in error, fractured his arm, and amputation became necessary. The surgical instruments employed on the occasion were a "large butcher knife," of a very sharp edge, and a "carpenter's sash saw," the teeth of which were as sharp and fine as those of an amputating saw. The operation appears to have been well performed, and the patient, under a proper treatment, soon recovered.

The court charged the jury to the effect, that if the operation was of service to the patient, and he did well and recovered, the surgeon

was entitled to compensation, though it was not performed with the highest degree of skill, or might have been performed more skillfully by others.

We are not prepared to say that this charge is erroneous. It is certain that the highest degree of skill is not necessary. The surgeon undertakes for a due and proper degree of skill and diligence in his profession, and for the employment of these he is entitled to a reasonable compensation. His right to recover does not depend upon the fortune of the case, whether it be good or bad, but upon the skill, diligence, and attention bestowed. On the contrary, if the patient suffer injury by the reason of the want of skill or diligence in the operation or treatment, or from such cause derive no benefit therefrom, in either case the surgeon is not entitled to any compensation, but is liable in damages for the mal-treatment and the negligence. The same may be said of other professions and vocations in which skill and diligence are required. (*Leare* v. *Prentice*, 8 East., 350; *Duncan* v. *Blundell*, 3 Stark. R., 6; 2 Wilson, 359; Chitty on Contracts, 165; Com. on Con., 246.)

We think that the charge of the judge is, in substance, conformable to the rules as we have stated it. For he says, if the operation were so unskillfully performed as to be of no service to the patient, the surgeon would not have a right to recover. It certainly required some degree of skill in anatomy and surgery to perform an operation of the kind, and the success that attended it, though not conclusive, is a circumstance from which skill may be inferred. The instruments employed, drawn from other vocations, were certainly unusual and extraordinary for such a purpose. But we are not to infer from this circumstance alone that the surgeon had not sufficient art and skill in the use of them. Besides, it is possible that the delay necessary to procure proper instruments might have been fatal to the patient.

Judgment affirmed.

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MASTER AND SERVANT.—LIABILITY OF EMPLOYER.

An employer is not liable to one of his employees for an injury sustained by the latter in consequence of the misfeasance or neglect of others of his employees engaged in the same general business.*

[*Sherman* vs. *the Rochester and Syracuse Railroad Company*; 15 Barbour's (N. Y.) Supreme Court R., 574.]

By statute of New York it is provided, that whenever the death of any person is caused by another's act or default, which would (if death had not ensued) have entitled the party injured to recover damages, the personal representatives of the deceased may recover damages, not exceeding, however, $5,000. Under this provision the administratrix of Sharon Sherman brought this action to recover damages for injuries

* See *Albro* vs. *the Agawam Canal Co.*, 6 Cushing, 75; 1 Liv. Law Mag., 456

to the intestate received by him through the alleged wrongful act of defendants by their servants, which occasioned his death.

The complaint stated in substance that Sherman was a brakeman on defendants' road, and that on the 5th of July, 1852, while he was acting as such, on the mail train of defendants, the train was wrongfully driven at the dangerous speed of eighty miles per hour, and at that rate was suffered to enter the space between two piles of wood which defendants had previously caused to be piled on each side of the track, and ran against a cow, in consequence of which the cars were thrown off the track, and Sherman received injuries which caused his death.

The defendants demurred to the complaint.

WELLES, J.—Assuming that the carelessness here complained of was that of the agents or servants of the defendants, other than that of the plaintiff's intestate, the action can not be sustained. It was decided by the court of appeals, in the late case of *Coon* vs. *the Syracuse and Utica Railroad Co.* (1 Seld., 492), that an employer is not liable to one of his agents or servants for the negligence of another of his agents or servants engaged in the same general business. The same principle had been previously decided in England, in South Carolina, and in Massachusetts. (*Priestly* vs. *Fowler*, 3 Mees. & W., 1; *Murray* vs. *S. Carolina Railroad Co.*, 1 MacMullan, 385; *Tarwell* vs. *B. & W. Railroad Co.*, 4 Metc., 49.) In such case, the doctrine of *respondeat superior* does not apply. The law may now be considered too well settled, upon authority, to admit of discussion or contradiction.

I think it must be intended from all the allegations in the complaint, that the injury to the deceased was caused by the negligence and carelessness of the servants or agents of the defendants. It consisted in allowing the train to attain and continue the unusual and dangerous rate of speed mentioned. No defect in the engine or machinery, or in the cars or the road, is alleged; nor is it charged that there was any want of capacity in the engineer, conductor, or any other person engaged in running the train, or defect in their general character for carefulness or attention to their duties; and no complaint is made that there was any thing wrong in piling the wood in the road as described. The complaint states that the speed was regulated, in part at least, by the application of the brakes according to the direction, by signals, by other agents or officers of the defendants. It is nowhere intimated, nor can it with any propriety be inferred from any thing stated in the complaint, that the dangerous velocity of the train at the time referred to was directed by the defendants in their corporate character. The complaint does state that the train had attained this dangerous speed by the carelessness and negligence of the defendants; but it is not stated how the defendants, as a corporate body, were guilty of such negligence, which could only be by a formal resolution by the board of directors, duly convened, directing the act complained of to be done. This, it will hardly be contended, would be a just inference.

I do not intend to assert that the corporation, as such, could not, without the act of the board of directors, be guilty of negligence, in the absence of any fault of their agents or servants, in the case of an omission to do what their duty to the community or to persons in their

employment required. In such a case, the gist of the complaint would be the culpable omission of the board to take the requisite action. But where an affirmative act is complained of, as in the case at bar, the only way in which the corporation can be liable in an action on the case, is, either by their organized action through the board of directors, or for the acts of their agents on the principle of *respondeat superior*.

It was not attempted upon the argument to put the plaintiff's right to recover on any other ground than the negligence of the defendants' agent. Upon that ground the question was fairly met by the counsel, who sought to sustain the complaint upon the doctrine of *respondeat superior* alone. In that view we think the law is settled against the plaintiff by the cases referred to, which can not be distinguished in principle from the present.

We are therefore of the opinion that the defendant is entitled to judgment on the demurrer, with leave to the plaintiff to amend the complaint on payment of costs

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### SALVAGE SERVICE.—WHAT CONSTITUTES IT.

**The relief of property from an impending peril of the sea, by the voluntary exertions of those under no legal obligations to render assistance, constitutes a case of salvage.**

[*Williamson* vs. *The Brig Alphonso and cargo*; 1 Curtis' (U. S.) C. C. R., 376.]

This was a suit for salvage performed under the following circumstances:

On the 29th of Aug., 1852, the schooner Fawn, of which the libellant, Williamson, was chief mate, and the brig Alphonso, sailed in company from St. Thomas, there being an understanding between their masters that the two vessels would keep company until they arrived off Turks Island.

Within two or three days after sailing, the master and mate of the Alphonso were taken sick with yellow fever, and the second mate was also disabled by sickness; in consequence of which the master ordered a signal of distress to be hoisted. It was observed on board the Fawn, which lay to and waited for the brig; and when the latter came up, the master of the schooner went on board, and was requested by the master to lie by close to the brig during the night. He declined to do this, considering it somewhat hazardous; but proposed to send his mate, the libellant, on board, and that both vessels should run into Turks Island. This arrangement was assented to, and carried into effect. The libellant went on board of the brig and took the command, and the next morning the two vessels ran into harbor.

The libellant brought this action for salvage, and the district court decreed to him five hundred and fifty dollars. The claimants appealed and urged three reasons of appeal, the first of which was that the libellant did not render a salvage service.

CURTIS, J.—It is strongly urged that both the peril and the service

were too slight to bring the case within the technical definition of salvage. But I am not of this opinion. The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature.

That such a peril of the sea was impending over the brig, I think appears. She was out of sight of land. Her master and both officers were disabled. A deadly infectious disease had seized two of them and a passenger. It does not appear that any one on board was able to navigate the vessel. The master, judging upon the actual facts, ordered a signal of distress to be made. Under these circumstances, I can not say that this vessel was not in distress, nor that the peril was so slight that a relief from it can not rise to the dignity of a salvage service. It is true she was but a short distance from port. But the land was not in sight, and the proof shows that there were dangerous shoals in the neighborhood; and it does not appear that the crew, unassisted, knew the bearings of the land or the course to be steered. It is urged that the schooner was in company, and therefore there was no real peril. That does not show that the peril arising from the condition of the officers was not real, but only that the means of relief from it, by others, who were under no legal obligation to render assistance, were at hand. But in considering the nature of such a service, we must look to the peril which impended if assistance were not given; not to the ease or difficulty of giving it, or the certainty that it could be obtained from salvors.

It was not argued that there was any such contract of consortship between the brig and the schooner as would repel a claim for salvage, upon the ground of a mutual legal obligation to give assistance if either should fall into distress. Nor is there any thing in the evidence upon which to rest such a position. There was an understanding that the vessels would sail in company, and they did so; but undoubtedly this meant no more than that they would sail out of port at the same time and keep along together as far as both should deem it best to do so, without any legal obligation upon the subject. Independent of some usage of the trade, or of some special circumstances, it may well be doubted whether masters have a right to go further than this; and there is no reason in this case to suppose that either intended to go further.

My opinion therefore is, that the schooner rendered to the brig technical salvage service to be compensated as such.

SALVAGE.—CLAIM FOR COMPENSATION.

Whether services rendered to a vessel in distress should be compensated upon the principles of salvage, or according to a *quantum meruit*, or at an agreed price, must depend upon the circumstances under which they were performed.

An agreed price will not be substituted for a salvage compensation unless a distinct agreement appears.

[*Hennessey* vs. *The Ship Versailles and cargo*; 1 Curtis' (U. S.) C. C. R., 353.]

This was a suit in admiralty to recover for salvage services alleged to have been rendered to the ship Versailles, which in coming up Boston harbor struck upon a sunken reef, was disabled, and was towed up by the steamer Rescue, at the request of underwriters of the Versailles. For the defense it was contended, that the services were rendered under an agreement, and were not to be paid for as salvage services. Other questions were raised, but we give only so much of the case as relates to this. The remaining facts are sufficiently stated in the opinion.

CURTIS, J.—No question is made that, in point of fact, the ship was withdrawn from her dangerous predicament, and restored to ultimate safety by the assistance of the steamer. But it is insisted that the service of the steamer was rendered upon a contract, which deprives the libellants of the character of salvors, and reduces their claim to a *quantum meruit* for work and labor; and that what was done was merely a towage service, and not a salvage service.

I do not think there is such a thing as towage service, known as such to the marine laws, as contradistinguished from a salvage service. Towage, like pumping or steering, making sail, or any other ship-work, may occur in the ordinary course of navigation, or may be a means of salvage. And whether it is to be paid for according to a *quantum meruit*, or at an agreed price, or by way of wages, or by a salvage compensation, must depend upon the circumstances under which it is performed.

In this case the Versailles being in distress, and in a condition to have a salvage service rendered to her, and having been relieved by towage, that towage was, in its nature and circumstances, a salvage service, unless it appears that there was some relation existing by contract between the managers of the steamer and the ship inconsistent with their sustaining the character of salvors. It is incumbent on those who assert that such a relation existed, and who call on the court to apply, to what is *primâ facie* a case of salvage, some other than the ordinary principles of adjudication which govern such cases, to plead the contract, and exhibit satisfactory proof in support of it. So that what I have to determine is, whether a contract is proved which establishes such a relation, between the asserted salvors and the ship, as deprives them of the character of salvors, by showing that the service was rendered in some other capacity; or if rendered in the capacity of salvors, that the agreement displaces the ordinary principles of adjudication, and introduces a measure of compensation derived from compact.

The evidence relied on by the claimants comes from the deposition of Mr. Caleb Curtis, the president of the Neptune Insurance Company, who, I infer, interposed in this matter, upon the reception in Boston of the news of the condition of the Versailles, in consequence of that company having an interest as insurers of the cargo to a small amount, It appears that about the same time the condition of the Versailles became known, it was also ascertained that two other vessels were on shore near the place where the Versailles was at anchor; and that Captain Hennessey, master of the steamer Rescue, was sent for and told of the condition of these vessels. Soon afterward, Mr. Curtis told the captain to go down, and if there was time before high water, he might go to the assistance of the ships on shore, but at all events to take the Versailles in tow, and bring her up before night. The Rescue soon after started, went directly to the Versailles, and took her in tow, as has been stated.

It is manifest that here was no express contract inconsistent with a technical salvage service. The steamer went on this expedition at the suggestion, and though not stated, it is fairly to be inferred, upon the request of the witness. In some sense this may be said to amount to an employment of the steamer, but so does any request for assistance. When the master of a vessel sets a signal of distress, it amounts to a request for assistance; and when it is tendered and accepted there is an employment. But the question always remains, what service is rendered, and how it is to be compensated? and in the absence of a binding contract, the marine law settles that question according to the nature of the service.

It is argued, however, that in this case, though there was no express contract to that effect, the court ought to infer there was a contract to pay a *quantum meruit* for labor at all events, though the Versailles had been totally lost. If there was such a contract, fairly made, I do not think salvage could be claimed. But I do not find the grounds necessary for such an implication. In the absence of an express contract, the law implies that services are to be paid for as such services are usually paid for. In the case of labor on land, only the fact of its performance, at the request of the defendant, is necessary to be shown, because such service is usually reasonably paid for at all events. In the case of mariners' wages, the performance of some voyage, in which freight might have been earned, must appear in addition to those other facts, because upon this event depends the title to wages; and so in the case of salvage, upon the ultimate safety of some of the property, as well as upon the other facts of service and request, depends the title to salvage; and, consequently, the law will not imply that labor in salvage is to be paid for, except on that contingency.

Now it does not appear either that such service generally, or when performed by this particular steamer, were usually paid for, at all events by a *quantum meruit*. As to the general practice, there is no evidence that the law is otherwise. And as to this particular steamer, though it appears her occupation is to tow vessels, it is not shown that it is part of her occupation to go to the relief of vessels situated as the Versailles was; and if I could infer this from the evidence, there is absolutely no

evidence that her owners, officers, and crew were usually or ever paid for such service at all events, and by a reasonable sum for mere work and labor.

The case, therefore, stands upon a request to the master of the steamer to go to the assistance of the ship, a compliance with that request, and the performance of a service in its nature and incidents salvage; and such service must be rewarded under the conditions, and according to the measure of marine law.

It has been suggested that it is of great practical importance to the commerce of the port, that the court should not come to a conclusion which would prevent those interested in vessels in distress from sending steamers to their assistance, without subjecting themselves to the payment of salvage. I do not conceive that the principles above laid down have any such tendency. It is competent for those parties to make any fair and reasonable contracts on these subjects, and this court will enforce them. But they must take care actually to make contracts, and not leave them to be inferred from facts which, in point of law, will not justify such inferences.

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### TRADE MARKS.—NAME OF VENDOR.

**Where a son left the employment of his father, and set up the business of manufacturing and selling the same article also manufactured by his father, under the same name—*Held*, that this constituted no infringement of the father's trade mark.**

[*Burgess* vs. *Burgess*; 17 Eng. Law & Eq. R., 257.]

The plaintiff in this action was the father of the defendant, and had employed him at a salary for many years in his business, which was that of an Italian warehouseman, at No. 107 Strand. Among the articles in which the plaintiff had been in the habit of dealing was a fish-sauce, originally manufactured by his father, and sold by him, and since by the plaintiff, known as "Burgess's Essence of Anchovies." Upon the occasion of a disagreement between the two, the defendant left his father and commenced trading on his own account, and among other articles he sold a fish-sauce purporting to be "Burgess's Essence of Anchovies," inclosed in bottles, and accompanied by labels and wrappers bearing a general resemblance to those used by the plaintiff in the sale of his essence of anchovies. The plaintiff thereupon brought a bill in equity praying to have the defendant restrained by injunction from representing the essence sold by him to be "Burgess's Essence of Anchovies."

KNIGHT BRUCE, L. J.—All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell them in their own names, and not the less so that they bear the same name as their father; and nothing else has been done in that which is the question before us. The defendant follows the same

trade as his father. He carries on business under his own name, and sells essence of anchovy as "Burgess's Essence of Anchovy," of which name it is. If any circumstances of fraud now material had accompanied the case, it would stand very differently; but the whole case lies in what I have stated; and the only ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovy. That does not give him such exclusive right as to prevent any man from making essence of anchovy, and selling it under his own name. I think this motion should be refused, with costs, with liberty to the plaintiff to take such proceedings at law as he may be advised.

TURNER, J.—It is clear no man can represent his goods to be the goods of another; but in all cases of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under his own name, and another person, not having that name, employs it in the sale of similar goods, it is clear that he so uses it to represent the goods sold by himself as the goods of another. But where two persons have the same name, it does not follow that because the defendant sells goods under his own name, and it happens that the plaintiff has the same name, he is selling goods as the goods of the plaintiff. I concur in the opinion that the motion should be refused, with costs, the plaintiff having liberty to apply to a court of law as he is advised.

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### TRADE MARKS.—NAME OF A COMPOUND.

**The inventor of an unpatented compound—*e. g.*, a medicine—has no exclusive right to make and vend it; but other makers have no right to sell it as the manufacture of the inventor, nor to adopt his label or trade mark, or one so like as to lead the public to suppose that the article sold by them is the manufacture of the inventor.**

[*Davis* vs. *Kendall*; 2 Durfee's (R. I.) R., 566.]

This was an action against the defendant for pirating the plaintiff's trade mark. It appeared that the plaintiff was the original inventor of a medical compound sold by him, by the name of "Pain-killer," that he had been the first to apply this word to such a compound; and that after said compound had become extensively and favorably known, the defendant manufactured and sold a similar compound by the name of "J. A. Perry's Vegetable Pain-killer." The defendant's medicine was put in bottles of similar size with those of the plaintiff, though of somewhat different shape. The plaintiff's label was a paper pasted on the body of the bottle, on the upper part of which was the word Pain-killer printed in a scroll, below which were the words "Manufactured by Perry Davis," and below this an engraving, intended to represent the plaintiff, surrounded by an oval circle bounded on either side by a simple wreath, and having in its lower margin the words, "The original inventor, No. 74 High St., Providence." Below the circle, in small type, were the words, "Copyright secured," and the price of the bottle, and at the bottom of the label the words, "Destroy

this as soon as the bottle is empty. This will prevent fraud." The defendant's label was similarly affixed to the bottle; at the upper part were the words, "J. A. Perry's Vegetable Pain-killer," underneath which was represented the bust of a man, and beneath this the words, "Manufactured in Providence, R. I. Price 80 cents. Copyright secured." The devices on the plaintiff's label were on a light ground, those upon the defendant's upon a dark ground. The case was tried to the court upon an agreed statement of facts.

GREENE, CH. J.—The plaintiff has no patent and no exclusive right to the compound called Pain-killer. He invented the compound and gave it the name of Pain-killer, and this seems to have been the first application of that term to a medical compound. The plaintiff, though not entitled to the compound, is entitled to his trade mark, and the law recognizes and will protect this right.

Trade marks may be, first, the name of the maker; second, symbolical; third, the name of the compound. Of this last kind is the trade mark of the plaintiff, PAIN-KILLER.

All are entitled to make and vend this compound, and to vend it as a similar article to that made and sold by the plaintiff; but no one but the plaintiff has a right to sell it as a medicine manufactured by the plaintiff. The adoption of the same label as the plaintiff's will, of course, be actionable; and so the adoption of a label so like the plaintiff's as to mislead the public, would be actionable. If the difference be merely colorable, it will not avail the defendant. But if the defendant state in his label, that the article which he sells was made by himself, although he calls it by the same name as the plaintiff, he will not be liable; because he has a right to make and vend the compound, if he vends it as his own, and not as made by the plaintiff. (*Canham* v. *Jones*, 2 Vessey & Beames, 218.) If the defendant, without fraud, use the trade mark of the plaintiff, he is still liable. If the right be violated, it matters not whether it be by fraud or by mistake. (*Millington* v. *Fox*, 3 Mylne & Craig, 339.)

The whole question in this case is, whether the defendant's label is liable to deceive the public, and to lead them to suppose they are purchasing an article manufactured by the plaintiff, instead of the defendant. The agreed statement of facts does not find that the defendant's label has deceived any one, and I do not think it will do so, but my associates think otherwise, and judgment must therefore be returned for the plaintiff.

TRADE MARKS.—QUALITY OF ARTICLE.

**Where plaintiff sold a superior quality of pens at a higher price and an inferior quality at a lower, distinguishing the two by different marks, and the defendant bought genuine pens of the plaintiff's manufacture of the inferior quality and sold them as the plaintiff's, but distinguished them by the mark applied to the better quality—*Held*, that plaintiff was entitled to an injunction.**

[*Gillott* vs, *Thettle.* New York Superior Court, 1854. Not yet reported.]

The plaintiff, Joseph Gillott, was a celebrated manufacturer of steel pens. It was his custom to put up a certain quality of pens in boxes marked with the number 303, and with the words, "*Manufactured under Joseph Gillott's own superintendence,*" upon the label. Another quality, similar in appearance, but manufactured with less care and labor, and sold for less than one third the price of the others, was numbered 753.

The plaintiff complained that the defendant was accustomed to put the inferior class of pens manufactured by plaintiff into boxes numbered 303, and prayed an injunction to restrain the defendant from changing the labels, and from using any such device to sell one class of plaintiff's pens as another class.

HOFFMAN, J.—It is apparent that the effect of the device is to sell the maker's pens of an inferior quality under the description or mark which he has selected to indicate pens of a much superior quality. It is obvious that by this the character of the maker must be injured, and the gain of the imitator unjustly increased. It is perfectly true that in almost every such case, if not in every one, the application for injunction is made where a party seeks to impose his own goods upon the public as those of the owner of the mark. But there is nothing to limit the right to such cases only, and to forbid the resort to this court when the wrong is a false representation by an adoption of one device of the maker appropriated to one quality of his articles, and affixing it upon another and inferior quality. I think this case a clear one, and the injunction must be granted as prayed.

This case was subsequently appealed to the full bench of the superior court, sitting in general term, where the judgment of Judge Hoffman was affirmed.

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EXPLANATION OF WRITTEN CONTRACT.—IDENTITY OF PAYEE.

**An instrument in the following terms, '*I. O. you* the sum of one hundred and sixty dollars," is a valid acknowledgment of indebtedness, and parol proof is admissible to identify the payee.**

[*Kinney* vs. *Flynn*; 2 Durfee's (R. I.) R., 319.]

This was an action of *assumpsit* on a writing in the following terms:

"I. O. you the sum of one hundred and sixty dollars, which I shall pay on demand to you." (Signed) LAWRENCE FLYNN.

It was written on a small memorandum book, which, as the evidence

tended to show, belonged to the plaintiff. The counsel for the defendant requested the court to nonsuit the plaintiff on the ground that the writing was insufficient to charge the defendant. This the court refused to do. The jury having found for the plaintiff, the defendant moved for a new trial upon exceptions to this and to several other rulings of the court.

BRAYTON, J.—The fourth ground assigned by the defendant's counsel for a new trial, is that the writing declared on is void for uncertainty, that it is not a promissory note or evidence of indebtedness and is void for uncertainty, there being no payee named therein, and being a case of patent ambiguity, is not susceptible of explanation by parol. The only ambiguity which the defendant's counsel claims to exist in the writing produced, is in the word "you," which he claims is indefinite and falls within the rule, which excludes parol evidence from being admitted to contradict, alter, or vary a written instrument, and he objects that parol proof was admitted to show to whom this writing was addressed and delivered.

Now the necessary inquiry is in what respect the parol evidence in any way contradicts, alters, or varies any thing that is written. The acknowledgment of indebtedness is the same, the amount is the same, with or without the parol evidence. Every thing intended to be contained in the writing is clear and explicit and not to be misunderstood. It is clearly an acknowledgment of indebtedness to the amount of one hundred and sixty dollars to the person to whom it is addressed. That person was not intended, as appears from the writing itself, to be ascertained in the tenor of the writing. By its tenor it refers to something extrinsic by which he is to be ascertained. *Id certum est quod certum reddi potest.* The writing is addressed to a person present; the promise is to the person addressed. The paper supposes it is to be handed to the payee, and by that means he is made certain. That proof is offered, to give effect to the paper in the mode contemplated by the writing itself.

Had the writing been inclosed in an envelop directed to the plaintiff, the defendant would hardly have objected that the name was on the envelop and not upon the written paper itself, and yet the proof would have been in its nature the same. In substance and effect the defendant says by this writing, I will pay to the person I am now addressing one hundred and sixty dollars on demand, and the question really is, who was he addressing? The witness neither gives the name nor professes to do so, but refers us to extrinsic evidence to ascertain it.

The authorities cited by the plaintiff's counsel fully sustain the admissibility of the evidence. (*Fisher* vs. *Leslie*, 1 Esp., 426; *Evans* vs. *Philpots*, 9 C. & P., 270; *Israel* vs. *Israel*, 1 Camp., 490; *Waithman* vs. *Elsie*, 47 E. C. L. Rep., 35; *Childers* vs. *Boulnois*, 16 *ib.*, 411; *Beukley ex parte*, 14 M. & W., 469; *Brown* vs. *Gilman*, 13 Mass., 158; *Douglass* vs. *Wilkinson*, 6 Wend., 644.)

EXPLANATION OF WRITTEN CONTRACT.—CONSIDERATION.

A subscription paper for the erection of a church edifice can not be upheld as a common law agreement, unless an adequate consideration for the subscription is shown.
But the actual consideration may be shown by parol.

[*Barnes* vs. *Perine*; 15 Barbour's (N. Y.) Supreme Court R., 249.]

This was an action upon a subscription paper for the construction of a church. No consideration for the subscription was set out in the paper, which contained merely a promise on the part of the subscribers, among whom was the defendant, that they would pay the sums set opposite their names toward the erection of a church to answer a description given in the paper. The defendant moved for a nonsuit upon the ground, among others, that the undertaking of the defendant was void for want of consideration. The motion was denied, and the defendant appealed.

WILLARD, P. J.—The subscription paper on which this action is founded is not a contract within the statute of frauds. (2 R. S., 135, § 2.) There is, therefore, no statutory requirement that the consideration on which it is made should be expressed in the instrument itself; as a common law agreement, however, it can not be upheld, unless it be shown to be founded on an adequate consideration. So generally is this principle understood, that it rarely happens that this kind of contract is drawn, without expressing on its face the consideration by which the subscribers are moved. But if the consideration be wholly omitted, or defectively expressed, the admissibility of evidence showing the actual consideration does not infringe the general rule of the common law, that parol evidence is inadmissible to contradict, or vary, or add to the terms of written contract. (1 Phil. Ev., 548, 561.) It is an established rule, that a party may aver another consideration which is consistent with the consideration expressed; and, *a fortiori*, adds Lord Coke, the averment may be made when no consideration is mentioned, etc. (Bedell's Case, 7 Rep., 40; *Peacock* vs. *Marks*, 1 Nes., 128; Brigman's Index, 433, 444, § 32.) This doctrine is well settled in this state. (*Tobey* vs. *Barker*, 5 John., 68; *Haddock* vs. *Kelsey*, 3 Barber, S. C. Rep., 100; *Trink* vs. *Green*, 5 *ib.*, 445; *Egleston* vs. *Knickerbocker*, 6 *ib.*, 458.) The cases on this subject in our courts will be found referred to in those cited. The rule prevails without exception, that when no consideration is expressed in a written contract not within the statute of frauds, parol evidence is admissible to show the actual consideration.

The subscription paper in this case does not set forth any consideration. The complaint avers that the consideration of the subscription of the defendant and others was the agreement of the trustees to build the church edifice referred to in the paper, and it avers that in consideration of the subscription of the defendants and others was the agreement of the trustees to build the church edifice referred to in the paper, and it avers that in consideration of the subscription of the defendants and others the trustees removed the old church and erected a new one

upon the same lot at an expenditure exceeding six thousand dollars. The proof establishes the truth of this averment; the case then stands the same as if the subscription paper had said on its face that the undersigned promise to pay the sums set opposite their names to the trustees, if the latter will remove the old church at Glens Falls, and erect a new one on the same lot, costing at least five thousand dollars. Here is a good consideration for the promise, and on showing performance on the part of the trustees they would be entitled to recover. They showed on the trial the consideration of the agreement, and their own performance, and would therefore be entitled to recover.

The judgment should be affirmed.

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EVIDENCE.—ENTRIES IN BANK-BOOKS.

In a suit brought upon a note formerly owned by a bank in which the maker of the note was a depositor, by one to whom the bank transferred the note after it fell due—*Held*, that entries in the books of the bank, and in the depositor's pass-book, were admissible to show that the note had been duly paid.

[*Jermain* vs. *Denniston*; 2 Selden's (N. Y. Court of Appeals) R., 276.]

Action on a promissory note.

The defendant was indorser of the note in suit, which was made by one Worth, for $7,000, dated 17th Feb., 1840, and payable to Denniston's order three months after date, at the Watervliet Bank. The note belonged to the bank. It was protested for non-payment at its maturity, and was held by the bank until after its failure, when it passed into the hands of the plaintiff, who now sought to recover against the defendant as indorser.

The case was tried before a referee. The defendant offered the books of the bank, and the pass-book of the maker of the note kept with the bank and by the bank—the entries in the books purporting to have been made while the bank owned the notes—in evidence, to prove the following facts:

*First.* That actual payment of the note was made to the bank after it was due, and before it was transferred.

*Second.* That at the time the note was due, Worth had a balance in his favor sufficient to pay the note, on the books of the bank, and in the hands of the bank.

*Third.* That when the note became due it was actually charged to Worth in his account with the bank, in part payment of a balance due from the bank to Worth on his deposit account, and the note retained merely as evidence of such change.

*Fourth.* That at the time the bank parted with the note, it was actually indebted to Worth for money deposited to an amount greater than the note.

*Fifth.* That on a settlement between the bank and Worth, before the transfer of the note to the plaintiff, the account of Worth with the bank, including the note in question, was settled, and a balance struck in favor

of Worth on the books of the bank, and on his pass-book, of $150 46. The counsel of the plaintiff objected to the admission of the books in evidence, and the referee excluded the evidence, to which decision the defendants excepted. Judgment was entered upon the report of the referee, and the defendants appealed.

RUGGLES, CH. J.—The referee erred in excluding the evidence. Conceding it to be settled in this state that mere declarations made by the holder of a promissory note while he is the holder and owner are not admissible against one to whom it is subsequently transferred for value after due, yet the evidence offered should have been admitted. The evidence was more than the declaration of the holder and owner. The entries offered were his act, and operated as an actual acquittance and discharge of the debt due on the note. The learned judge who delivered the opinion of the supreme court affirming the decision of the referee, thought the offer was ambiguous, and that no evidence was offered to prove the time of making the entries except the books themselves. But this does not seem to be the true meaning of the defendant's proposition. It should be understood as an offer to prove by some competent evidence that the entries were made while the bank held and owned the note. It is not necessary, therefore, upon this construction of the offer, to say whether the pass-book, when produced, may or may not have been *prima facie* evidence that the entries were made at the time of their date. The offer, according to a fair construction of it, was to show that they were made while the bank owned the note.

The entries made by the officers of the bank in the pass-book kept between the bank and its customer, are the customer's vouchers for payments, deposits, and other transactions with the bank. They are made by the bank, and delivered to the customer for his safety, and as written evidence of the facts appearing by the entries. When a customer having deposits in a bank credited on his pass-book is charged with his note, the charge is an appropriation by the bank of so much of its customer's money in payment and satisfaction of the note. It extinguishes the debt, and the note is thenceforth *functus officio*. As against a subsequent holder of the note who acquires it after due, it is equivalent to a receipt in full by the bank indorsed on the note, such subsequent holder being chargeable with notice of the equities existing between the bank and the previous parties. The case of *Paige* vs. *Cagwin* (7 Hill, 361) went, to say the least, quite far enough in rejecting the parol declarations of the previous holder against one who subsequently acquired the note after due. But admitting that doctrine to its fullest extent, it can not apply to this case, nor to any where the previous holder, while he owned the note, put into the hands of the maker, in the usual course of business, written evidence of its payment and discharge. Such written evidence may, it is true, be impeached or contradicted by the subsequent holder, but the burden of impeaching or contradicting it rests upon him.

If, therefore, the offer is to be understood here as it was below, I am of opinion that the referee erred in rejecting it as evidence; and that if no suspicious circumstances appeared on its face leading to a belief that the entries were not made at the time of their date, it should be

regarded as *prima facie* evidence that the note was paid before it went out of the hands of the bank.

The judgment against the appellant in the supreme court must be reversed.

GRIDLEY, J.—Dissented.

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### IMMATERIAL EVIDENCE.—RIGHTS OF THE COURT.

The court has a right to reject evidence offered in support of immaterial issues, although neither party objects to it.
Certain evidence offered in an action for assault and battery held immaterial.

[*Corning* vs. *Corning*; 2 Selden's (N. Y. Court of Appeals) R., 97.]

This action was brought to recover damages from the defendant, for having assaulted and beaten the plaintiff.

The defendant in his answer denied the statements of the complaint, and alleged that if there was any such assault as was charged, it was purely accidental. He also alleged that the plaintiff, Louisa F. Corning, was the defendant's niece, and had been adopted and educated by defendant as his daughter; that in 1848, one Howe enticed her away to his own house, a house of bad character in the city of Syracuse and near defendant's residence; that at the time mentioned in the complaint, the defendant was returning from the country, and unexpectedly overtook plaintiff, riding and talking in a public and familiar manner with Howe, in the most public part of the city, where the defendant was widely known, and that the defendant, feeling the injury inflicted upon himself and family by Howe, without reflection raised his whip and struck at Howe, intending to hit him, and not the plaintiff, but from the sudden starting of his horse the blow fell upon the plaintiff. The plaintiff in her reply denied that the assault was accidental, and that she was induced to leave defendant's house by Howe; and alleged that since leaving it she had been employed at the Messina Springs House, which was not to her knowledge a house of bad character.

On the trial the plaintiff proved the assault as charged in the complaint. The defendant then called the plaintiff as witness,* and put a number of inquiries for the purpose of showing the bad character of Howe, and of other inmates of the house where Howe and the plaintiff resided. The court excluded the testimony although the plaintiff did not object to it, and defendant excepted. The defendant then offered to prove acts of misconduct and improper intercourse between Howe and the plaintiff, and that these circumstances came to the defendant's knowledge shortly before the assault. He insisted that the evidence was competent in mitigation of damages, and to impeach Howe, who had been called as a witness by the plaintiff. But the court excluded the evidence, and the defendant's counsel excepted.

The jury found for the plaintiff, and the defendant appealed. One

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* The New York Code of Procedure authorizes either party to examine the other.

ground of appeal was, that the court erred in excluding the evidence above mentioned.

JEWETT, J.—All the issues made by the pleadings in this cause are *impertinent* and *foreign* to the merits of the controversy between the parties, except two: namely, the issue in respect to the commission of the trespass complained of, and the issue as to its having been accidental on the part of the defendant. On the trial, the defendant offered evidence to sustain these impertinent issues on his part, which the circuit judge excluded, thereby holding that the court was not bound to try such issues, although they had not been struck out, but stood upon the record. And in that I think the judge decided correctly. It would be a reproach to the administration of justice to require the court to try such issues of fact as are wholly *impertinent* and *foreign* to the merits of the case between the parties because the parties should, from any motive, think proper to present them by their pleadings. Several cases were cited on the argument by the counsel for the defendant, which he seemed to suppose sustained the point which he made, that the parties had a right to have such issues of fact tried by the jury as they had thought proper to make by their pleadings however impertinent; and that the exclusion of evidence pertinent to sustain them by the judge was erroneous. (*Meyer* vs. *McLean*, 1 John., 509; *Reynolds* vs. *Lounsbury*, 6 Hill, 534.) But I think that the counsel was mistaken in respect to the principle decided by those cases. It is obvious that they do not in the least degree sustain the principle contended for by the counsel for the defendant, that the judge at the circuit is bound to admit evidence to sustain the issues of fact made by the pleadings, although *impertinent* to the merits of the cause, and submit them to the jury. They merely show that where matter material to the merits of the cause is alleged by an informal pleading, or material matter is omitted to be alleged in a pleading otherwise formal, if the party does not demur, but goes to trial upon such pleading, he is concluded by the verdict. And to that effect is the statute. (2 R. S., 424, §§ 7, 8; also 601, § 60; Code, ch. 6.)

They do not show that it is erroneous for the judge who tries the cause to exclude the evidence offered upon issues of fact made by the pleadings, which are wholly *impertinent* to the merits of the controversy involved in the suit.

The trespass complained of was clearly proved, and there was no evidence given or offered tending to show that it was the result of accident. Conceding that the evidence offered to be given would have shown sufficient ground of provocation to induce the defendant, under the immediate influence of the passion thus wrongfully excited by Howe, to inflict personal violence upon him, at the time the assault was made upon the plaintiff, it would not in the least have tended to show that the defendant, accidentally, hit the plaintiff, in an attempt to strike Howe.

It is true that under the general issue, or denial of the fact charged, the defendant, in mitigation of damages, may give in evidence a *provocation* by the plaintiff, if it be so *recent* and immediate as to induce a presumption that the violence was committed under the immediate influ-

ence of the passion thus wrongfully excited by the plaintiff. (*Lee* vs. *Woolsey*, 19 John., 319; *Cushman* vs. *Waddell*, 1 Baldw., 58; *Matthews* vs. *Terry*, 10 Conn., 455.)

The defendant, in his answer, does not set up that he was provoked by any act of the plaintiff, or of any other person, at any time, to commit the alleged violence upon her. It was virtually disclaimed by his answer, as also by the course of the trial, that she was the object to which the blows given by him were *aimed*, or that she had in any manner provoked him to violence. But if it be claimed that evidence in mitigation of damages, under an answer denying the trespass was admissible, as no doubt it was, it is a sufficient answer to say that the provocation offered to be proved was neither *recent*, nor of a character which should in any respect mitigate the damages for the trespass committed. The plaintiff had neither done nor offered to do any injury to the defendant. She was more than thirty years of age, owing no service or duty peculiar to him, whose conduct he had no claim of right to control. Nearly a year had elapsed from the time she left the defendant's house under the influence of Howe, and took up her abode at the house of Dorman, where she had since resided. And although she had continued to live there, as was alleged, in contempt of the just restraints of morality and decorum, the defendant did not stand in a position or hold any relation with her enabling him to claim any better ground than any other good citizen could to mitigate the damages for personal violence upon her, by reason of excited feelings from such a cause.

The damages could not be mitigated by evidence that the plaintiff was dissolute in her conduct. She was entitled to the same measure of damages for the trespass as she would have been if she had sustained a good character for virtue.

The evidence offered and excluded was not admissible to impeach the credit of the witness Howe. To do that, the evidence must be confined to his general reputation, and can not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other without notice; and unless his general character only be in issue, he has no notice. (2 Phil. Ev., 431; Cow. & Hill's Notes, 764 to 768; *Jackson* vs. *Lewis*, 13 John., 504.)

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### NOTICE TO INDORSERS.—SERVICE BY MAIL.

**What is necessary to constitute a depositing of notice of protest in the post-office, considered.**

[*Mount Vernon Bank* vs. *Holden*, 2 R. I. R., 467.]

This was an action of assumpsit against the defendant as an indorser of a promissory note. It appeared on the trial, before Greene, Ch. J., that the note fell due on Friday, was noted for non-payment and a notice thereof was on the same day, inclosed in an envelop,

addressed to the defendant, and delivered to one Richard Howard, who voluntarily undertook to deposit it in the post-office. The postmaster was absent from his office on Friday, and Howard delivered the notice in the store of the postmaster to one Carpenter, who was a clerk of the postmaster in his store, and was in the habit of receiving letters in his absence, although it did not appear that he was a sworn clerk in the post-office. The postmaster kept a tavern, and a store in a room built out from his tavern, and also occupied and managed a farm in connection with his other business; and he kept a room in his tavern appropriated to the post-office, in which was a box marked "letter-box," in which letters were sometimes put by persons who mailed letters at that office, and where if letters were deposited they would be sent by the next mail. It was also proved to be the usage at this office, for persons having letters to send by mail, to deliver them to the postmaster, or in his absence to his clerk, Carpenter, and that the letters thus received were put by the postmaster or his clerk in a desk in the store, and thence taken to the room used as the post-office and mailed in season to go by the next mail. Testimony was also put in tending to show that this letter was not deposited in the room occupied as a post-office on the day the note fell due or on the day succeeding, until after the departure of the mail, when it was found by the postmaster on the lid of the letter-box, and was not sent until the Monday following, the usual time for the departure of the mail being ten o'clock in the morning.

It was contended for the defendant that to charge him as indorser, the notice should have been deposited in the post-office in season for the mail of the next day after the maturity of the note, and that it was not so deposited in the sense of the law unless it was deposited in the letter-box, or delivered to the postmaster or his authorized clerk, in the room appropriated for the post-office, in season to be sent by the next mail, and that the delivery of the letter to any person in the store, or in any other part of the tavern, was not depositing the letter in the sense of the law, but that the person so intrusted with the letter became the agent of the plaintiff, for the purpose of depositing it in the post-office in due season, and that the plaintiffs were liable for the miscarriage or default of such person, and if the letter was not deposited by him in the post-office in season for the next mail, the defendant was not liable. And the counsel for the defendant requested the court so to instruct the jury, which request the court declined to comply with, but instructed the jury—that if they found that at this particular post-office there was a custom of receiving letters at the store sanctioned by the postmaster, and known to the neighborhood and to the person who took the letter on behalf of the plaintiffs, then the delivery of the letter to the person employed by the postmaster in his store was a depositing of the letter in the post-office in the sense of the law, and if it was so delivered in season for the first mail of the next day it was sufficient to charge the defendant, although it was not sent by that mail. The jury found for the plaintiff, and the defendant thereupon moved to set aside the verdict and for a new trial, upon the exceptions to the charge of the court.

HAILE, J.—It is contended by the counsel for the defendant, that under the act of Congress establishing and regulating the post-office department, and the regulations for its government, the delivery of the letter containing this notice in the store of the postmaster was not a delivery in the post-office, and that the delivery to Carpenter, the assistant of the postmaster, was not a delivery to the postmaster in the sense of the law, because Carpenter had not been sworn.

By the 11th section of the act of Congress, 4 U. S. Statutes at large, p. 105, it is provided, "that every postmaster shall keep an office, in which one or more persons shall attend on every day in which a mail shall arrive, by land or water, as well as on other days, at such hours as the postmaster-general shall direct, for the purpose of performing the duties thereof."

A reasonable and practical construction of this section, in reference to the convenience of the postmaster and the accommodation of the public, would not require him to keep his office in a single room, nor to confine the receipt and delivery of letters to a single place in his office. And, indeed, this in the city of Providence and other large cities is not done, and is wholly impracticable with a regard to the convenient performance of the duties of the office, and the prompt accommodation of the public. Hence several places in the post-office are used for the receipt and delivery of letters, while other rooms in the same building are used for assorting letters and making up the mails.

And in a small country post-office, like the one where this letter was left, the postmaster must necessarily devote a large portion of his time to other occupations than the duties of his office, and may with propriety, we think, appropriate his store in the same building as a part of his office for the receipt and delivery of letters, provided this be made known to the public, while his letters should be assorted and his mails made up in a room exclusively devoted to that purpose, in conformity with the spirit of the regulations of the post-office department.

If, therefore, "at this particular office, there was a custom of receiving letters for the mail at the store, sanctioned by the postmaster, and known to the neighborhood and to the person who took the letter on behalf of the plaintiffs from the bank to the store," that store was, in our opinion, the post-office for the delivery of letters in the sense of the law.

In regard to the ground that Carpenter, the assistant, was not sworn, there is no evidence how that fact was; no inference can be drawn from his employment by the postmaster on his farm and in his store that he was not a legally qualified assistant. The regulations for the government of the post-office department, chap. 7, sec. 39, which provide that the postmaster can not be permitted to transfer the charge of his office and the performance of its duties to another, can not be intended to prohibit the appointment of an assistant to perform the duties of postmaster in his absence, especially as the 11th section of the act of Congress, above referred to, provides that one or more persons shall attend for the purpose of performing the duties of the office.

But this section of the regulations was intended to prevent the postmaster from transferring the charge of his office and the performance

of its duties to another, and thereby creating a sinecure, and virtually substituting in his stead, as postmaster, a person unknown to the department; for the 40th section of the regulations expressly provides that the duties of his office may be performed by a "sworn assistant or assistants whom he may employ to aid him when necessary."

The principal objection to Carpenter as an assistant, however, is that there was no evidence that he had been sworn.

By the 2d section of the act of Congress, 4 U. S. Statutes at large, p. 103, it is provided that all persons employed in the care or conveyance of the mails shall, previous to entering upon their duties, subscribe the oath or affirmation, the form of which is therein prescribed. And it is further prescribed in the same section, that every person employed in any manner in the conveyance or management of the mails, shall be subject to all the penalties for violating the injunctions or neglecting the duties required of him by the laws relating to the establishment of post-offices and post-roads, whether he has taken the oath or affirmation above prescribed or not.

From the latter clause in this section, it was evidently the intention of Congress that the acts of all persons assuming to officiate under the post-office department, so far as the public or third persons are concerned, should be deemed valid, although they may have neglected to take the required oath or affirmation, and may be subject to the penal consequences of such neglect. In this respect such officers, as to the public or third persons, must be considered and treated as other executive officers acting under color of authority of law; their acts must be held valid, and they deemed to be officers *de facto*, though they may not be, at the time, officers *de jure*.

In this view of the law, Carpenter must be considered to have been the assistant of the postmaster, and a delivery of the letter to him at the store a delivery to the postmaster. Public policy requires that such should be the law, for the public have no means of ascertaining whether such officers have taken and subscribed the requisite oath or affirmation, except by application to the general post-office, where a certificate thereof is required by law to be filed. And such an application could not ordinarily be made in season to avail a person engaged in a business transaction like this.

We find, therefore, no error of law in the charge of the court, and as the verdict is sustained by the evidence, this motion must be overruled, and judgment rendered for the plaintiff on the verdict.

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### EXECUTION OF WILLS.—ACKNOWLEDGMENT.

**It is essential to the due acknowledgment of a will by the testator that he in some way communicated the testamentary character of the instrument to the witnesses at the time of execution.**

**[Ex parte *Beers*; 2 Bradford's (N. Y.) Surrogate R., 168.]**

This was a decision of the surrogate upon a will offered for probate The decedent, it appeared, acknowledged the subscription of his name

at the end of the will to the two subscribing witnesses. At the time of his doing so the document lay open on a desk, covered with a piece of blank paper, so that no part was visible but the last line or two of the will, the attestation clause, and the signature. The witnesses might have read the attestation clause, but they were not requested to, and did not, except that one of them stated that he read the greater part of the first line of the attestation. That line, however, did not state the nature of the instrument. They read nothing showing that it was a will. They supposed, however, from circumstances, that it was a will, and one of them expressed his opinion in this way: "It is a poor look for me, as a witness to the will does not receive any thing." The decedent laughed, but neither assented nor dissented. The question was whether the will was sufficiently executed; the statute of New York requiring that the testator, at the time of subscribing the will, or of acknowledging his subscription, shall "declare the instrument so subscribed to be his last will and testament."

THE SURROGATE.—Ordinarily, where the witnesses do not recollect the circumstances attending the execution, resort may be had to the attestation, as the basis of presumption of due execution. But there is no room for such an inference when the witnesses recollect all the facts, and expressly deny the performance of the solemnities required by the statute. In the present instance they both concur in the statement that the decedent simply acknowledged his signature, and, pointing with his pen to the attestation clause, requested them to sign as witnesses, and state their residence under their signatures. They affirmatively disprove any testamentary declaration, and show that that essential ingredient was entirely wanting. Unless the remark of the witness and the laugh in reply can be construed into a declaration by the decedent that the paper was his last will and testament, there is no possibility of sustaining the execution. But that circumstance is susceptible of more than one interpretation, and neither the witnesses nor the court could safely and surely conclude from it the intention of the party to publish it as his will. So material a part of an important affair can not be left to the interpretation of a laugh, to mere guess, surmise, or conjecture. A declaration is an open act, a manifest signification or assertion, or assent by words or signs; and it must be made to appear by unequivocal circumstances, so that the testamentary character of the instrument is shown to have been communicated by the testator to the witnesses.

There must be some clear indication of the *animus testandi*—what Touchstone terms a "firm resolution, and advised determination to make a testament." Casting from our minds all that we now know of the character of this paper, by inspection, and regarding only the depositions of the witnesses, can we, from what transpired at the time, discover a declaration by the decedent to the witnesses that it was a will? That he knew it was a will is reasonable to suppose; that they guessed it was a will appears; but their minds did not meet on that as a common ground; and though the conjecture was clothed in form of words by one, it was neither denied nor admitted by the chief actor. A will can not be made by silence; there must be a distinct, affirma-

tive performance of all the statutory requisites. When the witnesses positively swear that no part of the paper indicating that it was a will was read by them, that the decedent carefully concealed from them the body of the instrument, that he did not ask them to read the attestation, and did not intimate that it was his will, it must require something more than a laugh responsive to a suggestion, showing that one of the witnesses supposed it to be a will, to establish the declaration essential to due execution. Such a requisite may be inferred, but the inference must be reasonable, and the fact from which it is drawn unequivocal and certain of interpretation. I am constrained for these reasons to pronounce against the probate.

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LEGACIES.—WHETHER CUMULATIVE OR SUBSTITUTIONAL.

The testator left legacies as follows:
1. By his will: "I give to my natural daughter, Mary Shean, £2,000."
2. By a codicil: "I add £3,000 to the £2,000 to which Mary Sheehan is entitled under my will."
3. By a later codicil: "Not having time to alter my will, and to guard against any risk, I hereby charge my estates with the sum of £20,000 for my daughter Mary Dickson."
*Held*, that the last legacy was substitutional, not cumulative.

[*Russell* vs. *Dickson*; 16 Eng. Law & Eq. R., 83.]

Stephen Dickson, by his will, dated 10th August, 1833, gave all his property to trustees to pay debts and legacies, among the latter £2,000 to his natural daughter, Mary Shean. On the 17th of August, 1833, the testator made a codicil which contained the following clause: "I add £3,000 to the £2,000 to which Mary Sheehan is entitled under my will, by which she becomes entitled to £5,000." On the 4th of September, 1839, the testator made another codicil, as follows: "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds, with the sum of £20,000, for my daughter Mary Dickson, subject to the limitations in my will contained as to marrying with consent, etc., of my brother Colonel John Dickson, and my brother Rev. Richard Dickson." This instrument was signed, published, and declared as his will by two witnesses. The testator died on the 14th of the same month. There was no doubt that the persons named Mary Shean in the will, Mary Sheehan in the first codicil, and Mary Dickson in the last, were identical, and were the testator's natural daughter. Mary Dickson having married one Russell, with the consent of the testator's brothers, the trustees paid the £20,000, but declined paying the £2,000, or the £3,000, whereupon a suit was instituted to recover the same in the court of chancery in Ireland, and the decree being against the plaintiffs, the case then came up in the House of Lords on appeal.

CRANWORTH, L. C.—I do not dispute the principle that where by two different instruments, as by a will and a codicil, or by two codicils, legacies are given to the same party *prima facie*, those are two distinct gifts; but there may be circumstances to show that the *prima facie* construction is not in this particular case the proper construction.

What the circumstances are which will outweigh the *prima facie* construction is very difficult to determine. The question now is, whether there are circumstances here to show that the £20,000 given by the last codicil was substitutionary for what was given by the will and the previous codicil. *Prima facie*, the gifts are to be considered cumulative. Is there any thing here to take the case out of the general rule. I have come to the conclusion that there is. By the will there is a gift of £2,000. Then, a few years afterward, in a codicil, he says, "I add £3,000 to the £2,000." Then comes the instrument in question, which is not in form a codicil. I pay no regard to the fact of there being nothing in the will as to marriage with consent of the testator's brothers; neither do I pay much attention to the circumstance, not wholly to be disregarded, that this was a codicil, though styled a will; but what I do consider as important is this, the last codicil begins in this way: "Not having time to alter my will," etc.; that is, "Not having time to reconstruct my will, and intending to do so, as to my natural daughter, I charge my estates with £20,000 for her," which I take to mean this: I have not time to do what I would wish as to my will, but I do alter it so far as it relates to my natural daughter, and instead of giving her £2,000 and £3,000, I charge my estates with the sum of £20,000 for her. It appears perfectly clear to me that when the testator meant to alter, he meant to substitute; and upon this ground I am of opinion that the case of the appellant fails.

Lord St. Leonards.—The testator having a natural daughter, gave to that child £2,000. As she advanced in years he executed a codicil, by which he gave her a further sum—"I add £3,000 to the £2,000," showing clearly that when he meant addition he knew how to express it. Up to this time he treated her as a natural daughter, when, from the facts in the case it appears that being in a dangerous state, he was anxious to alter what he had done by his will as to his daughter. Now, without looking at any rule of law, let us see what was the intention of the testator. Perceiving that the hand of death was upon him, he meant to place his child in the world, as far as he could, in the situation of a daughter; he acknowledges the relationship, and how differently does he treat her; instead of giving her the paltry sum of £2,000, and then adding another sum of £3,000 to that, he gives her at once a handsome provision suited for the station of life in which he wished to place her—he gives her £20,000. While he treated her as a natural child, he gave her the portion of an illegitimate child; but when he took her into his family to reside with him, he placed her in the situation of a daughter, and treated her as such. Could he have imagined that his daughter, whom he desired to place in an honorable position, would, after receiving the portion of £20,000 given to her as daughter, have fallen back upon her disagreeable description in the will, and have claimed the £5,000 as an illegitimate child of the testator. Can it be supposed that if he had re-made his will he would have given to this lady £2,000 as an illegitimate child, then £3,000 also as illegitimate child, and then £25,000 as his acknowledged daughter? Would he have given her £20,000. She changed her character, and having done so, she changed her position, and he changed her fortune. In the one

character he had given her comparatively small sums, in the other a large sum. She can not fill both characters, and she can not take both sums. This would account for these words, "not having time to alter my will." Doubtless had he done so, he would have treated this child as his acknowledged daughter. I have always been careful not to break in upon any rule of law, but I considered myself at liberty to decide this case upon the intention; and if you can find within the four corners of an instrument an intention that a legacy is not cumulative, but substitutionary, you are not only at liberty, but bound to give effect to the intention. I think the intention on these instruments is quite clear, and that the appeal must be dismissed with costs.

Appeal dismissed.

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APPEALS.—FORM OF JUDGMENT.

A judgment can not be affirmed on appeal as to part of the amount recovered, and reversed as to the residue, where a new trial is ordered as to the part reversed.

[*Story* vs. *The New York and Harlem R. R. Comp.*; 2 Selden's (N. Y. Court of Appeals) R., 85.]

This action was commenced in 1846 by Story and others to recover for work done by the plaintiffs for the defendants under a contract, and also to recover damages sustained by them in consequence of the suspension of the work by the defendants, which prevented the plaintiffs from completing the work under their contract.

The cause was referred to referees, who reported a large sum due to the plaintiffs for work done, and another large sum due them by way of damages for the suspending of the work. Defendants moved for a new trial, which was denied, and judgment was rendered upon the report. The defendants then removed the cause by writ of error to the supreme court, where the judgment was affirmed as to the amount allowed for work done. But as to the allowance for damages for the suspension of the work, the judgment was reversed, on the ground that the referees had admitted improper evidence, and adopted an erroneous rule of damages, and a new trial ordered. From this judgment of the supreme court both parties appealed.

FOOT, J.—The first question is whether the supreme court had authority to affirm in part and reverse in part the judgment of the superior court.

I see no objection to the exercise of such a power. The present supreme court, in each district, has the same powers, and exercises the same jurisdiction, as our former supreme court. (Laws of 1847, p. 323, § 16.) That court often exercised the power of affirming in part and reversing in part a judgment brought in review before it on writ of error, where such judgment was for distinct things. (*Smith* vs. *Jansen*, 8 John., 111; *Bradshaw* vs. *Callaghan*, *ib.*, 568; Anonymous, 12 *ib.*, 340. See, also, *Bronson* vs. *Mann*, 13 *ib.*, 460; *Williams* vs. *Sherman*, 15 *ib.*, 195; *Dennison* vs. *Collins*, 1 Cow., 112; *Parker* vs.

*Van Houten*, 7 Wend., 147; *Sheldon* vs. *Quinlen*, 5 Hill, 442 and note *a*.) The principle settled in these cases seems to be this: that where a judgment is not entire, but is for different things separable in their nature, and separated on the record, the supreme court, under its common law powers, may reverse in part and affirm in part. In the present case the two grounds of recovery are in their nature distinct, and are, in fact, separated through the whole proceedings. The testimony which shows the amount due for work done has no bearing on the claim for damages for a breach of the contract, and *vice versa*. The referees consider the two subjects separately, and report a distinct amount for each. There is no controversy about one, while there is a serious question about the other. On the whole, I think this a proper case for reversal in part and affirmance in part, provided the part reversed is erroneous.

The next inquiry, then, is, whether the judgment of the supreme court, reversing the judgment of the superior court as far as it related to damages for a breach of the contract, is correct.

On this branch of the case my opinion is that the report of the referees, allowing the damages in question, was erroneous, and should not have been confirmed by the superior court.

My conclusion is, that the judgment of the supreme court be affirmed, as thereby there will be a new trial in the superior court of the question for damages. A majority of the court concur with me in the opinion that the rule of damages adopted by the referees was erroneous, but they are of opinion that the judgment of the superior court could not be affirmed in part and reversed in part.

The judgment of this court therefore is, the judgments of the supreme and the superior courts be reversed, and that a new trial be had in the superior court, with costs to abide the event.

GARDINER, J.—The judgment should be reversed and the cause sent back, upon the ground that on a bill of exceptions the court have affirmed part and reversed part of an entire judgment of the superior court. One portion of the cause, therefore, has been sent back for a new trial, and the other is brought here. The different sections of the cause, separated by the judgment of the supreme court, have continued to diverge until one fragment is to be found in the court of original jurisdiction, and the other in the court of last resort. With a view to a reunion, I am of opinion that the judgment should be reversed, and the whole case remanded for a new trial.

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### NUISANCE.—POWDER-HOUSE.

**A powder-house located in a populous part of a city, and containing large quantities of gunpowder is, *per se*, a nuisance.**

[*Cheatham* vs. *Shearon*; 1 Swan's (Tenn.) R., 213.]

This was an action on the case for nuisance. The defendant was owner of a powder-house, situated in a populous neighborhood and

near some houses belonging to the plaintiff. And while containing some five hundred kegs of powder it was struck by lightning, and ignited, and the explosion which ensued destroyed the plaintiff's houses.

The jury, under the instruction of the court, found for the plaintiff, and the defendants appealed.

GREEN, J.—The only question in this case is, whether the erection of a powder magazine in a populous part of the city, and keeping stored therein large quantities of gunpowder, is, *per se*, a nuisance. And without doubt we think it is. The elementary treatises on criminal law hold that it is a nuisance. Common nuisances are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. (4 Bl. Com., 167.) It seems to us, that there are few things one could do that would annoy the community more than the deposit of a large quantity of gunpowder in the midst of a populous city. And this is so universally felt to be the case, that the practice is to erect magazines for keeping powder at a distance from the habitations of man.

The fact that it is liable to explode by means of lightning, against which no human agency could guard, is decisive of this question. If its explosion could only be produced by human agency, the question whether it is a nuisance or not might depend upon the manner in which it was kept. There might be a building so secure, and a method of keeping it so careful and safe, that danger would not be apprehended. But even then, with the utmost care, and the greatest confidence in the prudence and discretion of those whose business it might be to deal in it, if it were in the heart of a populous city, few of the inhabitants would feel at ease.

But when we know that the electric fluid may, in defiance of every precaution, at any moment cause it to explode, it can not be doubted that if five hundred kegs were stored in a magazine in the heart of this city, every thunder-storm would awaken universal alarm and consternation in the minds of the inhabitants.

But it is said that the fears of mankind will not alone create a nuisance. That is very true, if these are idle and silly fears, produced by imaginary dangers. But in the case stated, the dangers would be real, and all men of prudence and reflection would feel them to be so; and therefore their apprehensions would be well founded. Can it be possible that the law shall protect us from the annoyance of a pigsty or a slaughter-house, and yet afford no protection from a danger that might be constant annoyance, and which may and sometimes does result in a great destruction of life and property. Surely we think not.

Judgment affirmed.

SLANDER.—PLAINTIFF'S GENERAL CHARACTER.

In an action for slander the plaintiff is entitled to give in evidence, in chief, his general character.

[*Sample* vs. *Wynn*; 1 Busbee's (N. C.) R., 819.]

This was an action for slander. On the trial the plaintiff, after the examination of several witnesses, offered to prove that his general character was good. This evidence, being objected to, was ruled out, on the ground that all men are in law presumed to have a good character until the contrary appears; but the jury were instructed to consider the plaintiff as a man of good character.

NASH, CH. J.—That the defendant may show the bad character of the plaintiff in mitigation of damages is not denied, and it is equally undoubted that to rebut such evidence the plaintiff may show his general character to be good; but it is denied that such evidence can be given in chief, because the law presumes every man to have a good character. The question is a vexed one, both in this country and England. (2 Starkie on Ev., 216; *King* vs. *Francis*, 3 Esp. Cas., 116; 3 Stephens, N. P., 2,578; 2 Greenl. Ev., 280; *Gilman* vs. *Lowell*, 8 Wend., 578.) We think that in the clash of authority we are at liberty to look at the reasons which support the opposite sides. It is a general rule, recognized by all writers, that in civil proceedings, unless character be put *directly* in issue *by the nature of the proceedings*, evidence of the general character of neither party is admissible, but when it is so put in issue it is competent. In what case can the nature of the proceedings bring a case more decidedly under the exception implied in the rule than it does in this? The nature of the crime charged upon the plaintiff is of the most odious character. No case can be imagined in which the necessity of such evidence is more demanded. The crime charged is detestable—and there is but one witness to it. In such a case, how can the purest man shield himself from the effects of malice or revenge, if not permitted to resort to such evidence? But in this case the defendant has put on the record a plea of justification. Is not the general character of the plaintiff a matter of important inquiry to the jury in doing justice to the parties? The action of slander is founded on the alleged damage done to the plaintiff, and the malice of the defendant. Where the words spoken are in themselves actionable, the law implies malice; but the amount of damage, to a variety of circumstances, the repetition of the words by the defendant, the time, place, and manner of their utterance—all these are legitimate objects of proof on the part of the plaintiff. Why should not his general character aid him? It is said the law presumes the character to be good until the contrary is shown. Suppose this case: Two actions are brought by two different females against the same defendant for words charging each with incontinence. The one is pure and upright, the other a common prostitute. The defendant, as in this case, pleads the general issue and a justification, and upon the trial offers no evidence. The same jury tries both cases; the evidence of character is not offered,

because it is known the court will reject it. What is the jury to do? Why, both stand in law before them as persons of good character, and the jury must give to the prostitute the same amount of damages as to the plaintiff of irreproachable character. Would not common sense and justice revolt at such a result?

The view taken above of the rule in question is fortified by *M'Cauley* vs. *Birkhead*, 13 Ire., 29. The court say character is not brought into question, except upon the inquiry as to damages. "Evidence of general character is not admissible, except in those actions where the jury may in its discretion give exemplary damages." In such cases, to regulate their discretion, juries should be put in possession of all the circumstances connected with the transaction; and among these, certainly, is the general character and standing of the plaintiff. The action of slander is one in which the jury may give exemplary damages.

I know it is said that hard cases are the quicksands of the law. This is true when particular cases are attempted to be withdrawn from the operation of the law because they are hard; but it can not apply in laying down a general rule of evidence by which all cases coming under its operation are to be governed. We can not in this case state the principle more plainly or fully than it is stated in *M'Cauley's* case. In an action of slander the jury may give exemplary damages, and, to regulate their discretion, the plaintiff is entitled to give in evidence, in chief, his general character.

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### CRIMINAL PRACTICE.—SEPARATION OF A JUROR.

Where one of the jurors in a criminal case separated himself from the panel, but it was shown that he was absent in consequence of sickness, and only for a short time, and that while he was absent he conversed with no one—*Held*, that the separation was no ground for a new trial.

[*Stanton* vs. *The State*; 8 Ark., 317.]

The appellant was indicted for murder, and convicted. He moved for a new trial, which was refused, and his counsel excepted to the refusal.

One ground of the motion was, that while the jury were in charge of the officer, and were deliberating upon their verdict, one of them absented himself from the jury-room. The circumstances of the absence were stated in affidavits, which are substantially recited in the opinion.

Watkins, Ch. J.—The first ground of the motion was sustained by the affidavit of one of the jurors, that another juror named absented himself from the room provided for the jury at the hotel without being in custody of the officer who had charge of the jury; that the officer being notified of his absence, went in search of him, but came back without him; that the juror continued absent for about two hours, and did not return to the room until near daylight. To rebut this, the attorney for the state filed the affidavit of the juror whose conduct had been thus impeached, to the effect that during the night referred to he

was seriously indisposed, and suffering from a violent headache, and on account of the noise made in the jury-room he went out into the passage adjoining, in the third story of the hotel, for the purpose of obtaining relief, and for no other purpose. That he went out openly, and expecting to return immediately; but finding a table in the passage, he laid down on it for relief, and remained there until he returned into the jury-room, from whence he was absent about one hour, being all the time within hearing and call of the officer. That during his absence he did not see or converse with any person.

It appears that the attorney for the state excepted to the opinion of the court in allowing the first affidavit to be filed on behalf of the prisoner; and certainly the mode here resorted to of impeaching the verdict by the affidavit of one of the jurors who concurred in rendering that verdict, is subject to many serious objections. But apart from that, and waiving any inquiry whether the affidavit on its face is sufficient to raise a presumption that the absent juror was exposed to improper influences, any such presumption is fully rebutted, and the absence explained by the affidavit of the juror himself. There is nothing in this objection, as held in *Cornelius* vs. *The State*, 7 Eng., 810.

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### CRIMINAL PRACTICE.—INDICTMENT

**The omission of the indorsement, "A true bill," from an indictment, does not vitiate it. So held in Massachusetts.**

[*The Commonwealth* vs. *Smith*. Massachusetts Supreme Court, 1853. Not yet reported.]

In this case the defendant moved, after verdict, but before judgment, to quash the indictment on which he had been convicted. The ground of the motion was, that there was upon the indictment no certificate, signed by the foreman of the grand jury, that the indictment was "a true bill." The motion was denied, and the defendant excepted.

MERRICK, J.—Upon inspection of the indictment, it appears to have been signed by the foreman of the grand jury, and countersigned by the attorney for the commonwealth; but the words, "a true bill," are no where found upon it. This deficiency the defendant insists is a material and fatal objection to it: first, because these words are an indispensable part of every indictment; and secondly, because they constitute the only recognized phraseology by which the action of the grand jury, in the due presentment of a criminal accusation, can be legally authenticated.

This position seems to be well warranted by the decisions chiefly relied on by the defendant's counsel, of English courts; and if such an objection were made in those courts, it would undoubtedly be sustained. For there it is held, that these words are not only indispensable to make a complete and valid legal accusation, but that when indorsed upon a bill they become incorporated with and make a material part of its allegations. This necessarily results from the peculiar course

of proceeding in the allowance and institutions of prosecutions upon the presentment of a grand jury in that country. Before any complaint charging a party with a criminal offense can be submitted to that body there, for their consideration, it must be duly set forth and described in a bill properly prepared, and fairly engrossed on parchment. When its members have been regularly assembled, and have been sworn, charged, and empowered to exercise the duties of their office, all the bills which have been previously prepared in that manner are placed in their possession; and they then proceed to hear and consider the evidence adduced by the several prosecutors in support of their respective accusations, and thereupon to determine, in respect to each particular bill, whether it shall be found or rejected. As soon as their investigations are completed, and their decision in each case made, they carry and return into court, and publicly deliver into the hands of the proper officers all the bills they have before received, including those they have rejected as well as such as they have found to be true. And in order that the two classes may always thereafter be conclusively distinguished the one from the other, they are required to indorse the words, "a true bill," upon those which they have found, and the words, "not found," upon all which they have rejected. The indorsement of the former converts the bill from a simple complaint into a complete, formal, and effectual indictment. (1 Chitty, Cr. Law, 324; Com. Dig., Indictment, A; 4 Hawkins, P. C., book 2, chap. 23.)

But our practice and course of proceeding in the prosecution of public crimes and offenses, after the preliminary inquiry and action of a grand jury, are widely different, and involve no necessity for any similar indorsement, or mark of discrimination, after their several presentments.

It has undoubtedly been usual in this commonwealth to insert the words, "a true bill," at the foot of the indictment, above the signature of the foreman of the grand jury; but it may be questioned whether this form has been invariably observed. And no case has been cited or referred to, in which it has been decided in our courts that the inscription of these words upon any part of the bill is indispensable to its validity. No formal bills are ever previously prepared to be preferred before them, as in the English practice; but they receive and act upon all complaints which any individual may think fit to submit to them, and determine in what cases accusations shall be made. In these decisions they always act for the commonwealth, and never for a private prosecutor. Bills of indictment are drawn up by the attorney for the government under their directions, and in conformity to their decisions. They return these, and no other bills whatever, into court, and they are the only presentments made upon which parties charged with the commission of criminal offenses are arraigned for trial. The bills of indictment so returned are received by the court as official accusations of the grand jury, and placed upon its files and made part of its record. When, in addition to this course of proceeding, the indictment is verified by the signature of the foreman of the grand jury, and bears upon its face the attestation of the public prosecutor, there is no reason why its authenticity or its character, as a valid official accusation shall be afterward brought into question.

These words obviously constitute no part of the description of the offense charged in the indictment. They are not indispensable to the due and legal authentication of the action of the grand jury. Their absence can subject the accused to no inconvenience or disadvantage. The reason upon which they are elsewhere held to be essential, does not exist in our practice and mode of procedure; and therefore this omission in an indictment is simply the omission of a form, which, if oftentimes found convenient and useful, is in reality immaterial and unimportant.

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FORGERY.—WHAT CONSTITUTES IT.

**It is not forgery to procure fraudulently the genuine signature of a person to an instrument, by reading it falsely to him.**

[*The Commonwealth* vs. *Sankey*. Pennsylvania Supreme Court. Not yet reported.]

The defendant in error was tried upon an indictment for forgery.

The alleged forgery consisted in this: that the defendant wrote a note payable to himself for one hundred and forty-one dollars, and induced an illiterate man to sign it, by falsely pretending that it was for forty-one dollars only. The jury found these facts by a special verdict; and the court below considering that they did not amount to the crime of forgery, rendered judgment for the defendant.

BLACK, C. J.—The act was a forgery according to all the best writers on criminal law from Coke to Wharton. But their doctrine is not sustained by the ancient English cases, and is opposed by the modern ones. Only three American decisions were cited on the argument; and we take it for granted that there are no others on the point. Two of these (4 Mass., 45; 1 Yerger, 76) are wholly with the defendant, and the other (6 Shepley, 371) supports the argument of the commonwealth's counsel. The weight of the judicial authorities is in favor of the opinion that this is no forgery. We think that the arguments drawn from principle, and the reason of the thing preponderate on the same side. It must be admitted that, in morals, such an imposition as this stands no better than the making of a false paper. But even a knave must not be punished for one offense because he has been guilty of another. Forgery is the fraudulent making, or altering of a writing to the prejudice of another's right. The defendant was guilty of the fraud, but not of the making. The paper was made by the other person himself, in prejudice of his own right. To complete the offense according to the definition, it requires a fraudulent intent and a making both. The latter is innocent without the former, and the former, if carried into effect without the latter, is merely a cheat. If every trick or false pretense, or fraudulent act by which a person is induced to put his name to a paper, which he would not otherwise have signed, is to be called a forgery, where shall we stop and what shall be the rule? Is it forgery to take a note for a debt known not to be due? Or to procure

a deed for valuable land by fraudulently representing to the ignorant owner that it is worthless?—or to get a legacy inserted in a will by imposing on a weak man in his illness? All these would be frauds—frauds perpetrated for the purpose of getting papers signed—as much as that which was committed in this case. But no one thinks they are forgeries.

For these reasons, the judgment is to be affirmed.

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ILLEGAL CONTRACTS.—RECOVERY OF RECONSIDERATION.

**Money paid for the purpose of settling or compounding a prosecution for a supposed felony can not be recovered back by the party paying it.**

[*Daimouth* vs. *Bennett*; 15 Barbour's (N. Y.) Supreme Court R., 541.]

The defendant accused William Daimouth, the son of the plaintiff, with having passed to him a counterfeit ten-dollar bill; and on this charge he was arrested. While he was under arrest his father, the present plaintiff, and the defendant made an agreement by which the plaintiff promised to pay to the defendant thirty dollars, and the defendant in consideration thereof agreed to prosecute his son no further on the charge. The payment was accordingly made, and the young man was discharged. Subsequently the plaintiff demanded the repayment of the thirty dollars, which defendant refused.

The plaintiff then brought this action to recover back the amount so paid. It appeared from the testimony of William Daimouth that he never passed the bill to the defendant. There was no conflict of evidence in the case; but when the plaintiff rested, the defendant moved for a nonsuit upon the above facts, which was refused.

CRIPPEN, P. J.—This case presents the single point, whether money paid for the purpose of settling or compounding a supposed felony can be recovered back by the party paying it.

The contract made between the parties, and the payment of the money under it, was immoral and illegal. The common law declares all contracts to do acts that are indictable or punishable criminally to be illegal and void. It is a fundamental rule of the common law that whenever a contract is illegal as against morality or public policy, neither a court of law nor a court of equity will interpose to grant relief to the parties thereto. It is manifest that the contract under which the plaintiff paid his money to the defendant was *malum in se*, involving criminality and moral turpitude; it rendered the defendant liable to indictment and criminal punishment. If a contract be evil in itself, involving criminality and moral turpitude, neither party to such contract can have any remedy against the other; nor can money paid upon such contract be reclaimed by law or in equity. (Story on Cont., §§ 489, 490.) The same author also lays down the rule of law, that if a sum of money be paid by way of compounding a felony, it can not be recovered back, on a refusal of the other party to perform his part of

the contract; nor can an action be maintained to enforce the performance of such contract. If the money can not be recovered back for a refusal of the party receiving it to perform his part of the agreement, it would seem very clearly to follow that where the contract has been fully performed as agreed upon between the parties, no action can be maintained to recover back the money. No proof was given on the trial that the defendant did not keep his agreement with the plaintiff. It appeared that nothing further was done with the criminal prosecution against the plaintiff's son; the payment of the money by the plaintiff to the defendant put an end to the whole matter; the strong arm of the law was paralyzed thereby, and the plaintiff's son was discharged from the arrest on the warrant.

Where a contract is *malum prohibitum*—merely evil because it is prohibited by statute, and does not involve any moral turpitude or criminality—one party may have a remedy against the other, unless they are *in pari delicto*. But no relief will be granted even in such a case, if the parties are both involved in moral guilt. Agreements to do acts which are indictable or punishable criminally, or to conceal or compound such acts, or to suppress evidence in a criminal prosecution, are utterly void. (Story on Cont., § 569.) Also, all agreements which contravene public policy are void, whether they be in violation of law or morals, or obstruct the prospective objects flowing from some positive legal injunction. (Story on Cont., § 545.)

The money paid by the plaintiff to the defendant was intended to obstruct, and, as the proof shows, did, in fact, obstruct and put an end to the prosecution of the plaintiff's son, who had been accused and even arrested for a high crime. The plaintiff was a party to the agreement; he paid the money to the defendant; he was a *particeps criminis* with the defendant, connected with him in committing an act declared by statute to be criminal, and which subjected the defendant, if not the plaintiff, to criminal punishment.

Whenever a contract is forbidden by the common law or by statute, no court will lend it aid to give it effect. (Chitty on Cont., 570.) The same author also says that an agreement for suppressing evidence or stifling or compounding *a criminal prosecution, or proceeding for a felony, or for a misdemeanor of a public nature*, is void. (Chitty on Cont., 582.) It matters not whether the plaintiff's son was guilty or innocent of the charge made against him by the defendant; he had been arrested on a criminal warrant, charging him with a felony; while thus a prisoner, the plaintiff compounded the offense and stifled the prosecution, by the payment to the defendant of the money now sought to be recovered back in this action. It was undoubtedly immoral, nay, criminal, in the defendant to take the plaintiff's money under the agreement upon which it was paid to him; this, however, furnishes no legal ground to the plaintiff for recovering back the money. He is too deeply implicated in the wrong committed, by compounding the alleged felony, to command the aid of the law and of the courts in restoring to him what he has wrongfully and foolishly paid to the defendant. There were some cases at an early day which seemed to hold the doctrine that where a party paid money upon an illegal transaction he might

recover it back again in an action for money had and received. But it has been holden in numerous cases, both in England and in this country, that in cases where money has been paid upon a consideration like that established by the proof in this case, it can not be recovered back in an action for money had and received. (*Smith* vs. *Broomly*, Doug., 696; *Browning* vs. *Morris*, Cowp., 790.) There are many cases which maintain the doctrine, and such, no doubt, is the settled law, that where a contract is made, having for its ultimate purpose and intent to aid in violating a positive law or principle of public policy, or to commit a breach of good morals, the courts will not assist in enforcing it, whatever may seem to be the justice of it as between the parties. In such a case the courts treat both parties as having trodden on forbidden ground, equally in the wrong, and as being unworthy alike to ask for or receive their aid. In this case the parties deliberately agreed to violate the laws of the land—the plaintiff by paying, and the defendant by receiving, the sum of thirty dollars to compound an alleged felony; to stifle and discontinue a prosecution already commenced against the accused for a high crime. A party who thus illegally and improperly pays away his money, and afterward repents of his folly, and attempts, by an action, to recover it back, can not receive the aid of a court of justice in such an attempt.

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### INSANITY AS A DEFENSE.—DELIRIUM TREMENS.

What kinds of insanity constitute a defense to a charge of murder, considered.

[*The United States* vs. *McGlue*; 1 Curtis' (U. S.) C. R., 1.]

The prisoner, who was second officer on board the bark Lewis, was indicted for the murder of the first officer of that vessel while on board. The defense was insanity. The other facts appear in the charge of the court.

CURTIS, J.—The prisoner is indicted for the murder of Charles A. Johnson. It is incumbent on the government to prove the truth of every fact in the indictment necessary in point of law to constitute the offense. These facts are in part controverted, and in part, as I understand the course of the trial, not controverted; and it will be useful to separate the one from the other. That there was an unlawful killing of Mr. Johnson; that the mortal wound was inflicted by the prisoner at the bar; that this wound was given and the death took place on board of the bark Lewis; that Johnson was the first, and the prisoner the second officer of that vessel at the time of the occurrence; that the vessel at that time was either on the high seas, as is charged in one count, or upon waters within the dominion of the Sultan of Muscat, as is charged in another count; and that the prisoner was first brought into this district after the commission of the alleged offense—do not appear to be denied; and the evidence is certainly sufficient to warrant you in finding all these facts. It is not upon a denial of either of these

facts that the defense is rested, but upon the allegation, by the defendant, that at the time the act was done he was so far insane as to be criminally irresponsible for his act. And this brings you to consider the remaining allegation in the indictment which involves this defense. It is essential to the crime of murder that the killing should be from what the law denominates malice aforethought, and the government must prove this allegation.

Now, if you believe the evidence, there can be no question that the killing was malicious, provided the prisoner was at the time in such a condition as to be capable, in law, of malice. If he was then so insane that the law holds him irresponsible, it deems him incapable of entertaining legal malice; and one main inquiry in this case is, whether the prisoner, when he struck the blow, was so far insane as to be held by the law irresponsible for intentionally killing Mr. Johnson.

Some observations have been made by the counsel of each side respecting the character of this defense. On the one side, it is urged that the defense of insanity has become of alarming frequency, and that there is reason to believe that it is resorted to by great criminals to shield them from the just consequences of their crimes; that there exist in the community certain theories concerning what is called moral insanity, brought forward on trials of this kind, tending to subvert the criminal law, and render crimes likely not to be punished. On the other hand, the inhumanity and injustice of holding him guilty of murder who was not at the time of the act a reasonable being, have been brought before you in the most striking forms.

These observations of the counsel on both sides are worthy of your attention, and their effect should be to cause you to follow steadily, carefully, and exactly the rules of law upon this subject. The general question, whether the prisoner's state of mind when he struck the blow was such as to exempt him from legal responsibility, is a question of fact for your decision. But there are certain rules of law which you are bound to apply, and the court, upon its responsibility, is to lay down; and these rules, when applied, will conduct you to the only safe decision.

You will observe, then, that this defense of insanity is to be tested and governed by principles of law, and not by any loose general notions which may be afloat in the community, or even the speculations of men of science. And I now proceed to state to you such of them as are applicable to this case.

The first is, that the defendant must be presumed to be sane till his insanity is proved. Men, in general, are sufficiently sane to be responsible for their acts. To be irresponsible because of insanity is an exception to that general rule. And before any man can claim the benefit of such an exception, he must prove that he is within it.

You will therefore take it to be the law, that the prisoner is not to be acquitted upon the ground of insanity, unless upon the whole evidence you are satisfied that he was insane when he struck the blow.

The next inquiry is, what is meant by insanity? What is it which exempts from punishment, because its existence is inconsistent with a criminal intent? Clearly, it is not every kind and degree of insanity which is sufficient. There are undoubtedly persons of great general

ability, filling important stations in life, who upon some one subject are insane. And there are others whose minds are such that the conclusions of their reason and the results of their judgment are very far from right. And others, whose passions are so strong, or whose conscience, reason, and judgment are so weak or perverted that they may in some sense be denominated insane. But it is not the business of the law to inquire into these peculiarities, but solely whether the person accused was capable of having and did have a criminal intent. If he had, it punishes him; if not, it holds him dispunishable. And it supplies a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is the capacity to distinguish between right and wrong as to the particular act with which he is charged. If he understands the nature of the act, if he knows that it is criminal, and that if he does it he deserves punishment, then he is not so far insane as to be exempt from responsibility. But if he is under such delusion as not to understand the nature of the act, and has not reason and judgment to know that he is doing wrong, and is deserving of punishment, then he is not responsible. This is the test which the law prescribes, and which you are to apply in the present case.

It is asserted by the prisoner that when he struck the blow he was suffering under a disease known as *delirium tremens*. He has introduced evidence tending to prove his intemperate drinking of ardent spirits during several days before the time in question, and also certain effects of this intemperance. Physicians of great eminence, and particularly experienced in the observation of this disease, have been examined on both sides. They were not allowed to give their opinions upon the case; because the case, in point of fact, on which any one might give his opinion, might not be the case which you, upon the evidence, would find; and there would be no certain means of knowing whether it was so or not. It is not the province of an expert to draw inferences of fact from evidence, but simply to declare his opinion upon a known or hypothetical state of facts; and therefore the counsel on each side have put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. If you consider that any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence, otherwise they are not applicable to this case. And here I may remark, that although in general witnesses are held to state only facts, and are not allowed to give their opinions in a court of law, yet this rule does not exclude the opinions of those whose professions and studies, or occupations have rendered them peculiarly skillful concerning particular questions. We take the opinion of physicians in this case for the same reason that we resort to them in our own cases out of court, because they are believed to be better able to form a correct opinion upon a subject within the scope of their studies than men in general. But these opinions, though proper for your consideration, are nevertheless not binding on you against your own judgment, but should be weighed, and especially where they differ, compared by you, and such effect allowed to them as you think right. Besides these opinions, the physicians

have also described to you the symptoms of the disease *delirium tremens*. They all agree that it is a disease of a very strongly marked character, and as little liable to be mistaken as any known in medicine. Dr. Bell says the symptoms are.—

1. Delirium, taking the form of apprehensiveness on the part of the patient. He is fearful of something; imagines demons and snakes around him. In attempting to escape, he will attack others as well as injure himself. But he is more apprehensive of receiving injury, than desirous of inflicting it except to escape. He is generally timid and irresolute, and easily pacified and controlled.

2. Sleeplessness. I believe *delirium tremens* can not exist without this.

3. Tremulousness, especially of the hands, but showing itself in the limbs and the tongue.

4. After a time sleep occurs, and reason thus returns; usually the the sleep comes on in not less than three days, dating from the last sleep. At first it is broken; then this is followed by a profound sleep, lasting six or eight hours, from which the patient awakes sane.

Dr. Stedman, after describing its symptoms substantially as Dr. Bell did, says its access may be very sudden, and he has often known it first to manifest itself by the patients attacking those about them, regarding them as enemies; that a case may terminate in two days, and rarely lasts more than four days.

Regarding these accounts of the symptoms of this disease, you will inquire whether the evidence proves that they existed in this case; and whether the previous habits and the intemperate use of ardent spirits, from which this disease springs are shown; and whether the recovery of the prisoner corresponded with the course and termination of the disease of *delirium tremens* as described by the physicians.

It is not denied, on the part of the government, that the prisoner had drank intemperately of ardent spirits during some days before the occurrence. But it is insisted, that he had continued to drink, down to a short time before the homicide; and that when he struck the blow it was in a fit of drunken madness. And this renders it necessary to instruct you concerning the law upon the state of facts which the prosecutor asserts existed.

Although *delirium tremens* is the result of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable, and by the law is distinguished, from that madness which sometimes accompanies drunkenness.

If a person suffering under *delirium tremens* is so far insane as to render him irresponsible, the law does not punish him for any crime he may commit.

But if a person commits a crime while intoxicated, under the immediate influence of liquor, the law does punish him, however mad he may have been. It is no excuse, but rather an aggravation of his offense, that he first deprived himself of reason before he did the act. There would be no security for life or property if men could commit crimes with impunity, provided they would first make themselves drunk enough to cease to be reasonable beings. And therefore it is a

very important inquiry in this case whether this homicide was committed while the prisoner was suffering under that marked disease of *delirium tremens*, or in a fit of drunken madness. If the prisoner while sane made himself intoxicated, and while intoxicated committed a murder by reason of insanity, which was one of the consequences of that intoxication, then he is responsible in point of law, and must be punished. This is so clearly the law of the land as the other rule, which exempts from punishment acts done under *delirium tremens*. It may sometimes be difficult to determine under which rule the accused comes. But it is the duty of the jury to ascertain from the evidence on which side this case falls, and to decide accordingly.

It may be material for you to know on which party is the burden of proof in this part of the case. It is incumbent on the prisoner to satisfy you that he was insane when he struck the blow, for the law presumes every man to be sane till the contrary is proved. But if the contrary has been proved; the law does not presume that the insanity of the prisoner arose from any particular cause; and it is incumbent on the party which asserts that it did arise from a particular cause, and that the prisoner is guilty by law, because it arose from that cause, to make out this necessary element in the charge to the same extent as every other element in it. For the charge then assumes this form —that the prisoner committed a murder for which, though insane, he is responsible, because his insanity was produced by, and accompanied a state of intoxication. The government must satisfy you of these facts, which are necessary to the guilt of the prisoner in point of law. If you are convinced that the prisoner was insane to such an extent as to render him irresponsible, you will acquit him, unless you are also convinced that his insanity was produced by intoxication, and accompanied that state; in which case you will find him guilty.

The prisoner was acquitted.

(Note.—This distinction between *delirium tremens* and temporary madness, induced by intoxication, is laid down in *The United States* vs. *Drew*, 5 Mason, 28; and (in England) in John Burroughs' case, 1 Lewin, C. C., 75. In the latter case, Holroyd, J., said—"Drunkenness is not insanity, nor does it answer to what is termed an unsound mind, *unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong.*" That mere drunkenness is no excuse for crime is very clearly settled by many decisions both in this country and in England. *Cornwell* vs. *The State*, Mart. & Y., 147, 149; *Burnet* vs. *The State*, 133 *ib*; *The State* vs. *Turner*, 1 Wright's Ohio, 30; *The State* vs. *Thompson*, *ib.*, 617; *Schaller* vs. *The State*, 14 Missouri, 502; *The State* vs. *John*, 8 Ired., 330; *Pirtle* vs. *The State*, 9 Humph., 663; *Kelly* vs. *The State*, 3 Smedes & M., 518; *The United States* vs. *Clarke*, 2 Cranch, C. C. R., 158. But though drunkenness is not of *itself* a complete defense to crime, as insanity is, yet it may be admissible to the jury as evidence of the *intent*, in certain cases, with which the act was done. Thus in *Pigman* vs. *The State*, 14 Ohio, 555, it was held, on an indictment for passing counterfeit money, knowing it to be counterfeit, that the drunkenness

of the prisoner at the time of passing, was proper for the consideration of the jury in determining whether he *knew* the bill to be counterfeit. See also, *The State* vs. *McCante*, 1 Spears, 389; *Pennsylvania* vs. *Fall*, Addison, 257; *Swan* vs. *The State*, 4 Humph., 136; *Pirtle* vs. *The State*, 9 *ib.*, 570; *Haile* vs. *The State*, 11 *ib.*, 154.)

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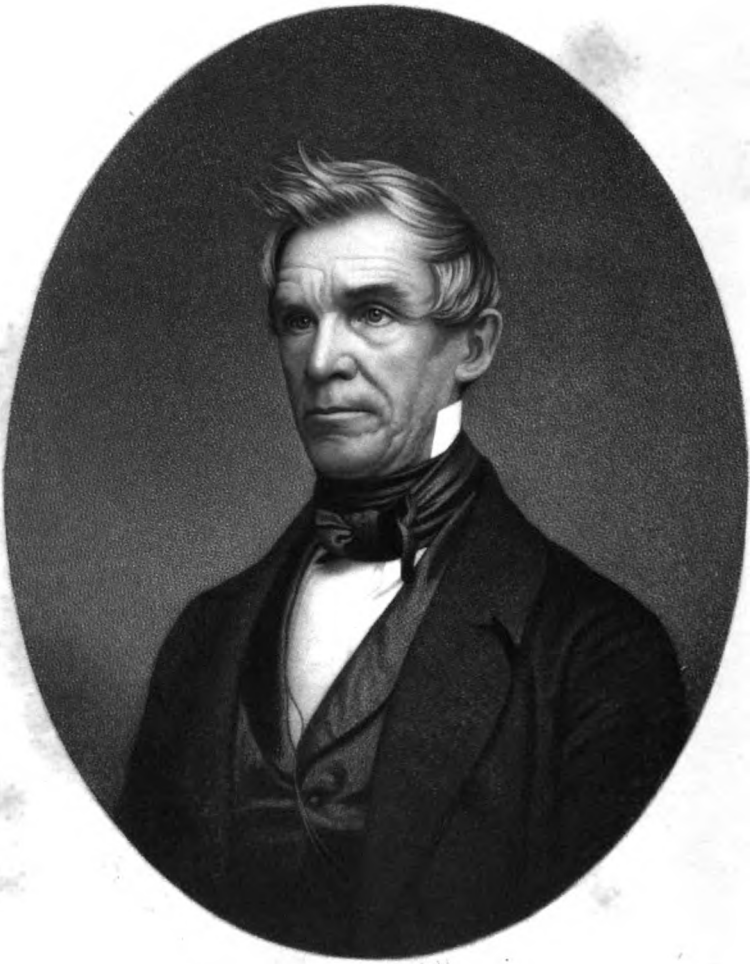
RAILROAD LAW.—DAMAGES FROM LOSS OF BUSINESS.

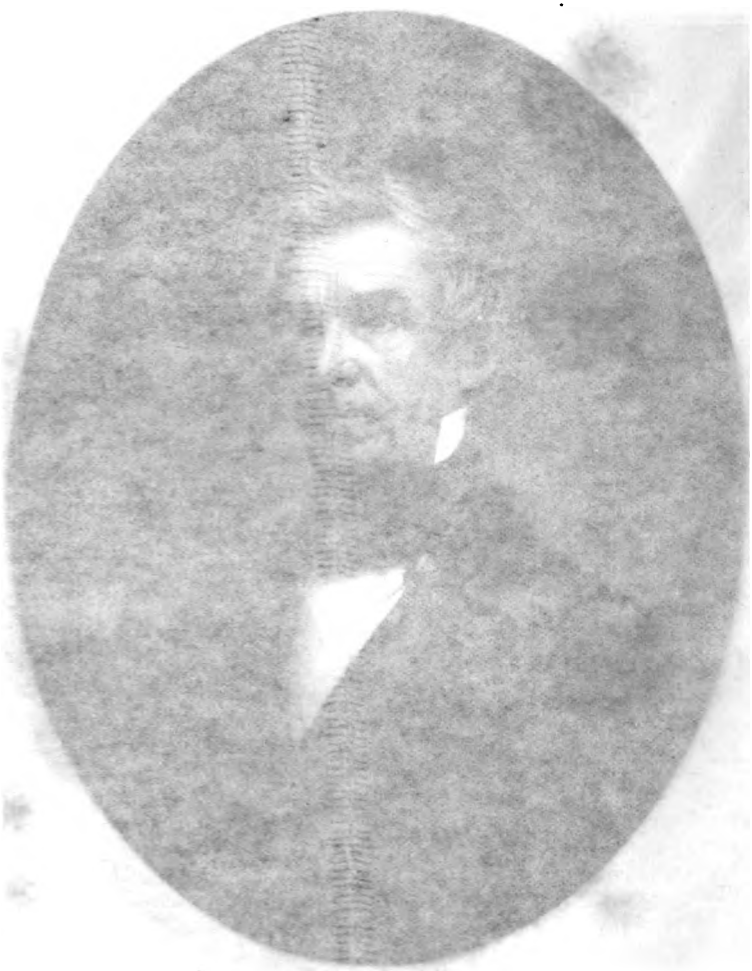
In the case of *Phillips* vs. *The Great Northern Railway Company*, lately tried in the English Queen's Bench, the plaintiff was a horse-dealer, and brought his action to recover damages for negligence on the part of defendants, whereby an accident occurred to one of their trains in which plaintiff was traveling. The plaintiff sustained an injury which prevented him from attending to business for five weeks. He showed that he was the agent of the French, Belgian, and Sardinian governments for the purchase of horses, especially stallions. The Belgian government was in the habit of paying him £25 for each horse which he purchased for them. The second half year of 1851 his profits were £3,000; in 1852 his profits were £5,000; in 1853, £4,300. His injuries from the railroad accident had prevented him from attending races and horse fairs, and he claimed that damages should be allowed him proportional to the anticipated profits which he was prevented from realizing. The defendants paid £228 into court as a fair pecuniary compensation for the injury complained of.

It was strenuously contended by the counsel for the railroad company, that the evidence offered in order to show the plaintiff's probable *loss of business* was altogether uncertain and irrelevant, and in the course of his address to the jury he propounded the following query: "If Baron Rothschild, or any great stockholder, should be prevented from attending 'change in consequence of an injury, caused without design or gross negligence, and should lose the chance of gaining £100,000, for example, must the unfortunate through whose act or omission the disaster was sustained, be held responsible for that amount?

The judge instructed the jury that they must award the plaintiff what, upon a review of the evidence, seemed to them a fair pecuniary compensation for the injury in question.

They subsequently rendered a verdict for the additional sum of £150, making the plaintiff's full amount of recovery £378.





# LIVINGSTON'S

## MONTHLY

# LAW MAGAZINE.

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## CONDENSED REPORTS OF RECENT CASES.

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MONTHLY

# LAW MAGAZINE.

VOL. II. JUNE, 1854. No. VI.

## CONDENSED REPORTS OF RECENT CASES.

### LEGISLATION.—SUBMISSION OF LAWS TO THE PEOPLE.

It is unconstitutional for a legislature to submit an act to the people for ratification. So held in New York.

[*Bradley* vs. *Baxter*; 7 Howard's (N. Y.) Practice R., 18.]

WE have already laid before our readers one or two decisions respecting the power of a state legislature to submit an act to the people for approval or ratification. The following case embodies the view of that question taken by the supreme court of New York.

An act passed by the legislature of New York in 1849, providing for the establishment of free public schools, contained a provision that the electors of the state should determine at the next general election whether the act should or should not become a law. The people supported the law; but some opposition to it having arisen on the score of unconstitutionality, the legislature subsequently ratified it.

The present action was brought against the defendants, trustees of a school district, to recover for property of the plaintiff taken by the defendants to satisfy a tax levied under the provisions of the free school law. The only question discussed upon the appeal was as to the constitutionality of the law.

PRATT, J.—We all concur in the conclusion that the act of March 26th, 1849, commonly termed the free school law, under the provisions of which a portion of the tax in question was levied, was not, at the time of such levy, a binding and valid law of the state. It only becomes necessary, therefore, for me to discuss this point in the case, and to state briefly some of the reasons upon which our conclusion is based.

Although the legislature has since the commencement of this suit ratified the act, and legalized all proceedings under it, so that our decision can not affect very seriously or extensively existing interests, yet we did not arrive at such conclusion without a deep-felt sense of the responsibility which the court would assume in pronouncing uncon-

stitutional and void, not only this particular act, but a whole system of legislation which has been rapidly increasing of late years, in this and many of the other states of this Union. But we recognize the constitution as the paramount law of the state, prescribing the fundamental principles upon which our government is based; and when a case comes before the courts, involving the question whether those principles have been violated in the action of any department of the government, we may not evade the responsibility of meeting the question firmly, and deciding it in accordance with our honest convictions in the premises.

As I understand the act under consideration, and the method of procedure by which it found a place in our statute books, the simple question is presented, whether the legislature or law-making power of the state is vested by the constitution (with some specified exceptions), exclusively in the legislature, or whether the power is only conferred upon that body to be exercised, or not, at its option—whether the obligation and duty rests upon that body alone to pass upon the expediency or inexpediency of all proposed laws—or whether it may, whenever it may deem it proper, relieve itself from such responsibility and refer the question to the people at large, to be decided at the ballot box; the legislature acting only as a committee to draw up the law in due form, to be thus presented to the people, or some power other than themselves to adopt or reject it.

The proposition thus presented would hardly require comment, and yet the act in question, if I understand it, was the result of precisely this kind of legislation. I am aware that it is insisted, and was strenuously urged upon the argument, that the legislature has power to enact conditional laws—laws to take effect upon the happening of some future, unknown, and contingent event. Nobody will contest this proposition. The legislature may undoubtedly provide by its enactments for anticipated or uncertain events, which may or may not happen. Most laws are intended to be prospective in their operation, and they may provide in themselves to take effect only on the happening of some uncertain or contingent event. Several cases of that kind of legislation were cited upon the argument. Some were cases of laws enacted to take effect upon the performance or non-performance of some act by a foreign government, by a municipal corporation, and in some cases by an individual. But in none of these cases was the act of the legislature made to take effect, upon any decision of this foreign or extraneous power upon the expediency of the act itself. Those laws were to take effect upon the happening of certain events, which would, in the opinion of the legislature or law-making power, render such a law expedient and proper for such a state of things. The circumstances, to meet which such laws were enacted, were contingent and uncertain; but the laws themselves expressed the deliberate will of the law-making power, provided the circumstances should happen to which the laws were intended to apply.

But in the case under consideration, the subject-matter upon which the law in question was to operate was neither contingent nor uncertain. The necessity for the law was just as imperious before the de-

cision of the people at the ballot box had been ascertained as it was afterward. The evils, which the law was designed to remedy, were neither augmented nor diminished by that decision. Every thing, so far as the subject-matter of the law was concerned, remained *in statu quo*. What then was the condition upon which the law was to take effect? What was the uncertain and contingent event upon the happening of which it was to become a valid and binding law? It was simply neither more nor less than the decision of the people at the ballot box upon the expediency of the law itself. In fine, it was submitting to them the question of the adoption or rejection of the proposed law. It was creating a new legislative power, which should exercise one of the most important functions in legislation, to wit: the final decision of the question of the adoption or rejection of a proposed bill.

The act in question, when it came from the hands of the governor, with his signature attached, did not necessarily express the will of a single member of either house upon the subject-matter of the law. It expressed this much and no more: that it was the will of the legislature that the question be submitted to the people at large to decide, whether it should become the law of the state or not. The governor, by signing it, only approved of thus submitting the question to the people. The language of the act itself shows clearly that such was the intention of its framers. (Sec. 10.) "The electors shall determine by ballot, at the annual election to be held in November next, whether this act shall, or not, become a law." It will be seen by this provision that the question *upon the final passage of the bill* was to be taken at the polls.

And the provisions of the act, prescribing the heading and form of the ballots, and the effects which should result from the majority of votes being for or against the law, show clearly that the members of the legislature intended to evade the responsibility of passing upon the question, whether the act should or should not become a law. No member of that body who voted for the bill in its several stages through the two houses, could be charged with any inconsistency of conduct for being found opposing it at the polls, or *vice versa*. No member had voted for a free school law, but simply to submit the question to the people and to confer on them the power to pass or reject the bill. The question then recurs: Is this kind of legislation within the spirit and meaning of the constitution?

It is conceded that it is not expressly forbidden by that instrument; but is it not forbidden by a necessary and reasonable implication?

"Every government," says an able writer upon constitutional law, "must include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers upon which all governments are supposed to rest, viz., the executive, the legislative, and the judicial powers. The manner and extent in which these powers are to be exercised, and the functionaries in whom they are vested, constitute the great distinctions which are known in the forms of government." (Story on Const., Book 2, p. 1.) In the states of this Union, while all the powers of government are supposed to emanate from the people, and to be exercised for their benefit, there is no

principle more fundamental nor more universally recognized during their whole history, than that these powers are not to be exercised by the people directly, but by representative bodies, selected from the people, to represent them in this respect. This, and the separation of the great powers of government into different departments, to be exercised by separate and distinct functionaries, lie at the very foundation of every state government.

Not a state in the Union is there, that does not recognize these principles as primary and fundamental, and the very foundation upon which the permanency and stability of its institutions rest.

The patriots and statesmen who laid the foundations of these noble political edifices of which we are all now so justly proud—of these institutions of government which should secure to each individual, however humble, all the freedom compatible with the general welfare and safety—were quite as solicitous to guard against the evils necessarily connected with, and growing out of, a consolidated democracy, as those of an absolute monarchy. The one was deemed quite as inconsistent as the other with that great idea which was the pole-star of all their efforts and all their aspirations: *liberty regulated by law.*

It can not be necessary for me to go into an extended discussion of the importance of this representative principle to a free government, and of the necessity of guarding and cherishing it as the sheet anchor of the permanency and stability of our free institutions, and of their efficiency in securing the great objects of all good governments, to wit: the happiness and prosperity of the people.

These questions have been so often discussed by others much more able to do them justice than myself, that the task is unnecessary. The reports of the convention that framed the constitution of the United States, and the public documents of that day, are full of able discussions upon this subject, and I may also refer to the opinions of the judges in two recent decisions in the highest courts of the states of Pennsylvania and Delaware, which I shall have occasion hereafter to cite. It only becomes necessary, therefore, I apprehend, to examine and ascertain whether the fundamental principles are secured to us by the constitution, or whether they are left by that instrument to the ever-shifting and ever-changing legislation of the state. Assuming that this representative principle lies at the foundation of our government, and that the constitution was designed to designate the functionaries by whom, and the manner and form in which, it shall be carried into execution, the question I apprehend will be found not difficult of solution.

Upon examining that instrument we find the executive, legislative, and judicial powers of government properly distributed to separate bodies, and the necessary power delegated to each. In this distribution the legislative power of the government is declared to be *vested* in a senate and assembly. The number composing each branch is fixed, and the manner of their election and the duration of the term of office is prescribed.

The number necessary to constitute a quorum for the transaction of business, the number necessary to pass the different kinds of laws, is

there designated—the form of the enacting clause of all laws is given, and freedom of debate secured.

The provision of that instrument, that the legislative power of the government shall be *vested* in a senate and assembly, of itself would seem to preclude the idea that there is any other power authorized to exercise the same functions. Especially when we observe the care which the framers of that instrument have taken in organizing these bodies, and in providing rules by which the merits of proposed laws may there be discussed freely, and by which no law can be passed without a concurrence of a majority of those elected to each branch, we can not resist the conclusion that it was the design of the constitution to vest the law-making power in the legislature, and nowhere else. It is true that the governor is endowed with a qualified veto, and in some peculiar cases the power is given to the legislature to refer certain great financial questions to the people. These are specific powers defined by the constitution itself, and afford, in my opinion, no authority to the legislature to refer to the people other matters, over which no such power is granted. As to such matters, the exclusive right to legislate is *vested* in that body, and that alone.

Whence, then, is the authority derived from the legislature to divest itself of this power? The mandates of the constitution are as binding upon the people in their sovereign as in their individual capacity. If by the fundamental laws the power to make the necessary laws of the country be delegated to the legislature, the people can not, except by changing the constitution, resume the power.

Again, it is a well-settled principle, that where a trust or confidence is confided to any person or class of persons, the trustees can not delegate that trust to others. And what trust, what confidence is more sacred, more responsible than the power to make the laws of a free people?

The power is not only delegated to the two branches of the legislature, but there is an obligation—a duty imposed upon them to make all such laws as are necessary and proper for the interests of the people and good order of the body politic—a duty from which they may not discharge themselves except by faithfully and honestly discharging that duty. If they may discharge themselves from the responsibilities which the constitution has devolved upon them in one case, they may in another, and this most important of all the functions of government is entirely afloat, vested, in fact, nowhere. If a bill may, in this manner, be submitted to a vote of the people at the ballot box for adoption or rejection, it may, so far as legislative power is concerned, be submitted to the vote of a mass convention.

Indeed, it may be a question whether this would not of the two be the preferable method.

There would surely be a better opportunity for discussing the merits of the proposed law, and for consultation among the people from the different sections of the state. Besides, history furnishes a precedent somewhat similar in character in the Athenian republic, where laws were framed by the senate to be submitted to an assembly of the whole people.

But perhaps a mode of procedure still less objectionable might be suggested. The laws might be passed by the legislature to take effect, or not, upon the approval or disapproval of a select number of persons designated in the act, thus creating a power in the state not entirely dissimilar to the old council of revision.

Other methods of relieving the legislature from the responsibility which rests upon its members might be suggested, but perhaps those already suggested are sufficient. The right to legislate in this manner was placed upon the argument almost, if not entirely, upon the assumption that the legislature was authorized to pass conditional laws—thereby assuming that the nature of the condition could not affect the question. If this assumption be true, it then necessarily follows that the submission to the vote of a mass convention, to a select body of men, or even to a foreign potentate, may be made the subject of a valid condition.

But why should this method of procedure be confined to the law-making of the government? Why not extend it to the executive and judicial departments? The functions of government which the latter are called upon to discharge, are no more sacred, no more important, than those devolving upon the legislative departments, and the constitution is no more explicit in defining and limiting their powers and duties.

The governor is vested by the constitution with the pardoning power, and this includes the power to grant in proper cases conditional pardons.

But can it be inferred from this that he may grant a pardon to be valid or void as the people might vote for or against the pardon at the next general election? Would a pardon be valid even that should take effect upon condition that the legislature should approve of it?

The courts of law sometimes make conditional orders and sometimes conditional judgments, but have they the power, or could the legislature give them the power, to give judgments to take effect, or not, as the people of the state or as particular localities might vote upon the merits of the case?

Suppose our new code, among other reforms, should contain a provision that in a given class of cases the courts might pronounce conditional judgments to be valid or void, for the plaintiff or defendant, as the people at the next general election should determine. There is no restriction in express terms in the constitution upon the power of the legislature in this respect, yet it would be so palpably contrary to its whole scope and meaning, so utterly subversive of the genius and theory of our institutions, that even the sanctity that is thrown around the code itself would scarcely shield such an innovation upon the present practice from universal condemnation, as being in direct conflict with the constitution. And still I am unable to perceive wherein it would differ in principle from the case under consideration. In either case the exercise in this manner of the functions vested in any department of the government would be utterly subversive of the primary principles of a representative government, and would be a fearful stride toward that worst of all despotisms, a consolidated

democracy. It appears to me perfectly manifest, therefore, that such legislation is in direct conflict with the constitution.

So far as there is any authority in the books directly upon the question, the preponderance is decidedly in favor of the conclusion to which I have come. (*Johnson* vs. *Rich*, 9 Barb., 630; *Parker* vs. *Commonwealth*, 6 Burr, 507; *Rice* vs. *Foster*, 4 Harrington, 479.)

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ADMINISTRATORS.—COLLECTIONS IN PENNSYLVANIA.

The administrator of a person domiciled at the time of his death in another state, can recover a debt due to his intestate in Pennsylvania, without first taking out letters of administration in that state.

[*Doud* vs. *Wolf*. Pennsylvania District Court, 1854. Not yet reported.]

The facts of this case are sufficiently indicated in the opinion.

HAMPTON, P. J.—The defendant's counsel move for a new trial, and assign as a reason that the court erred in allowing the plaintiff to recover without taking out letters of administration in this state.

The plaintiff resides in Ohio, where the intestate was domiciled and died, and letters of administration were granted. The intestate never resided in Pennsylvania, and had no estate here, real or personal. The defendant resides in Lawrence county. No objection was made to the authentication of the letters of administration; but defendant's counsel rely on the supposed rule, that a foreign administrator can not sue in the courts of this state without taking out letters of administration here. In support of this position they cite the sixth section of the act of 15th March, 1832 (*Dunlop*, 458), which provides, that no letters of administration, which may be granted out of the commonwealth, shall confer upon any person any of the powers and authorities possessed by an executor or administrator under letters granted within this state.

What is the true construction of this section? Did the legislature mean to include, in this provision, a case like the present? Such a construction should not be given to it, unless imperiously demanded by the plain, undoubted intention of the legislature, because it would lead to unnecessary trouble, expense, and delay in the collection of claims, and litigation in the settlement of estates. Under such a construction, whenever a person residing out of this state, having claims against one residing here, dies, his executor or administrator must either come here and take out letters himself, or procure some one to do so for him. In the former case, being a stranger, he would find great difficulty in procuring bail; and in the latter, as great difficulty in finding any one willing to take upon himself the burden of administration, when only a small debt is to be collected, as in the present case—and even that depending upon the contingencies of a lawsuit. But suppose the decedent creditor to have had debtors residing in different counties of this state, then the county where letters could be granted must be determined by the comparative amounts of the claims, because they can

only be granted under our statute in that county "where the principal part of the goods and estate of the decedent shall lie." But a *debtor* may change his place of residence from one county to another, and therefore "the principal part of the estate" is ambulatory, depending for its locality upon the whim of the debtor, who carries about in his person or pocket the *estate* of the creditor. But suppose, again, the debtor resides in one county, and *his* estate, out of which the claim must be realized, lies in another county, where should the letters be granted? Is it the *person* or the *property* of the debtor that forms part of the "*estate*" of his deceased creditor? If the former, then the letters are to be granted wherever *he* may be; and if the latter, then where *his* estate may be. But did the legislature mean by the word "estate," as here used, to designate a debt due by one of our citizens to a creditor out of the state? True, the largest and most comprehensive meaning of the word "estate" may embrace choses in action, rights, credits, etc., out of which any assets may arise, at least so far as to authorize the personal representatives of the demand to sue for and collect the same. But until actually collected, it is quite uncertain whether the money claimed will form any part of the estate of the intestate creditor, or not. In the first place, the claim may not be recoverable, either at law or in equity, owing to some fatal defect in the claim itself, or meritorious defense on the part of the debtor. In the next place, although a judgment may be obtained, yet the debtor may be utterly insolvent. In either case, the claim, so far from forming "*the principal part*" of decedent's "estate," would really form *no part at all*.

What benefit would arise, or what evil would be prevented, by requiring letters of administration to be taken out here? The administrator here would be merely ancillary to the administrator of the domicil, and bound to pay over to him the money as soon as collected, which would bring about the same result as if he had been allowed to sue for and collect it himself, except the expenses of the additional administration. Any rule, therefore, it seems to me, that would exclude the administrator from our courts, should also exclude his intestate, if alive, which would certainly be a most gross violation of comity between the states of this Union.

The legislature meant to provide a system for the safe administration of estates within the limits of this commonwealth, in the usual and ordinary acceptation of that term, whether their owners were domiciled *within* its boundaries or not. Thus, for instance, a man may reside at Camden, N. J., while his place of business, and, it may be, all his creditors, are in Philadelphia. It would be wrong in that case to permit the administrator of the domicil, who would be alone responsible to the authorities of New Jersey, to withdraw the estate of the decedent from the reach of his creditors and the control of the laws of Pennsylvania, and compel them to seek their remedy in a foreign state. This would be not only grossly unjust, but attended with great expense and delay, in the collection of their just debts, and therefore the legislature intended that, in such a case, administration should be granted in Philadelphia, where the principal part of his estate lay, in order that out of the proceeds thereof his just debts should be paid, and the balance of the

fund, if any remained, paid over to the administrator of the domicil, or otherwise disposed of according to law.

But here were no goods or chattels to be administered upon; no debts of the decedent to be paid; nothing to be done but the collection of a single claim, over which our Orphan's Court had no control or jurisdiction whatever, either before or after its collection. The decedent was not domiciled here, nor was the "principal part" of his estate situated in this county, and therefore the register would have had no authority to grant letters of administration on his estate, and if granted, they would have been utterly null and void, and would have conferred no authority whatever on the administrator to sue for and recover this claim.

The motion, therefore, for a new trial, is overruled.

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ADMINISTRATORS.—INTEREST ON ASSETS.

Administrators are liable to account for interest on funds in their hands, although no profit has been made upon them, unless the exigencies of the estate rendered it prudent that they should hold the funds thus uninvested.

A litigation respecting the title to the assets is not such an exigency as excuses the administrator from the duty of investing assets.

[*Duncan* vs. *Dent*; 5 Richardson's (S. C.) Eq. R., 77.]

The important question in this case was, whether Samuel Dent, the defendant, was chargeable with interest on the annual balance remaining in his hands in the execution of his trust. The facts relied on as constituting his excuse were these: There were several claimants of the funds in the administrator's hands, each of whom served the administrator with a notice to hold the funds subject to their respective claims, and he accordingly held the money in his hands, ready to pay it over to whoever should be entitled. He did not, however, use or make any profit out of it. The chancellor at circuit decided that the defendant was liable for the amount of interest. The case then came up on appeal.

WARDLAW, CH.—We are content with the conclusion attained by the circuit, that granting the defendant kept the funds in his hands without profit, he must pay interest, since no exigency of the estate intrusted to his management rendered it prudent that he should so retain the funds. No debt of the estate remained unsatisfied, and there was a clear balance in the administrator's hands, which was claimed by various persons in different rights. The obvious duty of the defendant, under such circumstances, was to file a bill of interpleader against all the adverse claimants, and to pay the money into court.

If this course had been adopted, and the litigation had seemed likely to be of long duration, the court, on the application of any of the parties, or *sua sponte*, might have ordered the investment of the money in securities bearing interest. Every man is presumed to know the law; and if trustees, who are in fact ignorant of the law,

will act upon their blind judgments without consulting the expert, they must bear the consequences of their rashness. It may be remarked, that the answer makes no mention of the suit or suits in equity, and the character of the litigation there was not otherwise brought to the attention of the chancellor than by a statement at the bar that the suits were for an account of the estate. If the fact be as now suggested, that these were suits by adverse claimants of the estate itself, this fact does not strengthen the defense, for such suits are necessarily dilatory, and if the defendant did not wish to use the money, he should have paid it into court.

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INFANTS.—LIABILITY FOR NECESSARIES.

An infant who has an allowance from the court, or from any other source, sufficient to provide him with necessaries suitable to his fortune and condition, is not ordinarily liable for necessaries supplied on credit.

[*Rivers* vs. *Gregg*; 5 Richardson's (S. C.) Eq. R., 274.]

This action was brought by certain creditors of one William M. Eddings against his administrator, to recover payment for necessaries alleged to have been furnished by them to Eddings during his minority. The facts are sufficiently stated in the opinion rendered by the chancellor upon the first hearing, upon the coming in of the master's report. That opinion also presents and discusses the points of law involved. It was affirmed upon appeal, with but little additional remark.

DARGAN, CH.—The administrator has filed exceptions to the master's report, in which he disputed the right of the creditors, under the circumstances, to claim any thing as necessaries. And this brings up a very important question—a question which must be of deep concern to parents and guardians, and to that interesting class of the community who, on account of their tender years and need of protection, the court of equity has under its own peculiar guardianship and care.

To show the great importance and necessity of this protection, I need not travel out of the facts of this case to present a striking illustration. Under the published order to prove their debts before the master, creditors have presented demands against the intestate's estate to the enormous amount of $14,205, all, or a very large part, of which was contracted within the last four years of his life, and principally within the last two years. Add to this, about $9,000 for money actually received by the intestate, on account of his allowance, and on account of the income of his wife's estate, all of which came into his hands and was consumed, and the aggregate is about $23,000. Thus we find this infant, whose person and estate were under the protection and guardianship of the court of equity, whose estate in possession was only $10,000, and whose indefeasible estate, eventually realized, was only $35,000, living, for the last four years of his life, at the extravagant and wasteful rate of nearly six thousand dollars per annum. And

yet this does not present a perfect view of his extravagance; for, as has already been observed, the principal part of the debt was accumulated within the last two years of his life, when his allowance was at its maximum, and when he also enjoyed the income of his wife's estate. He must have expended, after his marriage, seven or eight thousand dollars *per annum*. I was desirous to have gone accurately into this calculation, but the master's report, and the documents and evidence submitted with it, did not afford the data.

When the chancellor, by his order, granted this infant, out of his estate, an allowance of $1,000 *per annum*, and after his marriage increased it to $2,500 *per annum*, did he base his decree upon what, from the evidence before him, he supposed was *necessary* for the support and maintenance of himself and family, according to his fortune and position? If not, how futile was the preliminary inquiry as to what were his prospects and fortune? Did he grant him the annual $2,500 for and in lieu of necessaries; or did he mean that he should receive his allowance, and be armed with authority to contract debts, and charge his estate with the payment of double that sum in the way of necessaries? If this latter principle is to prevail, then I undertake to say that the protection which this court affords to the estates of infants is bitter mockery.

The general rule certainly is, that the infant is bound by his contract for necessaries. But there are exceptions equally clear and well-settled. *Necessaries*, when the term is applied to an infant, are those things that are conducive and fairly proper for his comfortable support and education, according to his fortune and rank. So that what would be considered *necessary* in one case would not be so regarded in another. The rule is entirely relative in its operation. But what are necessaries? Meat, lodging, clothing, and education, if the means admit of it, certainly fall within the definition. To which may be added, in case of marriage, the support of wife, children, and servants. All is relative, and is regulated by circumstances. But if an infant is furnished with these things by his parent or guardian, then the same articles, to the same or less amount, supplied by another under contract, are not necessary to him. To another, not so supplied, they would be necessary. The same remarks apply, with equal propriety and force, where the infant is supplied by parent or guardian with money to furnish himself with necessaries. In some cases, circumstances make it proper, and imperatively demand, that the infant should have the disbursement of his allowance himself. In the case of marriage and housekeeping, the perpetually recurring wants and exigencies of the family render it impossible that the guardian should always be called on to supervise the disbursement of the fund allowed to the infant. Or if, being a youth of fortune, he is sent upon his travels in foreign lands, or even in his own country, the guardian can not look to the expenditure of the money. It is necessarily intrusted to his own keeping. The brother of the deceased is now abroad on his European travels. Previous to his departure, an application was made to this court for a proper allowance to defray his traveling expenses. The court, upon due consideration, made an order for what was supposed to

be a proper allowance, reference being had to the amount of his fortune. Suppose this young gentleman should expend his allowance, and, in addition, should contract debts to the same amount for articles that, *prima facie*, would be regarded as necessaries. Could these claims be supported, on its being shown that the infant had an allowance that was amply sufficient to defray all his necessary and proper expenses? I suppose not.

He who deals with an infant is presumed to know his infancy. He is bound, at his own peril, to make the inquiry. It makes no difference whether the inquiries result in correct information or the reverse. It is no excuse, if he honestly supposed from his appearance or other circumstances, that the infant was an adult. The protection of this defenseless class of persons would be very inadequate if this principle is not further extended. The only safe rule for the security of infants and their estates is, that he who credits the infant for necessaries should be bound to know whether the infant has been supplied with a sufficient amount of those articles by the parent or guardian, or from some other source. The consequence, if any other rule than this prevails, would be that an infant's estate might be made liable for double the amount of *necessaries* that were *necessary* for him.

I will not say that an infant, after being supplied with necessaries, or a proper allowance in cash to procure them, may not, under some circumstances, be liable on a contract for necessaries. Suppose, for example, after being furnished with all things necessary for him, he should give them away, or sell them, or waste the proceeds in riot and debauchery. Or suppose that after having, in money, an allowance in money sufficient for all his wants placed in his hands, he should be robbed of it, or should lose it by accident, or at games of chance; then the infant would be reduced to want for the means of bare subsistence. Must he starve with a plenty in his coffers? Would he not be bound by a contract for necessaries under these circumstances? This is stating the strongest imaginable case against the rule. But its wisdom is still manifest. In a case like that supposed, I would say that the infant would be bound. But I would further say, that the party who alleged this extraordinary state of facts must prove it. In other words, when it is shown that an infant is supplied with necessaries by his parent or guardian, or with funds amply sufficient to procure them, the presumption of law and of reason must be, that he does not stand in need of credit to obtain what is necessary for him. And after this *prima facie* showing, he who alleges that notwithstanding this the infant was in a state of destitution, must take upon himself the burden of proving the allegation. If he does this in a satisfactory manner, his claim should be allowed. But even then it should be limited to bare necessaries, and should not be allowed to embrace articles of luxury which would otherwise be suitable to the infant's fortune and condition in life.

To illustrate these views further, I will advert to what I suppose would be the course which a case like this might take in a court of law. The plaintiff brings his action of *assumpsit* for goods, wares, etc. The affirmative is with him. He must prove his demand, to be entitled to recover. The defendant, however, has pleaded infancy.

This admits the account, and rests the defense upon the affirmation of a fact, which the defendant is bound to prove. If to this plea the plaintiff has replied, that the demand was for necessaries suitable to the defendant's fortune and condition in life, the burden of proof is again shifted. The plaintiff must prove his replication. This he does by showing, for example, that the account is for board, clothing, education, etc. On this proof he would be entitled to recover. But if the defendant has rejoined, that the articles furnished were not necessary to him, because he was furnished with the same articles by his parent or guardian, *here* the proof of all the facts stated in the previous pleadings would become unnecessary. The defendant would be bound to prove his rejoinder. But if the plaintiff has filed a surrejoinder, alleging, that although the infant defendant was furnished with support and maintenance, or the means of procuring it, by his parent or guardian, *yet* that by the defendant's improvidence or misfortune he had wasted or lost his means, so that he was reduced to a state of destitution, and the articles furnished by the plaintiff were thus become necessary for the infant, *here* the affirmative is again shifted, and the *onus* is with the plaintiff. In this court, happily, special pleading never prevailed. But what is valuable and subservient to the ends of justice, in the philosophy of that system, is applied here in practice in a short-hand way; though this court never suffers itself to be baffled by its subtleties or entangled in its technicalities.

In a case like that before me, it is not sufficient for the creditor of an infant, for the purpose of obviating the objection that the infant was furnished with necessaries, or the means of procuring them, by his parent or guardian, or from other source, to argue, *hypothetically*, that the infant, notwithstanding, *might have been* in a state of destitution, which rendered the articles furnished by the plaintiff necessary for him. In a court of equity, as in a court of law, he must state the fact affirmatively, and prove it positively.

The conclusion is, that an infant who is furnished with necessaries, or the means in cash of procuring them, by his parent or guardian, or from any other source, is, *prima facie*, not liable for necessaries supplied by a stranger or tradesman on a credit; and that the party who seeks to evade the operation of the rule, and bring his claim under an exception, must prove the destitution and necessities of the infant. (McPherson on Infancy, 507; *Bainbridge* vs. *Pickering*, 2 W. Bl., 1,325; *Cook* vs. *Deaton*, 3 Car. & P., 114; *Story* vs. *Perry*, 4 *ib.*, 526; *Ford* vs. *Fothergil*, 1 Esp., 21; *Burghart* vs. *Angerstein*, 6 Car. & P., 690; *Connolly* vs. *Hull*, 3 McC., 6; *Edwards* vs. *Higgins*, 2 McC., 21.)

It is a fallacy to suppose that a distinction can be drawn between the case where an infant is actually supplied with the necessaries themselves, and that, where he receives an allowance under an order of the court, which he is to disburse himself in their purchase. If it be urged that the infant may waste or misapply his allowance, and thus be reduced to a state of destitution, that would require his necessary wants to be otherwise supplied, it is obvious that the argument applies with equal force to the case where the infant is supplied with

the necessary articles for his use and consumption. These he may sell, give away, or waste, so that it may become necessary that he should have more, to save him from nakedness and starvation. The party who alleges such a state of destitution, as a justification for giving credit to an infant who is otherwise amply provided for, must take upon himself the burden o f proving it. And if he succeeds in this, he will have such relief as is proper under the circumstances. But until such a state of destitution is made to appear, it must be presumed that an infant who has an ample allowance in cash, does not need to be supplied with necessaries on credit.

To test this question still further: If the guardian had paid these accounts, would she have been allowed to charge them against her ward's estate? It is a waste of time to ask the question.

No guardian has the right, without the permission of the court, or without special circumstances of necessity, to transcend the income of his ward's estate, in expenditures for his benefit. And the court, in decreeing allowance, always has reference to the same general rule, from which it never departs, unless under special circumstances. And yet it is contended that this rule may be violated by tradesmen, for their own profit and speculation. The truth is, that these claimants *did* trust this unhappy youth at their own risk. They knew that they would be paid if he lived, and came to his inheritance. They, *for a consideration*, doubtless, resolved to take the hazard. That this is the case, is shown by the fact that two of them, whose claims are the largest, insured the infant's life in an amount sufficient, in one case, to save them from loss, and in the other to pay half the debt.

I think that the claims of these creditors should not be allowed, for the foregoing reasons. And I further think, that they are entitled to no commiseration. There are some unhappy circumstances connected with the case. There is but little doubt that the ill-fated youth was brought to an untimely grave by the improper and unbounded credit which was extended to him by these persons and others, for their own profit. It would be a gross perversion of justice to allow these claims. It is ordered and decreed, that the exception of the plaintiff to the master's report be sustained, and that the whole of the claims of creditors reported upon by the master be rejected.

Appeals were taken by the plaintiff and the defendants on all the disputed questions decided by the decree.

Dargan, Ch.—The appellants have pressed their case upon the attention of the court with an ardent, but a commendable and decorous zeal. Much ability and research have been displayed in the argument of the cause. I have not, however, been shaken in the conclusions which I formed on the circuit trial, and which I have expressed in the circuit decree. In that decree I have gone so fully into the consideration of the questions made on this appeal, that it seems to me unnecessary to say more on this occasion.

Decree affirmed.

COPYRIGHT TRANSLATIONS.

A translation of a book is no infringement of copyright.

[*Stowe* vs. *Thomas*. United States Circuit Court. Official report not yet published.]

The sole question in this case was, whether a translation of a copyrighted work was an infringement of the copyright? The facts material to an understanding of the question in controversy sufficiently appear in the opinion of the court.

GRIER, J.—The bill in this case alleges that Mrs. Stowe is the author and proprietor of a work called "Uncle Tom's Cabin," and has obtained a copyright of the same in due form of law; that the defendant has translated into German, printed, published, and sold the same in newspaper and pamphlet form; that such translation is an infringement of complainant's copyright, and therefore prays an injunction, account, etc.

The answer admits the facts stated in the bill, but denies that such translating, printing, publishing, etc., is an infringement of the complainant's copyright.

The question raised by these pleadings has not been decided either in England or in this country, in a case where it is directly involved.

In many of the states of Europe it has been made the subject of special legislation. In France, jurists appear to be divided in opinion. Pardessus is of opinion that a translation is an infringement of copyright. Renouard, on the contrary, argues that it is not. Mr. Godson, in his work on patents, concurs with Renouard. Mr. Curtis, in his treatise on copyright, agrees with Pardessus.

In this balance of opinions among learned jurists we must endeavor to find some ascertained principles of the common law, as established by judicial decision, on which to found our conclusion.

In order to decide what is an infringement of an author's rights, we must inquire what constitutes literary property, and what is recognized as such by the act of Congress, and secured and protected thereby.

An author may be said to be the creator or inventor both of the ideas contained in his book, and the combination of words to represent them. Before publication, he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge, or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who can not be deprived of the use of them, or their right to communicate them to others, clothed in their own language, by lecture or by treatise.

The claim of literary property, therefore, after publication, can not be in ideas, sentiments, or the creations of the imagination of the poet or novelist, as dissevered from the language, idiom, style, or the outward semblance and exhibition of them. His exclusive property in

the creation of his mind, can not be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright. (Burtis on Copyright, 9 *et seq.*)

The statute of 8 Anne, ch. 19 (which, so far as it describes the rights and property of an author, is but declaratory of the common law), is entitled "An act for the encouragement of learning, by vesting the copies of printed books in the author," etc. It gives the author "the sole right of printing and reprinting such book or books," and describes those who infringe the author's rights as persons, "printing, reprinting, or importing such book or books," without the license of the author. Our acts of Congress give substantially the same description both of the author's rights and what is an infringement of them.

Now, although the legal definition of a "book" may be much more extensive than that given by lexicographers, and may include a sheet of music as well as a bound volume, yet it necessarily conveys the idea of thought or conceptions, clothed in language or in musical characters, written, printed, or published. Its identity does not consist merely in the ideas, knowledge, or information communicated, but in the same conceptions clothed in the same words, which make it the same composition. (2 Black. Com., 405.) A "*copy*" of a book must therefore be a transcript of the *language* in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language can not constitute the same composition, nor can it be called a transcript or "*copy*" of the same "*book*."

I have seen a literal translation of Burns' poems into French prose; but to call it a *copy* of the original would be as ridiculous as the translation itself.

The notion that a translation is a piracy of the original composition is founded on the analogy assumed between copyright and patents for inventions, and where the infringing machine is only a change of the form or proportions of the original, while it embodied the principle or essence of the invention. But as the author's exclusive property in a literary composition, or his copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition, the argument from the supposed analogy is fallacious.

Hence, in questions of infringement of copyright, the inquiry is not whether the defendant has used the thoughts, conceptions, information or discoveries promulgated by the original, but whether his composition may be considered a *new work*, requiring invention, learning, and judgment, or only a mere transcript of the whole, or parts of the original, with merely colorable variations.

Hence, also, the many cases to be found in the reports which decide

that a *bona fide* abridgment of a book is not an infringement of copyright.

To make a good translation of a work often requires more learning, talent, and judgment than was required to write the original. Many can *transfer* from one language to another, but few can *translate*. To call the translation of an author's ideas and conceptions into another language a *copy* of his book, would be an abuse of terms and arbitrary judicial legislation.

Although the question now under consideration was not directly in issue in the great case of *Miller* vs. *Taylor*, yet the inference that a translation is not an infringement of copyright is a logical result, and stated by the judges themselves as a necessary corollary from the principle of law then decided by the court.

That case exhausted the argument, and has finally settled the question as to the nature of the property which an author has in his work, and it is, that after publication his property consists the "right of copy," which signifies the sole right of printing, publishing, and selling his literary composition or book; not that he has such a property in his original conceptions, that he alone can use them in the composition of a new work, or clothe them in a different dress by translation. He may be incompetent to such a task, or to make a new work out of his old materials; and neither the common law nor the statute give such a monopoly, even of his own creations.

The distinction taken by some writer on the subject of literary property, between the works which are *publici juris*, and those which are subject to copyright, has no foundation in fact, if the established doctrine of the cases be true, and the author's property in a published book consists only in a right of copy. By the publication of her book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights, and poetasters. They are no longer her own. Those who have purchased her book may clothe them in English doggrel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished, and all that now remains is the copyright of her book—the exclusive right to print, reprint, and vend it; and those only can be called infringers of her rights or pirates of her property who are guilty of printing, publishing, importing, or vending, without her license, "*copies of her book.*" In topical, but not very precise phraseology, a translation may be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.

The plaintiff's bill is therefore dismissed with costs.

PATENTS.—CONSTRUCTION OF SPECIFICATIONS.

When a patentee describes a machine, and then claims it as described, he is understood to claim, and his patent covers, not only the precise forms he has described, but all other forms which embody his invention. The application of this rule illustrated.

[*Winans* vs. *Denmead*. United States Supreme Court, 1853. Not yet reported.]

This case turned upon the construction of the specification upon which a patent had been granted to the plaintiff for a railroad car for carrying coal. The plaintiff's patent was for a car for carrying coal, made of thin sheet iron, in the form of the frustrum of a *cone*, substantially as described in his specification. The car of the defendant was made of iron of the same thickness, but was in the form of the frustrum of an *octagonal pyramid*. The excellence of both cars was due to their being self-sustaining—dispensing with framing, and carrying more coal, in proportion to dead weight, than had ever been carried before. In a word, they accomplished the same useful results, in the same way. But one was a *cone* and the other a *pyramid*. The horizontal section of one was a *circle*, and the other an *eight-sided* figure; and the specification claimed the *conical* form only substantially. The plaintiff brought this action in the circuit court for the district of Maryland, for an infringement. The defendant did not contest the plaintiff's patent, but denied that the car constructed by him was an infringement of it. Upon the trial the district judge instructed the jury; in that while the patent was good for what was described therein, a conical body in whole or in part, supported in any of the modes indicated for sustaining a conical body on a carriage or truck, and drawing the same, yet as it was admitted that the defendant's car was entirely rectilinear, there was no infringement of the plaintiff's patent.

Under this instruction the jury found for the defendant, and the plaintiff appealed to the supreme court. The nature of the invention and the substance of the specifications are stated in the opinion.

CURTIS, J.—Upon such a trial as that had in this case, two questions arise. The first is, what is the thing patented? the second, has that thing been constructed, used, or sold by the defendant?

The first is a question of law, to be determined by the court, construing the letters patent and the description of the invention and specification of claim annexed to them. The second is a question of fact, to be submitted to a jury.

In this case, it is alleged, the court construed the specification of claim erroneously, and thereby withdrew from the jury questions which it was their province to decide. This renders it necessary to examine the letters patent and the schedule annexed to them, to see whether their construction by the circuit court was correct.

In this, as in most patent cases, founded on the alleged improvements in machines, in order to determine what is the thing patented, it is necessary to inquire:

1. What is the structure or device described by the patentee as embodying his invention?

2. What mode of operation is introduced and employed by this structure or device?

3. What result is attained by means of this mode of operation?

4. Does the specification of claim cover the described mode of operation by which the result is attained?

Without going into unnecessary details, or referring to drawings, it may be stated that the structure described by this patent is the body of a burden railroad car, made of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustrum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached. This bottom is made movable, in order to discharge the load through the aperture left by removing it.

To understand the mode of operation introduced and employed by means of this form of the car-body, it is only necessary to state what appears on the face of the specification, and was testified to by experts at the trial as correct, that by reason of the circular form of the car-body, the pressure of the load outward was equal in every direction, and thus the load supported itself in a great degree; that by making the lower part conical, this principle of action operated throughout the car, with the exception of the small space to which the movable bottom was attached; that, being conical, the lower part of the car could be carried down below the track, between the wheels, thus lowering the center of gravity of the load; that the pressure outward upon all parts of the circle being equal, the tensile strength of the iron was used to a much greater degree than a car of a square form; and, finally, that this form of the lower part of the car facilitated the complete discharge of the load through the aperture when the bottom was removed.

It thus appears that, by means of the change of form, the patentee has introduced a mode of operation not before employed in burden cars, that is to say, nearly equal pressure, in all directions, by the entire load, save that small part which rests on the movable bottom; the effects of which are, that the load, in a great degree, supports itself, and the tensile strength of the iron is used; while at the same time, by reason of the same form, the center of gravity of the load is depressed, and its discharge facilitated.

The practical result attained by this mode of operation is correctly described by the patentee; for the uncontradicted evidence at the trial showed that he had not exaggerated the practical advantage of his invention. The specification states as follows:

"The transportation of coal, and all other heavy articles in lumps, has been attended with great injury to the cars, requiring the bodies to be constructed with great strength to resist the outward pressure on the sides, as well as the vertical pressure on the bottom, due not only to the weight of the mass, but the mobility of the lumps among each other, tending to 'pack,' as it is technically termed. Experience has shown that cars, on the old mode of construction, can not be made to carry a load greater than its own weight; but by my improvement I am enabled to make cars of greater durability than those heretofore made, which will transport double their own weight of coal," etc.

Having thus ascertained what is the structure described, the mode

of operation it embodies, and the practical result attained, the next inquiry is, Does the specification of claim cover this mode of operation by which this result is effected?

It was upon this question the case turned at the trial in the circuit court.

The testimony showed that the defendants had made cars similar to the plaintiff's, except that the form was octagonal instead of circular. There was evidence tending to prove that, considered in reference to the practical uses of such a car, the octagonal car was substantially the same as the circular.

The substance of the ruling of the judge who tried the cause was, that the claim was limited to the particular geometrical form mentioned in the specification; and as the defendants had not made cars in that particular form, there could be no infringement, even if the cars made by the defendant attained the same result by employing what was, in fact, the same mode of operation as that described by the patentee. We think this ruling was erroneous.

Under our law a patent can not be granted merely for a change of form. The act of February 21, 1793, sec. 2d, so declared in express terms; and though this declaratory law was not re-enacted in the patent act of 1836, it is a principle which necessarily makes part of every system of law granting patents for inventions. Merely to change the form of a machine is the work of a constructor, not of an inventor; such a change can not be deemed an invention. Nor does the plaintiff's patent rest upon such a change. To change the form of an existing machine, and by means of such change to introduce and employ other mechanical principles, or natural powers, or, as it is termed, a new mode of operation, and thus attain a new and useful result, is the subject of a patent. Such is the basis on which the plaintiff's patent rests.

Its substance is, a new mode of operation, by means of which a new result is obtained. It is this new mode of operation which gives it the character of an invention, and entitles the inventor to a patent; and this new mode of operation is, in view of the patent law, the thing entitled to protection. The patentee may, and should, so frame his specification of claim as to cover this new mode of operation which he has invented; and the only question in this case is, whether he has done so, or whether he has restricted his claim to one particular geometrical form.

There being no evidence in the case tending to show that other forms do in fact embody the plaintiff's mode of operation, and, by means of it, produce the same new and useful result, the question is, whether the patentee has limited his claim to one out of the several forms which thus embody his invention.

Now, while it is undoubtedly true that the patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, though they also embody his invention, yet such an interpretation should not be put upon his claim if it can fairly be construed otherwise, and this for two reasons:

1. Because the reasonable presumption is, that having a just right

to cover and protect his whole invention, he intended to do so. (*Haworth* vs. *Hardcastle*, Web. P. C., 484.)

2. Because specifications are to be construed liberally in accordance with the design of the constitution, and the patent laws of the United States, to promote the progress of the useful arts, and allow inventors to retain to their use, not any thing which is matter of common right, but what they themselves have created. (*Grant* vs. *Raymond*, 6 Peters' R., 218; *Ames* vs. *Howard*, 1 Sum., 432, 435; *Blanchard* vs. *Sprague*, 3 Sum., 535, 539; *Davol* vs. *Brown*, 1 Wood. & Minot, 53, 57; *Parker* vs. *Haworth*, 4 McLean's R., 372; *Le Roy* vs. *Tatham*, 14 How., 181; *Nelson* vs. *Harford*, Web. P. C., 341; *Russell* vs. *Cowley*, Web. P. C., 470; *Burden* vs. *Winslow*, 12 How.)

The claim of the plaintiff is in the following words:

"What I claim as my invention, and desire to secure by letters patent, is making the body of a car for the transportation of coal, etc. in the form of a frustrum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which, also, the lower part is so reduced as to pass down within the truck frame, and between the axles, to lower the center of gravity of the load, without diminishing the capacity of the car as described.

"I also claim extending the body of the car below the connectiug pieces of the truck frame, and the line of draught, by passing the connecting bars of the truck frame and the draught bar, through the body of the car, substantially as described."

It is generally true, when a patentee describes a machine, and then claims it as described, that he is understood to intend to claim, and does by law actually cover, not only the precise forms he has described, but all other forms which embody his invention, it being a familiar rule, that to copy the principle, or mode of operation described is an infringement, although such copy should be totally unlike the original in form or proportions.

Why should not this rule be applied to this case?

It is not sufficient to distinguish this case to say, that here the invention consists in a change of form, and the patentee has claimed one form only.

Patentable improvements in machinery are almost always made by changing some one or more forms of one or more parts, and thereby introducing some mechanical principle or mode of action not previously existing in the machine, and so securing a new or improved result. And in the numerous cases in which it has been held that to copy the patentee's mode of operation, was an infringement, the infringer had got forms and proportions not described, and not in terms claimed. If it were not so, no question of infringement could arise. If the machine complained of were a copy, in form, of the machine described in the specification, of course it would be at once seen to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of

inventors would be valueless, if it were enough for the defendant to say: Your improvement consisted in a change of form, you describe and claim but one form; I have not taken that, and so have not infringed.

The answer is: My improvement did not consist in a change of form, but in the new employment of principles or powers, in a new mode of operation, embodied in a form by means of which a new or better result is produced. It was this which constituted my invention; this you have copied, changing only the form; and that answer is justly applicable to this patent.

Undoubtedly there may be cases in which the letters patent do include only the particular form described and claimed. (*Davis* vs. *Palmer*, 2 Brock., 309.) But they are in entire accordance with what is above stated.

The reason why such a patent covers only one geometrical form is not that the patentee has described and claimed that form only; it is because that form only is capable of embodying his invention; and consequently, if the form is not copied, the invention is not used.

Where form and substance are inseparable, it is enough to look at the form only. Where they are seperable, where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention, for that which entitled the inventor to his patent, and which the patent was designed to secure. Where that is found, there is an infringement; and it is not a defense that it is embodied in a form not described, and in terms claimed by the patentees.

Patentees sometimes add to their claims an express declaration to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words. The exclusive right to the thing patented is not secured, if the public are at liberty to make substantial copies of it, varying its form or proportions. And therefore the patentee having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms.

Indeed, it is difficult to perceive how any other rule could be applied practically to cases like this. How is a question of infringement of this patent to be tried? It may safely be assumed that neither the patentee, nor any other constructor, has made, or will make, a car exactly circular. In practice, deviations from a true circle will always occur. How near to a circle then must a car be, in order to infringe? May it be slightly elliptical, or otherwise depart from a true circle, and if so, how far?

In our judgment the only answer that can be given to these questions is, that it must be so near to a true circle as substantially to embody the patentee's mode of operation, and thereby attain the same kind of result as was reached by his invention. It is not necessary that the defendant's cars should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be pre-

cisely the same in degree. It must be the same in kind, and effected by the employment of his mode of operation in substance. Whether, in point of fact, the defendant's cars did copy the plaintiff's invention in the sense above explained is a question for the jury, and the court below erred in not leaving that question to them upon the evidence in the case, which tended to prove the affirmative.

The judgment of the court below must be reversed.

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CONSTRUCTION.—TERMS OF A LETTER.

Where defendant wrote a letter to the plaintiff, a teacher, stating certain terms on which his fellow-townsmen desired to engage her services, and she accepted the invitation of the letter, and taught the school—*Held*, that the letter should be construed as merely suggesting terms upon which a contract might be made, not as offering a definite contract for acceptance.

[*Wilie* vs. *Price*; 5 Richardson's (S. C.) Eq. R., 91.]

This petition was filed by William Wilie and Amanda his wife, to obtain a discovery from the defendant. It appeared that the female plaintiff, before her marriage, had resided in Camden, with her brother-in-law, one Alden; when, through a letter written by the defendant to Alden, and dated the 14th of May, 1854, she was invited to take charge of a female school in the village of Lancaster, in the following terms: "We have had a meeting of all the citizens of the place who are interested in a female school, and all are perfectly satisfied with Miss Johnson, as recommended, and are very anxious to employ her as our teacher, and are resolved to make her this proposition. We will guarantee to her the sum of $400 for one year, and we will pay her board, she to take charge of the school; and if the school should become too great in number, an assistant will be employed at the expense of the trustees." Accepting this invitation, she went to Lancaster in June, 1845, and taught a female school there for one quarter and ten days. Becoming sick, she returned to Camden, with the intention of resuming her school on the restoration of her health, but while at Camden she received a letter from the defendant, suggesting that for various reasons the school should not be revived; and she did not resume, nor offer to resume, her employment as a teacher in Lancaster. The parties separated by consent, and neither now insisted upon the entirety of any contract between them for a year.

By their petition, the plaintiffs sought discovery from the defendant of the names of the trustees of the school, and of the persons represented in the phrase of the defendant's letter, "we will guarantee," etc., alleging that the defendant had declined to disclose these names on their previous application to him; and they prayed that he alone, if he wrote the letter without authority from others, or that he and others, who might be jointly liable with him, when made parties, might be decreed to make payment for the time during which the female plaintiff taught school. Upon the hearing, the chancellor

ordered the petition to be dismissed; and the plaintiff appealed from this decision. One question discussed from the appeal was, whether there was any contract between the parties.

WARDLAW, CH.—Does the letter of the defendant to a friend and agent of the plaintiff propose a definite contract, which her acceptance consummated into an agreement, by exhibiting the concurrence of minds of the parties of opposite interests in the subject? If an individual person were to write a letter to one wishing employment as a teacher, nearly in the words of the letter in question, saying, I will guarantee to you $400 a year and board you, if you will teach my daughters, it would not be questioned, that if the person addressed accepted the offer and entered upon the employment, a valid contract was made. So if one were to make a similar offer in behalf of himself and A and B, which was accepted, when he had no authority from A and B to make the offer, he would be singly bound. (*Fant* vs. *Gadberry*, 5 Rich., 10.)

But in ascertaining the intentions of parties from the language they have employed, courts should interpret and apply their words in the light of surrounding circumstances, and not insist upon any nice philological construction of their phrases. *Qui hæret in litera, hæret in cortice.* The letter of the defendant to Alden, agent of the plaintiff Amanda, when fairly interpreted, simply relates the proceedings of a public meeting, and proposes a basis upon which the plaintiff may treat for a contract with the citizens of Lancaster interested in a female school. It is not the offer of a contract in behalf of particular persons, to be completed by acceptance on the other side; it is the suggestion of what an irresponsible community had resolved to do, as the beginning of a correspondence for a contract. "We will guarantee," etc., by necessary inference, and by grammatical construction, refers to the writer of the letter, and to others in common with him, "interested in a female school" at Lancaster, and implies that a definite contract was to be thereafter made. We may regret that Miss Johnson, from youth and inexperience, as suggested in the earnest argument of her counsel, or from any other cause, was incautious in securing fit compensation for her services, by some contract binding her employers, before she entered upon her duties; and we may even regard the defense as ungracious; but we can not venture to decide cases upon notions of gallantry and taste. We are of opinion, that the letter of the defendant suggested terms upon which a future contract might be made, but did not offer a definite contract, to be completed by acceptance.

STATUTORY CONSTRUCTION.—VESSELS OF COMMERCE.

**Vessels engaged in the fisheries, including whaling vessels, are embraced in the phrase, "vessels of commerce."**

[*Extract from the charge of Mr. Justice Curtis to the grand jury, delivered at Providence, R. I., 15 Nov.*, 1853. 1 Curtis' (U. S.) C. C. R., 509.]

CURTIS, J.—In an act passed in 1850 (9 Stat. at Large, 515) occurs this clause: "Provided that flogging in the navy, and on board *vessels of commerce* be, and the same is hereby abolished from and after the passage of this act."

It is to be regretted that what we are bound to presume were the necessities of the case, did not permit Congress, in dealing with a subject of so much practical importance, to be more explicit in declaring its intention; and that consequently the powers and rights of masters and seamen engaged in the merchant service are involved in doubts which can be finally removed only by legislation, or at the expense of much time and money, and no small suffering by many persons. To remove some of these doubts, so far as may be in my power, by an exposition of what I deem to be the legal effect of this clause, is my present purpose. In the first place, then, what is meant by the words "vessels of commerce?"

So far as I am aware, these words are here used for the first time to describe a class of vessels. The phrases found in other laws are, "any American ship or vessel," "any vessel belonging in whole or in part to any citizen or citizens of the United States," or in equivalent terms. And the argument which may be derived from this departure from the use of these usual words is, that if Congress had intended to embrace every vessel belonging to a citizen or citizens of the United States, or every American vessel, the act would have said so; and that instead of doing so, it restricts the operation of the law to one kind of vessels only, that is to say, vessels of commerce; and that vessels employed only in fisheries are not vessels of commerce; that they are recognized by the legislation of Congress as engaged in a distinct business, viz., in the capture of whales and the taking of fish, and are under restrictions and requirements, and are entitled to privileges which are not attached to other vessels whose business it is to carry on the intercourse and traffic of the commercial world.

It must be admitted that this argument is entitled to no small weight; and I believe the opinion that vessels engaged in the fisheries are not within this law is entertained by some, though I do not know that it has yet been announced in any judicial decision. The great and increasing number of persons employed on board vessels engaged in the whale fishery, the length of many of their voyages, the large proportion of green hands unaccustomed to the necessary subordination of the service, its frequent emergencies and great hazards, the terms of the contract by which all participate in the disappointments as well as the successes of the voyage, and in some places, there is

too much reason to believe, the unfair practices which have been used to obtain men—all combine to render it extremely important that the lawful powers of the master to inflict punishment on the crew of such a vessel should be clearly defined. I believe it is within the experience of all who are accustomed to administer the criminal laws of the United States, in the district constituting this circuit, from whence mainly this fishery is prosecuted, that there is no class of vessels in respect to which it is so necessary that the relative rights and duties of officers and seamen should be settled and known, or in respect to which doubts upon important points would work so much mischief. I have therefore given to this question the consideration which it demands, and my opinion is, that by this law it was intended by Congress to embrace vessels engaged in the whale and other fisheries, under the words "vessels of commerce," and I will state briefly the reasons which have brought me to this conclusion.

In the first place, I do not perceive any sufficient reasons why masters of fishing vessels should continue to possess the power to inflict the punishment of flogging when it is taken away from all others. If, as we are bound to presume, there was a mischief to be remedied, I can not find any firm ground upon which it can be asserted that fishing vessels were not within that mischief. There are differences, undoubtedly, between the ordinary merchant service and the persons engaged in it, and the fisheries and those who carry them on. But if those differences are such as to render this power more necessary in whaling than in merchant voyages, they clearly render its existence less necessary in the other fisheries, in which, from the character of those employed, and the nature and terms of their enterprises, an occasion to inflict such punishment is, happily, extremely rare. And if we consider the purpose of the law to have been to abolish this mode of punishment, because of its effects upon those subjected to it, those engaged in the fisheries, so far as I can see, have an equal claim to be protected from these effects. And therefore if the words "vessels of commerce" can be fairly interpreted so as to include vessels engaged in the whale and other fisheries, I feel it to be my duty so to interpret them.

From a very early period in the history of the government, Congress has regulated the vessels and the persons employed in the fisheries. Their national importance was well understood when the constitution was adopted. Their rights and privileges had formed a prominent subject of the negotiations for peace with Great Britain, and hold an important place in the treaty of 1783; and they have at all times been treated as a subject of legislation within the constitutional powers of Congress. Yet there is no clause of the constitution conferring that power on Congress, except this: "Congress shall have power to regulate commerce with foreign nations, and among the several states."

It is clear, then, that unless the fisheries were a branch of the commerce of the United States, Congress would not have power to regulate them; a power which, so far as I know, has never been questioned, and certainly has been exercised so long, and in so many forms,

that it must now be deemed to be beyond dispute. Nor does there seem to be any real difficulty in considering the fisheries as one branch of commerce. It has been said by high authority, that the term commerce, though it includes traffic, is not limited to the buying and selling of commodities.

It includes also intercourse, and therefore a vessel which merely transports passengers from one country to another is engaged in commerce, and is under the regulating power of Congress. So it includes the mere transportation of commodities; and a vessel which carries commodities for hire, though the master or owners neither buy nor sell any thing, is engaged in commerce.

Now, though whale ships are engaged in capturing whales, and in manufacturing their oil, they are also engaged in transporting that commodity across the ocean, for sale on its arrival here. They not only transport from without the United States one of the commodities of commerce, but that commodity is brought into the United States, and is sold for the account of those employed in the voyage, and owning the vessel. In the strictest sense, therefore, such vessels are engaged in commerce, and may be called, though it is in legislation a new phrase, vessels of commerce. In this sense, I consider Congress used the words, intending to embrace in them all vessels within the commercial power of Congress.

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### FIRE INSURANCE.—CONSTRUCTION OF POLICY.

**In a fire policy it was provided that the company should not be liable for any loss occasioned by the explosion of a steam-boiler. An explosion took place, which so far shattered the building that the fire in the furnace and stove set up in it was communicated to the woodwork and machinery. *Held*, that the company were not liable for the damage thus done by fire.**

[*St. John* vs. *The American Mutual Fire and Marine Ins. Co.*; 1 Duer's (N. Y.) Superior Court R., 371.]

This was an action on a policy of insurance. The facts appear sufficiently in the opinion of the court.

Bosworth, J.—The defendant, by the policy of insurance on which this action is brought, agreed to make good to the plaintiff all such immediate loss or damage, as should happen by fire, on their machinery and fixtures in the brick building Nos. 5 and 7 Hague Street, in the city of New York.

The policy (in the body of it) provided that the company shall not be liable for any loss or damage by fire, which may happen by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power.

Certain conditions were annexed to the policy, by one of which it is provided, among other things, that the company will not be liable for any loss occasioned by the explosion of a steam-boiler, or explosions arising from any other cause, unless specially specified in the policy.

The preliminary proofs of the loss, signed and sworn to by the plain-

tiff, state the fact of the occurrence of the fire, and that it "was immediately preceded by the explosion of a steam-boiler on said premises, whereby the walls of the said building were mostly thrown down, and the fire which was used in the furnace of the steam boiler and in stoves in various parts of said building was communicated to the frame and woodwork of said building, and the materials and machinery contained therein."

W. M. Tweed, a witness for the plaintiff, testified that he resided in the rear of the premises, and that his bedroom window looked right into the building. That he was dressing when he heard a report like a gun, and looking toward the building, saw it sinking, and a cloud of dust rising. Saw the flame break out before he left the house. The fire burned briskly from the time when it first broke out till 4 P. M., and continued till 6 the next morning.

When the plaintiff rested, the defendants' counsel moved for a nonsuit, on the ground that it was manifest from the plaintiff's testimony, that the fire was occasioned by the explosion of the boiler, and that by the express conditions of the policy the defendants were not liable for a loss so occasioned.

The motion for a nonsuit was overruled and exception taken. The main question arising on the appeal involves the proper construction of the clause, in the conditions annexed to the policy, which declares that this company will not be liable "for any loss occasioned by the explosion of a steam-boiler."

Was the loss on this case occasioned by the explosion of a steam-boiler, according to the natural and obvious meaning of those words, as used in this policy?

Unless this clause will exempt the defendants from all loss or damage by fire which may be caused directly and immediately by the explosion of a steam-boiler, it is wholly nugatory.

All kinds of loss resulting from the explosion of a steam-boiler not producing fire, nor bringing the insured property and fire in contact, must necessarily have been borne by the plaintiff, even if no part of this clause had been contained in the policy. The insurance is only against loss and damage by fire. If there had been no fire, and the insured property had been utterly destroyed by the explosion, no recovery could have been had against the company, even if this clause had been omitted, for the simple reason, that only loss or damage by fire was insured against.

It can not be supposed that the clause was introduced to guard against a liability which could not by any possibility arise, but to guard against one which might arise but for the existence of this provision. The only one which could arise from the explosion of a steam-boiler, would be for an immediate loss or damage by fire occasioned or communicated by such explosion.

The policy, after providing that the company will not be liable for any loss or damage by fire happening by means of any invasion, etc., adds that they will not be liable "for any loss occasioned by the explosion of a steam-boiler." The most comprehensive terms are here used. And if this loss was occasioned by the explosion, it would seem

to be covered by the clause, whether the loss resulted from the fire being directly communicated to the injured property, or from its being crushed into worthless fragments.

A loss of the former nature was the only one which the company had any occasion to guard against. We think they have done this by the clause in question.

The preliminary proofs and other evidence show that the explosion communicated the fire in the furnace and stoves directly and instantaneously to the injured property. So far as loss and damage by fire resulted from a burning of the insured property, it was occasioned solely, immediately, and exclusively by the explosion. The explosion and setting on fire of the injured property were simultaneous, and the former caused the latter. It was the actual and immediate cause of the loss. The explosion threw the fire among the insured property, and immediately set it on fire. The loss produced by burning was therefore occasioned by the explosion. The burning of the property was a direct and inevitable result of the explosion, and not a remote consequence of it.

We are of the opinion, that the loss or damage resulting from the burning of the insured property was occasioned, in this case, "by the explosion of a steam-boiler," according to the obvious and proper meaning of those words as used in this policy, and that the plaintiff ought to have been nonsuited.

The verdict must be set aside and a new trial granted, with costs, to abide the event.

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CONTRACTS.—BAILMENT.—SALE.

**Where ale was sold in barrels upon an understanding that the barrels should be returned by the purchaser, and if not returned they should be paid for by him at a stipulated price—*Held*, that this was a bailment of the barrels, and not a sale.**

[*Westcott* vs. *Tilton*; 1 Duer's (N. Y.) Superior Court R., 53.]

This was an action to recover the value of seventy-four iron-bound ale barrels, as unjustly obtained by the defendant, and was tried before the chief justice and a jury in October term, 1851.

The facts proved on the trial were that the plaintiff, who is a brewer in New York, sold in March, 1850, a large quantity of ale in iron-bound barrels to Sherburne & Son, of Boston, on the understanding that the barrels should be returned to the plaintiff, and that in case of failure to return them, they should be paid for at a stipulated price. Sherburne & Son shortly thereafter sold one hundred barrels of the ale to the defendant with the same understanding. In the same month Sherburne & Son, who had then become insolvent, in compliance with a demand of the plaintiff for the empty barrels, gave an order on the defendant for seventy barrels then in his possession. The defendant, however, refused to deliver the barrels, alleging that Sherburne & Son were indebted to him, and that he meant to retain the barrels and apply their value in part satisfaction of his claim.

Verdict was found for the plaintiff for $164 40, subject to the opinion of the court at a general term upon a case to be made by the plaintiff.

SANDFORD, J.—There was no sale of the barrels by the plaintiff to Sherburne & Son.

The evidence shows that when the plaintiff sold ale to that firm, he loaned to them the barrels in which the ale was contained, to be returned to him as soon as the ale was drawn out, with an agreement, that if for any cause it became impossible for Sherburne & Son to return any of the barrels, they should pay for such barrels at a rate stipulated.

This agreement was for the benefit of those purchasers, so that instead of being subjected to a suit for tort in the event of their default to return all the beer casks at the proper time, they should be liable only for their value as upon a contract of sale at a fixed price.

When the beer casks in question were delivered to Sherburne & Son they were the property of the plaintiff. If they had been lost on the voyage to Boston, or burned after their arrival there, the loss would have been his, and they continued to be his property up to the period when Sherburne & Son delivered them to the defendant.

The cases of *Smith* vs. *Clark*, 21 Wend., 83, and *Norton* vs. *Woodruff*, 2 Comst., 153, to which we were referred, are not analogous. Those were instances of exchange of wheat for flour, and there was no stipulation or expectation that the flour to be returned was to be manufactured from the wheat delivered. The court, therefore, held that there was no bailment of the wheat; that it was a sale payable in flour, and that the title to the wheat passed on its delivery. Here, by the contract between the plaintiff and Sherburne & Son, the casks in which the ale was delivered, branded with the plaintiff's name—the specific thing—were to be returned, and not a substitute. It is therefore more like the case of *Mallory* vs. *Willis*, 4 Comst., 76, where flour to be made out of the wheat delivered was to be furnished to the owner of the wheat, and the court of appeals decided that it was a bailment of the wheat, and not a sale. (See also, 2 Kent's Com., 755, note 1, 7th ed.; *Sargent* vs. *Gile*, 8 N. H. R., 325; *King* vs. *Humphrey*, 10 Penn. R. (by Barr), 217.)

The facts presented in the case of *Westcott* vs. *Thompson* were somewhat different from those in the case before us. The plaintiff seems to have relied mainly upon proof of a usage in the trade, and it was shown that he received in return the barrels of other brewers in lieu of his own. These circumstances probably influenced the judgment of the supreme court in giving their decision upon the contract, and they make the case to differ so far from the one before us that it does not possess the weight of an authority. We are entirely convinced that the contract, in this case, was one of bailment, and that there was no sale to Sherburne & Son.

The right set up by the defendant remains to be considered. He claims to be a purchaser of the casks in good faith, and to have the superior equity to retain them.

But first he takes the ground that Sherburne & Son had the election, if the delivery to them were a bailment, to keep the casks if they

thought proper and to pay for them at the stipulated price. We do not so understand the contract. If the casks were in the store of Sherburne & Son, empty, we have no doubt the plaintiff could compel their delivery to him, and maintain an action of replevin if such delivery was refused. The privilege to account for the casks at the price agreed, was applicable only to the case of an inability to return the casks, not to a voluntary retention of them.

They might be unable, from various circumstances, and an instance of a sale of the ale in casks to a remote town or a distant port might be one of those circumstances. Without speculating, however, upon the precise nature or degree of the inability which would have entitled Sherburne & Son to pay for the casks instead of returning them, it is clear that such inability was the sole ground and extent of the privilege.

Next, the defendant's right as a purchaser. While we hold the contract to have been a bailment only, at the same time we are prepared to say, that as against the plaintiff the agreement for receiving the value of the casks which Sherburne & Son were unable to return, would, in favor of a *bona-fide* purchaser of the casks from them, without notice of the bailment, be evidence of an authority to them to sell the casks, it would be so on the ground, that the plaintiff, in favor of such a purchaser, ought to be stopped by that agreement, and the apparent ownership of Sherburne & Son, from denying that they had such an authority.

But the defendant does not stand in the position of a purchaser in good faith, who has paid value upon the strength of Sherburne & Son's right to sell the casks. He bought the ale of them, with the understanding that the barrels were to be returned, or to be paid for. They were not paid for. The ale was sold to him when it was delivered. The barrels were not. If he had the pure option of electing to keep the casks and pay for them, he did not exercise the right. There is no evidence that he ever thought of keeping them until after Sherburne & Son failed. After that event, and some months after the casks had been demanded of him in behalf of the plaintiff, he attempted to pay for the casks to the assignee in bankruptcy of Sherburne & Son, by offsetting their value against a protested note of that firm held by him. It does not appear that he had this note when the firm failed or when the casks were first demanded. And after that it was too late for him to influence the plaintiff's right, as the real owner, to have the casks returned to him.

Besides all this, the evidence would warrant a jury in finding that the defendant received the casks from Sherburne & Son on the same terms and conditions that they received them from the plaintiff, and that they never had a right to elect to become the purchaser of the casks.

On both grounds we are clear that he had no just claim to withhold the casks from the plaintiff, and there must be a judgment for the latter for the amount of the verdict.

Judgment for plaintiff.

PAYMENT.—NOTE OF THIRD PERSON.

When the seller of goods accepts, at the time of sale, the note of a third person, unindorsed by the purchaser, in payment, the presumption is that the payment was intended to be absolute; and though the note should be dishonored, the purchaser will not be liable for the value of the goods.

[*Noel* vs. *Murray*; 1 Duer's (N. Y.) Superior Court R., 385.]

This was an action to recover the sum of $988 69, as a balance due to the plaintiffs upon a sale by them to the defendant of a quantity of looking-glass plates. The answer admitted the sale, but set up as a defense, the satisfaction of the whole debt then contracted, by a payment of $38 33 in cash, and a delivery of a promissory of J. Howland & Son for $988 69; and gave in evidence the plaintiffs' bill, to which was appended the following receipt signed by the plaintiffs:

"NEW YORK, *October* 12*th*, 1850.

"Received from John B. Murray, Messrs. J. Howland & Sons' note, at six months from 17th September, for nine hundred and eighty-eight $\frac{89}{100}$, and thirty-eight $\frac{33}{100}$ dollars, in full for the above bill."

The note referred to, it was admitted, had not been paid.

It was also proved on the trial that the plates were ordered, and the order was accepted by the plaintiffs on the 8th of October, though none of them were delivered until the 12th.

OAKLEY, C. J.—It is not necessary to deny that in this state the law is settled that the acceptance of a bill or note of a third person, by a creditor, even when not indorsed by the debtor, never operates as a satisfaction of a precedent debt, unless it is expressly shown that such, at the time, was the understanding and agreement of the parties; and it may also be admitted that this rule prevails, even when a receipt is given by the creditor, acknowledging the bill or note to have been received by him as a payment in full. But these admissions are not at all inconsistent with the position that when the seller of goods, at the time of the sale, accepts the note of a third person not indorsed by the debtor, and gives a receipt for it, as a payment, in part or in full, of the price, it is a presumption of reason, and therefore of law, that the payment so made was meant to be absolute and the purchaser to be wholly discharged. That this is the reasonable and legal presumption we can not donbt.

In this case there was in reality no sale before the 12th of October, and consequently no precedent debt. The order given by the defendant, and its acceptance by the plaintiffs on the 8th of October, were evidence of a verbal agreement; but as none of the goods were then delivered, and no part of the consideration then paid, the agreement was void under the statute of frauds, so that when the parties met on the 12th, there was no contract upon which either of them was, or could be rendered, liable to the other. The actual sale was made and completed on that day; and as the date and delivery of the goods, and the delivery and acceptance of the note, were simultaneous acts, they

must, in our judgment, be considered as parts of one transaction, and the execution of an entire agreement. The sale, by the election of the plaintiffs, was not for cash, or upon credit, but partly for cash and partly for the note; and the acceptance of the note and the discharge of the defendant thus became conditions of the purchase. All the facts in the case, the entries in the books, and, emphatically, the terms of the receipt, correspond entirely with this view of the intention of the parties, and, as it seems to us, do not admit of any other interpretation.

Whether a receipt thus given, and expressed to be for a payment in full, ought not to be held as concluding the plaintiffs, is unnecessary now to determine; but we are clearly of opinion that it casts upon them the burden of proof, and that the conclusion, which its terms necessarily suggest, could only be repelled by evidence of an express agreement that the note should be held only as collateral security, and its amount be credited to the defendant only when collected. No such evidence was given or offered upon the trial.

We are therefore of opinion, that the defense set up in the answer has been established, and that the defendant is, upon the facts, as they appear in the case, entitled to judgment.

We remark, in conclusion, that we have not been referred to any adjudged case which is in conflict with the views we have expressed; and our decision is fully sustained by the case of *St. John* vs. *Purdy* (1 Sand. 9).

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### STATUTE OF LIMITATIONS.—PART PAYMENT BY CO-DEBTOR.

**A part payment made by one of several joint debtors, upon a debt barred by the statute of limitations, will remove the bar of the statute as to the others.***

[*Reid* vs *McNaughton*; 15 Barbour's (N. Y.) Supreme Court R., 168.]

This was an action on a joint and several promissory note made by one Crary as principal, and McNaughton as surety, for two hundred dollars, to Daniel Reid, and dated 23d July, 1841. The defense was the statute of limitations. It appeared that John Crary had made a part payment in 1845, and having died in 1848, this action was brought against McNaughton.

WILLARD, P. J.—The only question which fairly arises on this appeal is, whether payment of interest by Mr. Crary, one of the joint and several makers, took the case out of the statute of limitations as to McNaughton, the action having been brought within six years after such payment was made.

There is a difference between the acknowledgment of a debt and a promise to pay by an oral declaration, and a partial payment of the debt itself, especially when the payment is for interest. The payment of interest raises a conclusive presumption that there remains due a prin-

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* Our readers will remember that the supreme court of Pennsylvania have, in a recent case, rendered a decision diametrically opposite to that given above. (See *Coleman* v. *Fobes*, 2 Liv. Law Mag., 246.)

cipal sum upon which that interest is computed. When the sum paid is expressed to be $14 for the interest for one year, as in the present case, it removes all doubt that a principal of $200 remains due. In *Whitcomb* vs. *Whiting*, Doug., 651, a note was taken out of the statute as against all the parties, by the payment, by one of the joint makers, of the interest and part of the principal. Payment by one, said Lord Mansfield, is payment by all; the one acting virtually as agent for the rest; and the law raises the promise to pay when the debt is admitted to be due. In *Hunt* v. *Bridgham*, 2 Pick., 581, a partial payment made on a note by the principal promissor, took the case out of the statute of limitations as to the surety. In that case the payment was made after the statute had attached, and it was a payment *generally* on the note, and not specifically of interest. It was a case, therefore, where the equity of the defendant was far stronger than in the principal case. It went farther than it is necessary to go in this case.

Payment by the principal takes the case out of the statute, as against the surety. The payment of principal or interest stands on a different footing from the making of promises, which are often rash and ill-interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment, (*Wyatt* vs. *Hobson*, 8 Bing., 309; *Burleigh* vs. *Stott*, 8 Barn. & C., 36. See also *Pease* vs. *Hirst*, 10 Barn. & C., 122; *Lane* vs. *Doty*, 4 Barb., 530; *Tracy* vs. *Rathbun*, 3 *ib.*, 543; *Hammon* vs. *Huntley*, 4 Cowen., 493; *White* vs. *Hale*, 3 Pick., 191; *Frye* vs. *Baker*, 4 *ib.*, 382; *Round* vs. *Lathrop*, 4 Conn. R., 336; *Channel* vs. *Ditchburn*, 5 Mees. & W., 494; *Manderton* vs. *Robertson*, 4 Man. & Ryl., 440.)

The slight circumstances which had, in many cases, been held to avoid the statute of limitations, led to Lord Tenterden's act (9 Geo. IV. ch. 14), requiring a writingin the case of a new promise or acknowledgment. But that statute left the effect of a partial payment untouched. (6 Bac. Abr., 403, tit. Limitations of Actions; Coll. on Part. 234.) In the code of 1849, §90, it is provided, that "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; *but this section shall not alter the effect of any payment of principal or interest.*" Here is an express legislative recognition of the safety with which we may repose upon an act of partial payment to remove the bar, interposed by the statute, to the remedy.

The principle that each joint debtor, while the liability continues, is the agent for his companion to make payments, has been repeatedly affirmed by eminent judges in distinct terms. (See *Burleigh* vs. *Stott*, 8 Barn. & C., 36, and various other cases already cited.) Payment by one inures to the benefit of the other. A release to one would discharge the debt as to both. (Bac. Abr., tit. Obligation D.) While the original debtors are living there is a privity between them. This privity is destroyed by the death of either party, and the agency is revoked. (*Lane* vs. *Doty*, 4 Barb., 530; *Atkins* vs. *Fredgood*, 2 Barn. & C., 23; *Slater* vs. *Lawson*, 1 Barn. & Ad., 396.) In these cases it was in effect

conceded, that during the life of the original parties, each joint debtor is the agent for his associate to make payment. And the common law declares the effect of the payment of part of a debt. It continues the liability of all the parties from the time of payment. (2 Greenl. Ev., §444.) The code does not confine the effect of this payment to the party making it, but leaves the case as at common law. I have never been able to discover any hardship or absurdity in the rule. (Angel on Limitations, chap. 23, p. 270, *et seq.*)

With regard to partners, it has never been denied, that during the continuance of the partnership one partner has a right to do acts and make admissions in reference to the partnership affairs by which all are bound. This is one of the incidents of that relation, and springs from their community of interest. Payment to one of two partners is payment to both. (Coll. on Part., 379, 3 Moore & Payne, 555.) Notice to one binds the whole. (*Mayhew* vs. *Eames*, 1 Carr. & P., 550; 1 Maule & S., 259; *Powell* vs. *Waters*, 8 Cowen., 670, 2 Hill, 451; 5 *ib.*, 101; 6 *ib.*, 318; 4 Paige, 127; 3 Barb., 529.) A release by one of several joint obligees is binding upon all, upon this same principle of agency.

The same principle applies between joint makers of a note, who are not partners. With respect to that transaction they are treated as partners, and subject to all the consequences of that relation. (Douglass, 653, note; Coll. on Part., 239.) The act relative to proceedings against joint debtors treats them as partners *quoad hoc*. (2 R. S., 377; Code, §136.) And this partnership continues till the debt is paid.

The payment of interest by Crary, before the statute of limitations had run, continued not only his liability, but that of McNaughton, upon the note, for six years from the time of such payment. I do not express my opinion on the effect of a partial payment by one, after the statute has attached, that point not being involved in this case. Nor do I express my opinion on a collusive payment, or a small sum paid in fraud of the other joint maker. There was no pretense that the pres ent was not a fair payment made in the ordinary course of business.

I think the judgment should be affirmed.

HAND, J.—Payment of part of the principal or interest is evidence to take the debt out of the statute of limitations. This was so in England before Lord Tenterden's act, and is so since, and has always been so in this state. (*Smith* vs. *Ludlow*, 6 John., 267; *Wenman* vs. *Mohawk Ins. Co.*, 13 Wend., 267; *Arnold* vs. *Downing*, 11 Barb. 554; *Carshore* vs. *Huyck*, 6 Barb., 553; Aug. on Lim., ch. 22; 1 Smith's Lead. Cases, 318, and notes; 2 Sand., 64, n. b.)

The important question in the case now under consideration is, whether part payment by one joint and several maker or contractor will have the like effect as to all of them. It can not be denied that part payment, and even a new promise (before the case of *Van Keuren* vs. *Parmelee*, 2 Comst., 523), was evidence to take a debt out of the statute. This principle was perfectly well settled and has been held to extend to admissions made after the statute had run. (*Smith* vs. *Ludlow*, 6 John., 267; *Johnson* vs. *Beardslee*, 15 *ib.*, 3; *Hammond* vs. *Huntley*, 4 Cow., 494; *Dean* vs. *Hewitt*, 5 Wend., 257; *Patterson* vs

*Choate*, 7 *ib.*, 441 ; *Stillwell* vs. *Hausbrouck*, 1 Hill, 561 ; *Tracy* vs. *Rathbun*, 3 Barb. (S. C.) R., 543 ; *Lane* vs. *Doty*, 4 *ib.*, 530 ; *Watkins* vs. *Stevens*, *ib.*, 168.) The rule has prevailed in England, certainly since *Whitcomb* vs. *Whiting* (2 Doug., 652), decided in 1781, and before and after Lord Tenterden's act, before and after the statute had attached, and against sureties. (*Perham* vs. *Raynal*, 2 Bing., 396 ; *Burleigh* vs. *Stott*, 8 Barn. & C., 36 ; *Bradford* vs. *Tupper*, 7 Eng. L. & Eq. R., 541 ; *Perry* vs. *Jackson*, 4 T. R., 516 ; *Wyatt* vs. *Hodson*, 8 Bing., 309 ; *Rew* vs. *Pettet*, 1 Ad. & E., 196 ; *Pease* vs. *Hirst*, 10 Barn. & C., 122 ; *Goddard* vs. *Ingraham*, 3 Q. B., 839 ; *Channel* vs. *Ditchburn*, 5 Mees. and W., 464 ; *Chippendale* vs. *Thurston*, Moo. & M., 411 ; 2 Saund. R. ; 64, note b. ; 1 Smith's Lead. Cas., notes to *Whitcomb* vs. *Whiting*.)

The decision in *Van Keuren* vs. *Parmelee*, so far as the points decided properly arose in that case, of course is binding upon this court. But it was not a case of part payment, which has been considered as standing upon firmer ground ; and has been excepted from the operation of the new statute. (Code, 110.) If we thought the great array of authorities unsound in principle, still we should not feel authorized to go beyond the case in the court of appeals. It is admitted that case wrought a great change in this state in the law of contracts, and many debts may have been lost to the creditor by overruling an unbroken current of published decisions on the subject in our own courts, covering a period of about forty years, and, indeed, overruling all the decisions in our own courts and in England. With all respect, this seems very like judicial legislation. And we are almost tempted to exclaim in the language of a very learned and able judge, in respect to another decision, "that this avowed departure from the law as it had been previously settled, has made a precedent of 'paramount authority' I most respectfully deny." (1 Hill, 452.) I believe both decisions produced some surprise. Whether the former rule was put on the ground of original contract, agency, or community of interest, was of no importance, if such was the law when the agreement was made. The payment of the debt is a common duty, and payment by one is payment by all. And certainly payment before the statute has attached exonerates all from a legal obligation to that extent, and is doing no more than to perform a legal as well as a moral duty which they then could be compelled to perform. An acknowledgment by one co-contractor, after the statute had attached, since the decision in the court of appeals, is not sufficient. Whether an acknowledgment before, or part payment after, would be, is not the question now before the court. Notwithstanding the statute, the demand remains in existence, and a clear recognition of that existence restores the remedy. It does not create a new debt, but continues the old one. (*Dean* vs. *Hewitt*, 5 Wend., 257 ; *Soulden* vs. *Van Rensellaer*, 9 *ib.*, 297 ; *Wait* vs. *Morris*, 6 *ib.*, 394 ; *Watkins* vs. *Stevens*, 4 Barb., 168 ; *Quantock* vs. *England*, 5 Burr., 2,630 ; *Perham* vs. *Raynal*, supra.) In this state and in England, even before Lord Tenterden's act, a mere admission that the debt was valid in its origin was not sufficient. And if the acknowledgment was accompanied by any protestation against paying the debt, it was insufficient. But from

a clear recognition of an existing debt—a general and unqualified acknowledgment—when nothing is said to prevent it, a general promise to pay ought to be inferred. (*Sands* vs. *Gelson*, 15 John., 518; *Stafford* vs. *Richardson*, 15 Wend., 302; *Allen* vs. *Webster*, *ib.*, 284; *Fearn* vs. *Lewis*, 6 Bing., 349; *Tanner* vs. *Smart*, 6 Barn. & C., 603; Ang. on Lim., ch. 20; 2 Saund., 64, note c, 6th ed.) The power of one partner to create a debt against the co-partnership after dissolution is quite another matter. By acknowledgment, the co-debtor does not create a new obligation; he only restores the remedy, and such only would be the effect, if it bound a co-contractor. The declaration is upon the old contract, except on a promise by an executor or assignee. And admissions to a stranger are sufficient, certainly as against himself. (*Watkins* vs. *Stevens*, *supra*, and cases there cited; *McCrea* vs. *Purmort*, 16 Wend., 477; *Depuy* vs. *Swart*, 3 *ib.*, 135; *Stafford* vs. *Bacon*, 1 Hill, 534; *Soulden* vs. *Van Rensselaer*, 9 *ib.*, 297; *Wait* vs. *Morris*, 6 *ib.*, 294.) The statute does not extinguish the debt or right; and it is optional with the defendant whether, in pleading, he will waive it or not. (*Higgins* vs. *Scott*, 2 Barn. & Ad., 413; 1 Saund. R., 283, n. 2; Bal. on Lim., 17, notes; 1 Toml. Dic., 461.) In many cases, even in trespass, where a joint liability exists by well-established rules of evidence, the admissions of one are competent evidence against his co-defendant. However, complete homage must be paid to the decision of the court of appeals on the question before them, and the effect of the mere admission or promise of one co-contractor is no longer an open question in this court.

The code is not applicable to this case; for that has not altered the law as to payments; and besides the right of action accrued before it was passed. (Code, §§73, 110.) It has been held it applied where the promise was after the code and after the statute had run. (*Wadsworth* vs. *Thomas*, 7 Barb., 445.) With all respect, I have doubts as to the correctness of that decision. (2 R. S., 40, §45; *Van Rensselaer* vs. *Livingston*, 12 Wend., 490; *Sayere* vs. *Wisner*, 8 *ib.*, 661; *McCormick* vs. *Barnum*, 10 *ib.*, 104; *Huntington* vs. *Brinkerhoff*, *ib.*, 278; *Millard* vs. *Whittaker*, 5 Hill, 408; *Johnson* vs. *Burrill*, 2 *ib.*, 238; *Cole* vs. *Irvine*, 6 *ib.*, 634; *Van Hook* vs. *Whitlock*, 3 Paige, 409; *Didier* vs. *Davison*, 2 Barb. Ch., 477; *Carshore* vs. *Huyck*, 6 Barb., 583; *Williamson* vs. *Field*, 2 Sandf. Ch., 533; *Austin* vs. *Tompkins*, 3 Sandf. (S. C.) R., 22; 1 Denio, 128; 7 John., 477.) If the old debt is not extinguished, and the suit is upon that, the right of action within the meaning of the act accrued as soon as a suit could have been brought, and has never accrued twice.

But it is sufficient that this is a case of part payment before the statute had attached. The judgment should be affirmed.

CADY, J., dissented. Before referring to any cases, it may be well to refer to the statute of limitations itself, to ascertain what construction ought to be put upon it. 2 R. S., 295, §18, is as follows: "The following actions shall be commenced within six years next after *the cause of such action accrued, and not after.*" Among the actions enumerated in that section are actions for trespass on lands, actions of replevin, actions for libels and actions of assumpsit. It has at no period been

held by any court, that an admission by a person that he had committed a trespass on another's lands, or published a libel, would take the case out of the statute of limitations, and enable the injured party to maintain an action, ten years after the trespass on the land was committed, the goods taken, or the libel published. Why? Because the admission that a person had felled the trees of his neighbor, taken his goods, or libelled him, gives no new cause of action. The admissions as to the libel may be as full and complete as those concerning a note; and why should they not enable the injured party to recover in one action as well as in the other? The only answer must be, that as to the note, the courts have held that the admission was evidence of a *new* promise, that when the admission was made, a new cause of action accrued; but as to the libel, the admissions were not evidence of a new publication of the libel, and did not therefore give a new cause of action. If the effect of an admission was to continue the old cause of action, its operation would be as effectual in an action for a libel as in an action on a promissory note, and the court must have been much inclined to evade the statute of limitations, when it was first decided that an admission that a note was unpaid, was evidence of a promise to pay it, and that by a promise thus proved a new cause of action accrued.

The plaintiff now insists that John Crary, the principal debtor, had, on the 14th day of October, 1845, authority to make, and did make, a new contract, by which a new cause of action accrued against the defendant, and in favor of the then holder of that note, to recover from him the amount due upon the note, at any time within six years thereafter; and the plaintiff must fail in his action, unless he can show that John Crary had such authority, and that by paying interest on the note he had made such *new* contract which bound the defendant and gave the plaintiff a *new* cause of action against the defendant. There are many adjudged cases which go to sustain the claim of the plaintiff, and others that show that the claim can not and ought not to prevail. How came John Crary, by authority, to make a *new* contract in October, 1845, securing to the then holders of this note a right to sue the defendant at any time within six years thereafter? Suppose John Crary, on the 14th day of October, 1845, had written as follows, on the back of this note: "I, John Crary, for myself and for my surety, John McNaughton, agree that the within note has not been paid, and that we and each of us will pay the same at any time within six years from this date," and signed his name to it; he would thereby have bound himself, but I doubt whether any court would say that he thereby bound the defendant. But will the fact that he paid on that day $14, for the arrears of interest on the note, be legal evidence of a valid contract precisely like the one above supposed? If he had no authority to make an express contract to that effect binding on the defendant, the law would not imply such contract from any act which he could do. It will be difficult, I think, to find a case where the law had implied a contract from the act of a party who had no right to make the contract implied.

What reason has been assigned for holding that payment by one joint debtor created a new cause of action against the others? The only

reason assigned is, that each is agent for the other in making payments. (*Whitcomb* vs. *Whiting*, Doug. R., 652.) Nothing but the great name of Lord Mansfield could have given currency to such reasoning. It is plain enough that payment by one is payment for all, so far as relates to the satisfaction of the debt; but that fact neither shows, nor has it any tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due; and like any other admission can only affect the party who makes it, unless he has authority to speak for others as well as himself. (*Van Keuren* vs. *Parmelee*, 2 Comst., 527.)

I shall not spend time in collecting the cases which have been decided on the authority of *Whitcomb* vs. *Whiting*; nor those in which that case has been disregarded, as I believe the court of appeals, in *Van Keuren* vs. *Parmelee*, intentionally overruled the opinion of Lord Mansfield in that case, and all other cases resting on that. *Dunham* vs. *Dodge* (10 Barb., 566) was a case like this, and decided in favor of the defendant. I am therefore of opinion that the motion for a new trial should be granted.

Judgment affirmed.

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## DAMAGES.—RULES OF LAW.

**The rules of law relative to the measure of damages and the admission of evidence in actions against common carriers of passengers, for personal injuries received through their negligence, considered.**

[*Caldwell* vs. *Murphy*; 1 Duer's (N. Y.) Superior Court R., 233.]

This action was brought to recover damages for an injury done to the plaintiff, and for the death of his child Agnes, caused by the overturning of an omnibus belonging to the defendants, in Third Avenue, in New York city. The case was tried in February, 1851, before Judge Duer and a jury, and a verdict rendered for the plaintiff for $625—and the defendant now moved to set aside the verdict and for a new trial.

CAMPBELL, J.—As a general rule, in cases free from malice or willful negligence, evidence of the wealth of the defendant is inadmissible, because the plaintiff is entitled to the actual damages sustained without regard to the ability of the defendant to pay them. (*Myers* vs. *Malcolm*, 6 Hill, 292.) But in relation to the plaintiff the case is widely different. As to him, it is often necessary to inquire into his condition in life, his habits, pursuits, and necessities, in order that the jury may determine what actual damage he has sustained. The loss of a limb might produce equal pain to two men, but the actual damage which that loss would occasion, when we are called upon to estimate that damage in dollars and cents, would depend very materially upon the pursuits and condition in life of the party claiming to recover such damage. The jury have, and must inevitably have, a very large and liberal discretion in apportioning the damages to the rank, condition, and character of the plaintiff, and they must have evidence touching

that condition and character, so as to have some guide to that discretion. (*Foot* vs. *Tracy*, 1 John., 53; *Lincoln* vs. *Saratoga and S. R. R. Co.*, 23 Wend., 425.) In estimating that damage, also, it is very manifest that a most important inquiry must be, whether the injury which the plaintiff has sustained is of a temporary or of a permanent character. Where successive actions may be brought for a continuous wrong, as in the case of a continued trespass upon land, the damages in each suit are very properly limited to those sustained by the plaintiff at its commencement; but for an injury to the person, resulting from a single act, a single action only can be brought, and it would therefore be manifestly unjust not to take into consideration upon the trial the nature and extent of the injury in all its consequences, since, by not so doing, the plaintiff in many cases would be deprived of the larger portion of the compensation he might justly claim, and the damages given be wholly disproportioned to the injury sustained. The ruling of the judge on the trial, admitting evidence on both these points, we therefore think was correct.

Another question was put to one of the witnesses, inquiring what had been the condition of the plaintiff as to health since the injury, was objected to, and application was made to strike out the answer of the witness, which answer was, that the plaintiff has since invariably complained, and which application to strike out was refused by the judge. It was, perhaps, not very material, and was not much pressed upon the argument. The complaint of pain and suffering connected with the appearance of the injured party forms the means of judging as to his physical condition. The witness to whom this question was addressed had attended on the plaintiff as a friend during the period immediately following the injury, and had aided in lifting him in and out of bed, and saw him frequently after he was able to leave his house, and had therefore the best means of learning whether such complaint was real. We think it was proper evidence for the jury under the circumstances. The judge charged the jury that, as a general rule, common carriers transporting passengers for hire are liable for damage to the persons carried unless the same resulted from inevitable force, or inevitable accident, but in this case, he added, that the sole question was whether the accident was justly imputable to the negligence of the driver. It was contended by the defendant's counsel that there is a wide difference between the liability of common carriers of merchandise and of carriers engaged in the transportation of passengers, that while by the common law the rule, originating in motives of public policy, was that the former were rendered liable for loss, except occasioned by the act of God or the king's enemies, it was much less stringent in reference to the latter class of carriers, and they are not liable if they use ordinary care and prudence in the management of their vehicles. In *Ingolls* vs. *Bills and others*, (9 Metcalf, 1,) the supreme court of Massachusetts examined with much care, and commented on many of the leading cases, and they say in conclusion: "The result to which we have arrived from the examination of the case before us, is this—that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harness,

horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against." Having thus provided the means of transport, they are in like manner bound to use the utmost care and diligence in the managing, directing, and using those means, so that, as far as human care and foresight can go, they may guard against injury. Having done all that human care and foresight can do, and loss happening, they are not liable. Pure accidents will excuse them. They are not answerable, at all events. Human life is too valuable to be required absolutely at the hands of those who have done all that the utmost care and foresight can do for its protection. But the magnitude of its value, at the same time, requires of carriers of passengers such extreme care and foresight. The charge of the judge that the law exacted from common carriers of passengers extraordinary care and diligence, and that they are liable, unless the injury arises from force or pure accident, was entirely correct. We do not deem it necessary to enter upon a review of the cases, but we think they will be found to support this view. (*Christie* vs. *Griggs*, 2 Campbell, 79; *Asten* vs. *Heeren*, 2 Esp. R., 533; *Ingolls* vs. *Bills*, 9 Metcalf, 1.)

At the present period, when the lives of so many hundreds of people are intrusted to the carriers of passengers by steamboats and railroads, and when accidents and disasters are so lamentably frequent, it is no time to relax a rule so salutary and so necessary for public safety.

We are unable to see any reason for a new trial. The judgment for the plaintiff is therefore affirmed with costs.

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DAMAGES.—ASSAULT AND BATTERY.

The rights of officers and private persons, in making service of process, considered. In what cases verdicts will be set aside on the ground of excessive damages.

[*Hager* vs. *Danforth*; 8 Howard's (N. Y.) Practice R., 435.]

This was an action to recover damages for an alleged assault and battery committed on the plaintiff's wife. On the trial the facts shown were substantially these: In August, 1851, the defendant proceeded to the house of the plaintiffs with the view of making service of a subpœna on the latter, issued in a suit commenced before a justice of the peace by the defendant against Hager. The defendant having entered the outer door of the house was met by the plaintiff's wife; words ensued, and she ordered him to leave the premises. This the defendant refused to do, but proceeded toward another room of the house in search of Hager. At the door, between the stoop and main kitchen, a scuffle ensued, and the defendant, in attempting to force his way through, seized the plaintiff's wife and choked her. The defendant succeeded in effecting his way into the main kitchen. After the defendant had choked her, she threw water upon him. Hager was engaged in the business of lathing in an upper chamber. As the wife interfered to prevent the defendant from opening the door leading to the chamber, the latter threw her back against the catch of another

door, and slightly bruised her back. The husband then appeared, and the subpœna was read to him, and shortly afterward the defendant left the house.

The judge, among other things, charged the jury that a license to enter the house for the purpose of serving the subpœna was to be implied; but after Mrs. Hager had ordered defendant out, the subpœna was not a justification or protection to him in pressing forward, and when resisted in his advance, using force to serve it; to which part of the charge the counsel for the defendant excepted.

The jury rendered a verdict in favor of the plaintiff, for $250 damages. The defendant now moved for a new trial.

WRIGHT, J.—The counsel for the defendant makes two points on the motion for a new trial: 1st. That the judge erred in charging the jury "that after Mrs. Hager had ordered the defendant to leave the house, the subpœna was not a justification or protection to him in pressing forward, and when resisted in his advance, using force to serve it. 2d. That the damages are excessive."

1st. On the trial of the case, I was not aware of any principle of law to justify an individual not in the discharge of any official duty, but a mere volunteer, in the service of a subpœna, issued by a justice of the peace in a civil suit, who, having obtained peaceable admission into the house of another, is directed to leave the premises; but, instead of doing so, presses onward forcibly into other rooms of the house, and when resisted by the wife of the plaintiff, inflicts violence upon her person. And subsequent reflection and examination have satisfied me that no such principle exists. I have not been referred to, nor do I think any case can be found in the books justifying the party in using force, breaking the inner door of a man's house, and assaulting his wife when resisting his progress, for the ostensible purpose of making service of a subpœna in a civil suit on the owner of such a house. It is a maxim of the law "that a man's house is his castle;" to enter it without his license or permission, express or implied, is a trespass. Even when entering it by license or permission, a direction to leave is a revocation of the license; and to remain afterward, at least by force, the party becomes a trespasser, "*ab initio*." The owner is entitled to the unmolested enjoyment of his own dwelling. In it, the law throws around the shield of protection, of himself and family. No officer of the law, even, can enter by force to arrest an inmate; it is only when the outer door is open, that an officer armed with process to arrest is justified in entering, and when in, in using force to execute his process.

Leaving out of view in this case the question of the regularity of the process, and the defendant's right to serve it, had he been an officer of the law, with legal process in his hands, as no arrest or manual seizure of the party was required in doing what the defendant did, he would have been technically a trespasser. All the cases to which I have been referred by the counsel for the defendant relate to officers having legal process in their hands, requiring them to seize and arrest the party. In such cases, having gained peaceable entrance into the house, the law justifies the officer in using reasonable force in doing what the process demands. But there is a very wide and obvious

distinction between a case of this kind, and that of a party who voluntarily sues out process requiring no manual seizure or arrest; undertakes the business himself of serving it; with that view, forcibly enters another man's "castle;" is directed to leave the premises; but, instead of so doing, maintains his position, and by force continues in the house, pressing his way to other apartments, until he has accomplished his end.

2d. Should the verdict be set aside and a new trial granted, on the ground that the damages are excessive?

That courts have the legal right to grant new trials in actions of tort, when the damages given are disproportionate to the case proved, has been universally admitted. But the damages should be so outrageous and extravagant as manifestly to show that the jury must have been actuated by passion, partiality, prejudice, or corruption. In other words, that the jury have utterly disregarded the evidence in the case in making up their verdict, and have been controlled by blind passion or prejudice, by or against the parties, or corrupt feelings and motives. The cases are extremely rare in this state of an interference by the courts with the verdict of a jury in actions of tort, on the ground of excessive damages, perhaps for the very potent reason, among others, that it is difficult to come to the conclusion that, in a case where it is peculiarly the province of a jury to measure the damages, they have committed, not an error of the judgment, but of the heart, that they have acted not wisely, but corruptly.

The case was far from one calling for extravagant damages. The wife of the plaintiff, the injured party, evinced at no time any disposition to retire from the strife. Her conduct was characterized by but a small measure of that delicacy and refinement that we look for in a woman. She could bandy opprobrious epithets with almost as much facility as could the defendant. The injuries to her person were slight. I should certainly have been better satisfied with a less verdict, and sitting in the place of the jury, would probably have named the damages at a much smaller sum. But this is not a reason for reversing their verdict. The damages must be so extravagant as to manifest that it was the result, in no degree, of judgment, but of passion, or prejudice, or corruption.

This can hardly be predicated of any verdict of $250 in an action of assault and battery of a female. The charge in this case was not only of assaulting a woman, but doing so in her own house, or that of her husband. The defendant himself sought out the occasion for committing violence, and the jury may have supposed that, although the woman was not entitled to that consideration that under other circumstances her sex demanded, there was scarcely a circumstance in the case to palliate his conduct. I do not think a precedent in this state can be found for setting aside a verdict on the ground of excessiveness of damage in an action of assault and battery, where the amount fixed by the jury did not exceed the sum of $250; and in my judgment, it would not be discreetly or soundly exercising that discretion with which I am in some degree clothed, to make a precedent in this case.

DAMAGES.—NEGLIGENCE OF INJURED PARTY.

Although a party claiming damages for injuries received through the default of another was himself guilty of negligence, yet that will not defeat his recovery unless his negligence contributed to cause the injury.

[*Carrol* vs. *The New York and New Haven R. R. Comp.*; 1 Duer's (N. Y. Superior Court) R., 571.]

This action is brought to recover damages for injuries to the person of the plaintiff, occasioned by a collision on the New York and New Haven Railroad, on the 25th of October, 1851. The facts and grounds of defense sufficiently appear in the opinion of the court.

Bosworth, J.—The plaintiff was injured by two trains running in opposite directions coming in collision. Both trains belonged to the defendants and were controlled by their agents. The collision resulted from their gross negligence. At the time of the collision the plaintiff was in the post-office apartment of the baggage car. It was a much more dangerous location, on the happening of a collision such as took place, than a seat in the passenger cars, and he knew this fact. The conductor acquiesced in his riding in the baggage car; he was therefore lawfully in that car; that is, he was not a trespasser by being there. His being there did not tend directly or indirectly to produce the collision which injured him. If he had been in either of the passenger cars, the collision would have taken place; but if he had been in a passenger car he would not have been injured unless the collision had been productive of consequences to him not suffered by any one in a passenger car. The collision was not caused directly or indirectly, immediately or remotely, by his being in the baggage car; but the injury to himself resulted from the fact that he was in that car when it occurred, and he knew when he took his seat in it, that if a collision took place between that and another train running in the opposite direction, the position was one of much more danger than a seat in either passenger car. Was that a negligence on his part contributing to produce the injury, within the meaning of the rule that "whenever it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or contributed toward it, he is not entitled to recover?" No care on the part of the plaintiff could have prevented the collision; no vigilance on his part, after there were any grounds for apprehending a collision, could have saved him from injury. The collision, therefore, was wholly without fault or negligence on his part, and by the collision he was injured.

It was the duty of the defendants to employ the most scrupulous care and attention to prevent a collision of their trains running in opposite directions. The plaintiff was under no obligation to the defendants to select a location, with a view to avoid the possible consequences of their neglect of that duty. A neglect of that duty would be generally regarded as imminently perilous to all the passengers on board. Whatever may be believed to be the relative safety under such circumstances, of those occupying the passenger cars, probably

but very few, if any, would take passage in a train which they knew it was morally certain would come in collision with one going at the usual running speed in an opposite direction.

The defendants, at the time of the collision, were not in the lawful exercise of their rights. It was their duty so to run their trains that such a collision should not occur. Where an injury is inflicted directly and solely by such a collision, if the notice specified in chap. 140, § 40 of the session laws of 1850, p. 234, be not at the time posted up as prescribed by that act, the injured party may recover, even though he be in the baggage car, if there with the knowledge and without objection from the conductor. The fact that there was accommodation for him in the passenger cars will not exempt them from liability in such a case, though the actual results of the collision may demonstrate, that on that particular occasion, he would not have been injured if he had been, at the time of the collision, in the passenger cars.

It seems to me that if the defendants are to be held liable in such a case, it must be on the broad grounds, that if a collision of their trains occur from their gross neglect, by which a passenger is injured, they can not be exempted from the consequences on the ground that he was knowingly in a place more dangerous to his safety in the event of such an occurrence than a seat in the passenger cars, if he was lawfully in the place where he was injured. That the defendants are under an obligation so to run their trains that those going in opposite directions shall not come in collision. That it is gross negligence in their officers and agents not so to run them. That a passenger is under no obligation to take any extra care with the sole view of preventing or mitigating consequences that may result from such a gross neglect of duty on their part. But for this gross neglect, there would have been no collision and no injury. The only answer the defendants can make is, Our gross negligence would not have injured you if you had been in a car set apart for passengers, which, as was well known, was much the safest place of the two, in the event of our running two trains into each other. The injured party may properly reply: I owed no duty to you requiring me to guard against or to anticipate the possibility of such an act on your part, the non-performance of which duty can exonerate you from liability to compensate for injuries caused by such act.

A careful consideration of all the cases on which the defendants' counsel rely in support of the rule for which they contend, will show that it is accurately expressed by saying, that one party can not recover from another damages for an injury, when his own negligence or wrong contributed to bring about the act or occurrence which directly caused the injury; and that if his own negligence or wrong did not contribute to produce the act which caused the injury, the party doing the act is liable. In support of this position his honor cited and commented upon the following authorities. *Munger* vs. *Tonawanda*, R. R. Co., 4 Coms., 349; *Blyth* vs. *Topham*, Cro. Jac., 158; *Bush* vs. *Brainard*, 1 Cowen., 78; *Sarck* vs. *Blackburn*, 4 Carr. & P., 297; *Blackman* vs. *Simmons*, 3 Carr. & P., 138; *Howland* vs.

*Vincent*, 10 Met., 371; *Cook* vs. *the Champ. Trans. Co.*, 1 Denio., 91; 5 Denio., 266, 7.)

A proper application of the principles of these cases, as well as of others relating to the same subject, leaves the plaintiff's right to recover free from all reasonable doubt.

He took a seat in the post-office department of the baggage car. The position was injudiciously chosen, and may be assumed to have been known to him to have been a far more dangerous one than a seat in a passenger car. But he took it with the assent of the conductor. He was not there as a trespasser, or wrongfully, as between him and the defendants. So far as all questions involved in the decision of this question are concerned, he was lawfully there. His being there was not such negligence, in the legal sense of the term, as exonerates the defendants from the consequences of injuring him by such culpable negligence as consists in running two trains of cars into each other so violently as to entirely demolish the car in which he was sitting.

On such a state of facts, the defendants are not at liberty to urge that the plaintiff was voluntarily in an unnecessarily exposed position. The injury was caused directly and wholly by the gross negligence of the defendants. The plaintiff was lawfully in the place he occupied, was passive, did nothing, and was incapable of doing any thing. While in this position, the defendants, by gross negligence, imminently dangerous to the lives of all the passengers in the train, caused him severe injuries. He was under no obligation to them to be more prudent and careful than he was in contemplation of there possibly being such highly culpable conduct on their part as would, in all probability, endanger his life if he remained where he was, and his personal safety on any part of the train. (*Skinner* vs. *London, Brighton and South Coast R. R. Co.*, 2 L. & Eq. R., 360; 2 McNull, (S. C.) R., 404; *Zelder* vs. *Louisville, etc., R. R. Co.*, 7 Ad. & N. S., 377 and 378; *Mayne, etc.*, vs. *Brooke*.)

We all concur in the opinion, that no error was committed in the charge as made, and that the judgment must be affirmed with costs.

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### PAROL GIFT.—REAL PROPERTY.

**A parol transfer of land requires to be supported by *exclusive* possession.**

[*Blakeslee* vs. *Blakeslee*. Pennsylvania Supreme Court. Not yet reported.]

This was an action of ejectment brought by R. P. Blakeslee, the defendant in error, against Abraham F. Blakeslee, to recover 47 acres of land, in Crawford county. Both parties claimed under their father, Reuben Blakeslee, the plaintiff below claiming as a purchaser by parol from his father, and the defendant below and plaintiff in error claiming by a deed from his mother, the widow of Reuben Blakeslee, to whom the land in dispute was devised by him. The land in dispute

was held by Reuben Blakeslee, by settlement title. He also held, by a deed, twenty-two acres, forming, with forty-seven acres, his entire homestead. In 1843, the plaintiff below being about to go West, his father agreed that if he would marry a certain girl and remain at home, he would make him a deed of the farm. The plaintiff said he would marry the girl that evening. A deed was drawn for the twenty-two acres. The old man declined inserting the land in dispute in the deed, because he said he had no deed for it himself. But he added that it would be all the same, as he could get the deed from Abraham. The plaintiff complied with his promise, married his father's choice, lived on the land, cleared a number of acres, and gave the old people a share of the crops. They also resided on the land, and assisted to farm it, and at the death of the old man the widow claimed to hold the land in dispute under the devise. The plaintiff made a tender of money to Abraham Blakeslee before the death of his father, but he refused to make a deed.

The court instructed the jury, that if there was a contract executed between the parties, but the land in dispute omitted from the deed, on the promise of the father to give a deed for it, and *if exclusive possession of the land was delivered to plaintiff* under the contract, and if he made valuable and permanent improvements on the land, and if defendant had notice of the arrangement—if they were satisfied of all these things, the plaintiff was entitled to their verdict; otherwise, not.

The verdict was for plaintiff, and defendant appealed, contending that there was nothing in the evidence to take the case out of the statute of frauds.

Black, C. J.—The plaintiff is seeking to recover the forty-six acres, without having the slightest written evidence of his title, and therefore in direct opposition to the statute of frauds, Is there any thing in the circumstances of the case to take it out of that statute? Has he proved the payment of purchase money and exclusive possession taken, in pursuance of the parol agreement? It is not necessary to say whether the evidence proves a contract or a gift. Neither are we called on to say whether the marriage of the plaintiff is such a consideration for the land as would be equal to a payment in money. The judgment can not be sustained, for a reason that makes all others of no importance. There was no exclusive possession in the vendee. The twenty-two acres included in the written conveyance, and the forty-six now in dispute, were used and occupied as one farm. The vendee farmed the land, and lived in the house. But his father lived in the same house, owned the farming implements, and received the half of the crops. The share which the son got was not more, probably, than the value of his labor. It may be said that the father regularly received all the profits of the land, and had his home upon it. Can it then be said that the plaintiff's possession was exclusive? The ancient departures from the statute of frauds have been much lamented in modern times. The rule, therefore, which requires the vendee in a parol contract to show every thing which equity requires to entitle him to relief from its operation, instead of being relaxed, is becoming

tightened by degrees. It has now got to be a work of some difficulty to establish a contract in a way which will stand the test to which it is sure to be subjected. But if a sale not witnessed by a writing is hard to support, what ought to be the fate of a demand like the present, which is directly in the face of a deed? It can not be said there was no writing here. There was but one bargain between the parties, and that was attested and consummated by an interchange of their solemn deeds. When the plaintiff claims land not embraced in the deed, he is encountered not only by the statute of frauds, but also by that other rule of law, equally unbending, which makes the deed conclusive evidence of the contract.

It is argued in this case that the deed does not express the contract, and that a chancellor would reform it, or decree on the evidence, as if the forty-six acres were included. This is an error. Parol evidence can only be admitted to vary or change the terms of a written paper in cases of fraud or plain mistake of fact. All the cases cited by the defendant in error go to establish this principle, and they establish nothing more.

Was there any fraud or falsehood practiced on the defendant in error by his father? Most assuredly the evidence submitted to us does not prove any such thing. Nor is there a fact asserted in the argument from which we could fairly infer that there was the slightest deception. Both parties acted with their eyes open equally wide. Undoubtedly, the original contract was that both pieces of land should be conveyed. When the papers were preparing, the father proposed that one piece should be left out of the deed, and he carried his point by saying, what the son knew as well as he did to be true, that he had not yet perfected his deed from the commonwealth. Neither was there any mistake made by the scrivener. He wrote just what he was directed. No deed or other writing was ever reformed upon such evidence. The promise of the father that the son should have a title afterward for the forty-six acres, adds nothing to the force of the previous contract. It was a parol promise, and in itself gave no right to the land.

This, then, is a plain case. Simply stated, it stands thus: A father agrees, by parol, to give his son sixty-eight acres of land. He afterward makes and delivers a deed for twenty acres, a portion only of the sixty-eight. The deed being made without fraud, and accepted without mistake, can not be treated as a conveyance of land which it does not mention. The promise to convey the remaining forty-six acres, whether made at the date of the deed or before, still rests in parol, and can not be enforced, because the statute of frauds forbids it, and because there was no such exclusive possession under it as will enable a court to decree a performance.

We do not say that there was an absolute merger of the contract in the deed. But, at least it was no more than a part execution of the previous bargain. The deed for a portion of the land does not take the contract for the balance out of the statute. The vendee has no better title for the forty-six acres than he would have had for it if no conveyance had been made of the twenty-two acres. Since his deed does not cover the land in dispute, he can only fall

back on the verbal agreement, and that, as I have already shown, will not support him.

Judgment reversed, and *ven. fa. de novo* ordered.

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DONATIO CAUSA MORTIS.—THE WHOLE ESTATE.

A gift of a specific chattel is good by way of a *donatio causa mortis*, where it appears to have been the intention of the donor to give the individual chattel, and not to make a nuncupative will of his whole estate, although the chattel given may have composed nearly the whole property of the donor.

[*Michner* vs. *Dale*. Pennsylvania Supreme Court. Not yet reported.]

This was an action brought by the defendants in error, who were brother and sister of one James E. Dale, to recover from the administrator of Dale the value of a bag of gold dust and coin. Their claim was based on the following facts.

Dale, the deceased, a native of Philadelphia, and a bachelor, having lived several years in California, embarked at San Francisco in the month of August, 1850, for Panama, on board a steamship. On the voyage between Acapulco and Panama he was seized by the cholera. He sent for the purser of the ship, Mortimer Lent, who, when he came, found Dale lying dangerously ill on the steerage deck. A sailor was in attendance upon him. The sick man held in his hands a buckskin bag of gold dust and some pieces of coin, together amounting in value to one thousand seven hundred and seventy dollars and sixty cents ($1770 60), which he handed to the sailor, and requested him to deliver them to Mr. Lent, which was done on the spot. In answer to the questions put to him by Lent, he said his name was James E. Dale; that he was twenty-six years old; that he was not married. Lent asked him whom he wanted to have his effects? He said, his sister and brother, residing in Philadelphia. This, says Lent, was all he said; but on further examination the witness stated, "the said gold dust and coin were given to me in presence of said James E. Dale, and at his request, and he wished his brother and sister to have it." About six hours after this occurrence, Dale died of the disease from which he was then suffering.

The jury found for the plaintiffs below, and the defendant obtained a writ of error, assigning as errors certain instructions given by the court below to the jury.

WOODWARD, J.—The plaintiff in error, who was defendant below, founds an argument on the word "effects," that it was a nuncupative disposition of his whole estate, and not a mere gift of the gold dust and coin. This question was properly submitted to the jury, and they found that the words of designation had reference only to the gold dust and coin. And interpreting the words of the dying man by his action, there is no room to doubt, that the *effects* which he meant to give to his brother and sister were what he handed to the sailor.

Though we have derived the name and some of the principles of such gifts from the Roman law, yet we treat them with less favor than they enjoy in that system of jurisprudence, because it is the policy of our law to require all testamentary dispositions to be in writing. Our statute of wills does, indeed, provide for nuncupation in respect to personal property, but surrounds it with so many requisites and intricacies (all of which we hold to be indispensable—*Haus* vs. *Palmer*, 1 Am. S. R.), that it is scarcely more than a nominal exception to the general rule, that testaments must be written. And I agree it is a fair principle of decision, as suggested in *Headly* vs. *Kirby* (6 H., 329), that we take our statute of wills as a general rule, and treat *donationes mortis causa* as exceptions which are not to be extended by way of analogy. It results hence, that nothing can be sustained by way of *donatio causa mortis*, that is not strictly and purely such.

*Donatio causa mortis* is a gift of a chattel made by a person in his last illness, or in *periculo mortis*, subject to the implied conditions, that if the donor recover, or if the donee die first, the gift shall be void.

In this definition I have followed, substantially, Ch. J. Tilghman in *Wales* vs. *Tucker* (3 Bin., 370), and the English cases collected in 6 Bac. Abrig., 162; but I am aware that in *Nichols* vs. *Adams* (2 Wh., 22), it was criticised by Ch. J. Gibson, who quoted from Justinian's Institutes to prove that there was nothing like "*sickness*" in the primitive definition, and to deduce what he considered the proper definition—a conditional gift, dependent on the contingency of expected death.

I am far from thinking definitions unimportant; for in the law, as in all other sciences, they are the very keys to accurate knowledge, and the difference between these definitions is not material, as applied to the case before us, for according to either or both of them a good *donatio causa mortis* was made by Mr. Dale. It was a gift in his last illness, and in view of expected death, and the donees surviving him, the implied conditions were taken away, and the gift became absolute. Delivery was indispensable. But whether made to the donee immediately, or to another for him, was held to be immaterial in *Drugs* vs. *Smith* (26 Wins., 404). The delivery to Lent was all that the law required. And it was the completeness of this delivery in execution of the gift which excluded the rights of the administrator. A gift is an executed contract. It may be defeated by conditions subsequently; but it must vest presently, or it is nothing; for a mere promise to give can not be enforced, either at law or in equity. When a chattel has been given *causa mortis* possession delivered, and death has performed the condition subsequent on which it depended, no title whatever in that descends to the executor or administrator, and he has no right to the possession of it for purposes of administration. If the title of the donor be so effectually divested by a gift *causa mortis*, that he can not affect it by his subsequent will, as was held in *Nicholas* vs. *Adams* (2 Wn., 93), then, beyond controversy, his personal representative can take no interest in it. The donee, it is true, must account for the value of the chattels, if creditors appear, and there be not estate enough besides to satisfy them; for in no manner whatever can a man, living or dying, give away his estate in fraud of creditors. The law compels him to

be just, before it permits him to be generous. But until the donation is needed to satisfy the creditors, the donee is entitled to enjoy, and it is not subject to the ordinary course of administration. (Roper on Legacies, p. 3; *Tate* vs. *Hilvert*, 2 Vesey, Jr., 120; *Walter* vs. *Hodge*, 2 Swans., 98.)

It was greatly insisted in argument that the court ought to have instructed the jury, that if the gold was the principal part of Mr. Dale's property, he could not make a *donatio causa mortis* of it, and for this *Headly* vs. *Kirby* was called on. In that case there was a variety of chattels—they were not specified by the donor. Nothing more than a constructive delivery occurred. The language was evidently testamentary, and it referred expressly to all her property. In these particulars the case is broadly distinguished from the present, and it does not decide that where a simple chattel is the whole of a man's estate, or the principal part of his property, it may not be given *causa mortis*. The doctrine of that case, predicated of the circumstances then before the court, is not to be questioned, for it rests on sound reasons; but if applied to a case like this, it would defeat all gifts made as memorials of gratitude and affection in the most solemn circumstances of life. It is due to the sensibilities of our nature, that that the law permits, under proper limitations, such expressions of a dying man's regards. Many a chattel, of small intrinsic worth, has been thus impressed with an unspeakable value, which it would be a sort of sacrilege to subject to inventory, appraisement, and sale in open market.

The court does not charge that a man could dispose of his whole estate as a gift *causa mortis*; and if the gold dust and coin were the principal part of the decedent's property, we see nothing on the record to impeach it as a *donatio causa mortis*.

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### NEW TRIAL.—COSTS.

**What costs the court, on granting a new trial for insufficient evidence, should impose on the party obtaining a new trial. Two cases.**

[I. *Ellsworth* vs. *Gooding*; 8 Howard's (N. Y.) Practice R., 1.]

HARRIS, J.—The granting of a new trial, on the ground that the verdict is against evidence, or because the damages are excessive, has always been regarded as a matter of favor rather than of right. The trial having been fairly conducted, and there being no error of law, or misconduct of the jury, it is very much in the discretion of the court whether the case shall be submitted to another jury. Hence it is that the practice has obtained, when a new trial is granted under such circumstances, of imposing as a condition the payment of costs. (*Jackson* vs. *Thurston*, 3 Cow., 342.) In such cases, the costs which the court has required the party obtaining the new trial to pay, as a condition of the favor granted, are the costs of the former trial and of the motion. There is no reason why the costs of the circuit preceding

that at which the trial was had, should be paid, any more than the other costs in the cause. The true rule is, to charge the party obtaining the favor of a new trial with the costs of such proceedings as are vacated for that purpose.

[II. *Kennedy* vs. *The New York & Harlem R. R. Co.* New York Superior Court. Not yet reported.]

This was an action to recover the value of the contents of a trunk lost on the Harlem railroad. The case was referred, and the referee reported for the plaintiff, assessing his damages at $138 61. Judgment was rendered in accordance with this report; but on appeal to the general term, an order was obtained setting aside the judgment and report on payment of costs, as against evidence. The defendants then moved for a modification of the order, so as to make the costs abide the event.

OAKLEY, C. J.—A new trial has already been granted on payment of costs, and the question is, whether the order as to costs shall stand. A distinction has been taken between new trials granted on want of sufficient evidence, and new trials granted on mistakes of law. In the latter case, the costs have abided the event of the new trial; in the former case, they have been paid upon the granting of the new trial. I never could see the reasonableness of this distinction.

This action was brought to recover the value of the contents of a trunk. The contents of the trunk were testified to by a single witness, (the plaintiff's brother), and the new trial was granted because his testimony was wholly unworthy of belief. When the order was granted, no particular attention was paid to the question of costs. Under the rule hitherto observed, the appellant would pay the costs of the appeal. But I do not think the rule a wise one, and hereafter it will be so modified that, as a general rule, the appellant shall pay the costs of the suit, but the costs of the appeal and subsequent proceedings shall abide the event. I do not see why the defendants should pay the costs of a motion in which they are successful.

Costs of the reference allowed, but costs of the appeal and other proceedings to abide the event.

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## CRIMINAL PRACTICE.—CONFESSIONS.

**On a trial for murder, the statements made by the prisoner while under examination before the jury summoned to make inquisition concerning the death, and previously to the bringing any charge against him, are admissible as evidence for the prosecution.**

[*The People* vs. *Hendrickson*, 7 Howard's (N. Y.) Practice R., 404.]

The prisoner was tried and convicted for the murder of his wife; and appealed from this conviction.

The facts involved in the case are sufficiently stated in the opening of the opinion.

HARRIS, J.—On the evening subsequent to the death of his wife, the

defendant was sworn and examined as a witness before the coroner's inquest. Upon the trial, the counsel for the prosecution offered to prove what the defendant had stated before the coroner's inquest. It was objected to, on the ground that such statements were not voluntary. The objection was overruled, and the testimony was received. No charge had been made against the defendant at the time he was examined, nor is there any evidence that he was suspected of crime, unless the fact is to be inferred from the tenor of his examination. The question is thus presented, whether, upon a trial for murder, statements made by the defendant, upon oath, before the jury summoned to make inquisition concerning the death, and before he had been accused of the murder, are admissible as evidence for the prosecution.

Confessions have been appropriately divided into two classes, *judicial* and *extra judicial*. (1 Greenl. Ev. § 216.) The former embraces the preliminary examination authorized by statute, when a party accused of a crime is brought before a magistrate. Such confessions, attended, as they are, with peculiar solemnities, take higher rank as evidence than other mere admissions or declarations. Such other admissions and declarations constitute the class of *extra judicial* confessions. They are to be proved as other facts are proved, and, being proved, are to be submitted to the consideration of the jury.

The preliminary examination which the magistrate, before whom a person accused of crime is brought, is authorized to take, must be conducted in the manner prescribed by law, or it will be deemed irregular, and rejected. Thus, it is required that the examination should not be taken upon oath. Whenever, therefore, it has appeared that the party accused has been sworn, the examination has been excluded (*Smith's* case, 1 Stark's R., 242; *Rivers'* case, 7 Carr. & P., 177; *Pikesley's* case, 9 Carr. & P., 124.) This rule is confined to the official examination of the *party accused*. It is no objection to a confession, as such, that it has been made when the party was under oath. (*Haworth's* case, 4 Carr. & P., 254; *Tubby's* case, 5 Carr. & P., 530; case of *Merceron*, 2 Stark., 366; *Wheaton's* case, 2 Moody's C. C., 45; case of *Broughton*, 7 Iredell, 96.)

The only valid objection that can be taken to any extra judicial confession is, that it was not voluntary. No witness is bound to answer any question when the answer will tend, in the least degree, to criminate him. Of this he is made the judge. If, waiving the right to object on this ground, he proceeds to answer, his statements are to be regarded as voluntary, and may be used against him for all purposes. (2 Starkie's Ev., 50; 1 Phil. Ev., Cowen & Hill's ed., 110; Roscoe's Cr. Ev., ed. 1852, 28; 1 Greenleaf's Ev., § 219.) In every such case, then, the proper inquiry is, not whether the statement was made under oath, but whether it was free and voluntary, or was made under the influence of fear or hope. In the one case, the confession may always be proved—in the other, never. There may be a difficulty in determining whether a confession has been made under the influence of hope or fear, but, that question being determined, the question of admissibility is also determined.

It is only when *a party accused* has been examined on oath, that his

statements are to be rejected when offered in evidence against him. The general rule, that what a person says, when examined as a *witness* in a legal proceeding, may be used in evidence against him, has not been restricted or qualified. The witness speaks at the peril of having his statements turned against himself. He may refuse to answer any question, the answer to which may tend in any degree to involve him in a criminal charge. If, waiving this privilege, he proceeds to testify, his statements, though upon oath, are to be regarded as free and voluntary, and are receivable as evidence against him.

It has been said that the very fact that a witness objects to answer, will excite suspicion, and may thus tend to involve him in an accusation. This may be so. A refusal to answer a pertinent question may be supposed to betray conscious guilt; but against this the law has furnished no protection. It guards the witness against *involuntary self-crimination*, but not against the unfavorable surmises which his refusal to answer may suggest. It is only because his answer, if given, will be deemed to be voluntary, that a witness is excused from answering in any case.

In the case before us, the defendant was examined before the coroner's inquest in the capacity of a witness. He had not then been accused; nor was he, in any legal sense of the term, suspected of the crime for which he was subsequently indicted and tried. He had the same right as any other witness, to decline answering the question, if, in his own opinion, the answer would tend to involve him in a criminal charge. If, after having so declined, he had still been required to answer, what he said could not have been used against him. Having testified, and having omitted to avail himself of his privilege to decline answering, his statements must be deemed free and voluntary, and were properly received in evidence against him upon the trial.

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### AGENCY.—PURCHASE FROM PRINCIPAL.

One who has voluntarily constituted himself the agent of another, and has, in that capacity, obtained information to which, as a stranger, he could not have had access, is bound, in subsequently dealing with his principal, as purchaser of the property which formed the subject of his agency to communicate all such information.

[*Casey* vs. *Casey*; 14 Ill. R., 112.]

This was a bill filed for the purpose of setting aside the sale of an inheritance on the ground of fraud. The material facts in the case are substantially as follows:

One Aaron Piggot, of New York city, died, leaving his entire estate to his wife, who died a few days thereafter, leaving an estate of over fifteen thousand dollars to her heirs, of whom the plaintiff was one, and entitled to one eighth part. He resided in Tennessee, and there was no evidence that he had ever known Mrs. Piggot, or had ever heard of his inheritance, or of her death, except what he learned from the defendant at the time of the sale. The defendant, who had been for

some years acquainted with Mr. and Mrs. Piggot, having heard of their death, repaired to New York, where he found a controversy pending before the surrogate court about the probate of the will of Aaron Piggot, which was opposed by his heirs-at-law. In this controversy he employed counsel on his own responsibility, and for the benefit, as his answer alleged, of the heirs and next of kin. After returning from New York he visited the complainant at his residence in Tennessee, where he purchased his interest in the estate for seventy-five dollars. He also purchased the interests of the other heirs. The actual value of the estate left by the intestate was over fifteen thousand dollars, of which over thirteen thousand was realized after paying the expenses of the administration.

CATON, J.—In the investigation of the important questions presented for our consideration in this case, it may be proper, in the first place, to consider the relative position of the parties at the time the contract was made, and see whether they were dealing with each other at arms' length, as it is termed, where each party relies upon his own information and judgment, irrespective of confidence in, or reliance upon the other party; or whether there was that relation of trust and confidence existing between them which imposed the duty upon the defendant of the observance of that higher morality and integrity which required him to disclose to the complainant every material fact and circumstance within his own knowledge, which was necessary to enable the other party to contract upon an equal footing with himself.

The law will frequently impose this duty from the legal relationship existing between the contracting parties, such as parent and child, guardian and ward, attorney and client, trustee and beneficiary, partner and partner, principal and agent, and the like; in which cases the law will presume a confidence and trust to be reposed, to take advantage of which amounts to a fraud; and the courts will scrutinize with the most jealous vigilance the dealings between the parties standing in such fiduciary relation. It is the confidence which one party reposes in the other, or is supposed to repose in him, which prompts the courts to require frankness, candor, and sincerity, and when these are not observed, it is held to be a breach of that confidence, and a fraud. It is not the relationship alone which of itself imposes the obligation of frankness, but it is the confidence which the relationship is supposed to inspire or imply, for without confidence there can be no imposition. The very idea of imposition presupposes a reliance abused. Hence, although the relationship may be shown to exist, which of itself raises the presumption of confidence, yet if it affirmatively appear that notwithstanding the relationship there was no confidence or reliance reposed, but that the parties actually dealt upon equal terms, each relying upon his own knowledge and judgment, without reference to, or any reliance upon, the knowledge of the other, or his judgment founded upon the knowledge, it would be strange to hold that there had been an imposition and fraud. (*Coles* vs. *Trecothick*, 9 Ves., 248.) So, on the other hand, that degree of dependence and confidence may be shown actually to exist, which will impose the obligation of a full disclosure and open frankness where the legal relationship above referred to, which raises the

presumption of confidence, does not exist. In the one case the confidence is presumed—in the other, it must be proved; but when shown to exist in either way, the same duty is imposed. It is this circumstance of confidence and its abuse which the courts of equity seize hold of and rely upon when they grant relief in cases of this sort. There may be, and no doubt often is, a certain degree of moral delinquency in the making of bargains where the parties treat as strangers, with which the courts will not interfere; for should we undertake to enforce the highest degree of moral duty, many, if not most, of human transactions might become unsettled. But whenever a party acts upon the confidence with which another has inspired him, courts may well inquire whether that confidence has been inspired but to be betrayed. (1 Story's Eq. Jur., § 308; *Fox* vs. *Mackreth*, 2 Brown, Ch. R., 426.)

In treating of this subject, however, we must not lose sight of the right which each party has in ordinary negotiations to act for himself, and to avail himself of his own superior judgment, vigilance, or industry, and of information fairly obtained; but in doing so he must treat as a stranger, and not mislead the other party by false or partial information, when he knows that his representations are relied upon, and are influencing the other party in the treaty.

Did the defendant in this case occupy this confidential relation toward the complainant during the negotiation which resulted in the contract now sought to be set aside? We think he did. In the first place, he had put himself in the position of an agent of the heirs of Mrs. Piggot in reference to this estate. He went to New York, supposing that he might have an interest in the estate himself; but when he arrived there, and found he had no legal claim to it, and saw that the interests of those who were entitled to it were likely to suffer for want of attention, he, as a friendly act to them, interested himself in their behalf, and employed counsel to protect their rights, believing that they would reimburse him for his expense and trouble. The answer of the defendant, and the testimony of several of the witnesses, show that the defendant took an active and lively interest in looking after the estate, and this one of the executors says he professed to do on behalf of the heirs of Mrs. Piggot, and he asserts the same thing in his answer, so that there can be no doubt or dispute that he assumed and professed to act as their agent in the premises. Whether they had authorized him so to act or not, there can be no doubt that it was their right to avail themselves of the benefits accruing from those acts; and can it be said that the information acquired by him relative to the estate, while thus professing to act for them, was not theirs, and that they were not entitled to it just as much as if they had previously appointed him as their agent? Assuming the character of agent for the heirs enabled him to obtain information to which a stranger would not have access; and can it be admitted that he might treat with the heirs for the purchase of the estate, and conceal from them information thus acquired in their names? Suppose, that while professing to act as their agent, he had made an advantageous arrangement for the estate, and acquired the title to property in their names, it would have been theirs as much as if they had originally authorized him to act, nor could he

fairly take a conveyance from them embracing such property, without fully and fairly disclosing all the facts to them; and yet the information obtained by an assumed agent as much belongs to the principal as does property acquired by him in that capacity. Whether, by our law, the principal is bound to reimburse the agent for his trouble and expense, it is not necessary to inquire. Probably, if the position of affairs was such that the principal was at liberty to avail himself of the benefits of the acts of the agent or not, and he chose to do so, he might be liable to reimburse, as in case of an original appointment, but where, as in this case, the services rendered were of such a character that the heirs could not choose but reap the benefits, if benefits there were, resulting therefrom, without abandoning the principal estate, another result might follow. (2 Kent, 616, and note.) Sir William Jones may have gone too far in requiring extreme diligence of an assumed agent under the common law (Jones on Bailment, 48), but it seems that ordinary care is certainly required. (*Nelson* vs. *McIntosh*, 1 Stark. R., 237.) If a self-constituted agent must exercise ordinary care about the business in which he assumes to act, he must be bound to the observance of frankness, sincerity, and good faith toward the principal whose business he volunteers to manage. If he interposes to do a friendly act for another, in his name and for his benefit, he should not be allowed to benefit himself by it at the expense of that other. That would be allowing an injury under the guise of friendship. The very act of interference, under professions of friendship, may be as well calculated to inspire confidence as those characteristics which would induce an original appointment, and the law may as justly presume a confidence to be inspired in the one case as its existence in the other. In either case, the agent should be held to the same measure of truth and sincerity, and presumed to pledge himself to a full disclosure to the principal of every material fact and circumstance relating to the subject-matter of the interference, especially when treating with the principal for the purchase of the thing itself. We hold then, that the defendant, by interfering with, looking after, and managing this estate in behalf of the heirs and as their representative, and as such acquiring the means and facilities for information in regard to it, to which a stranger would not have had access, took upon himself the character of their agent, and thus assumed the obligations and responsibilities toward his principals which properly appertain to that character, and that in treating with them for the estate, he was bound to disclose, not only that he had assumed that character, but also every matter within his knowledge which was important for them to know to enable them to treat understandingly for the disposition of their rights, unless such disclosure was distinctly and understandingly dispensed with.

EVIDENCE.—PRIVILEGED COMMUNICATIONS.

Where an attorney is consulted merely as a friend, and neither he, nor the person consulting him, understands that the relation of attorney and client exists between them, the attorney is not excused from disclosing the communication in a court of justice.

[*Goltra* vs. *Wolcott*; 14 Ill. R., 89.]

This was an appeal from the court below, who admitted the testimony of one, English, against the objection of the appellant.

It seems that the plaintiff met English, who was an attorney, in the street, and told him that he had a case about which he wanted his opinion; he stated his case to him, it being the same one now in controversy, and English gave his opinion about it. The plaintiff did not, however, tell English that he wished to employ him as attorney, nor did he subsequently consult with him in regard to the case. The plaintiff objected to English's testifying to the communications then made to him, on the ground that it would be a breach of professional confidence; but the court overruled the objection, and the communications were given in evidence to the jury.

TRUMBULL, J.—The propriety of the admission of the communications in question depends entirely upon whether the relation of attorney and client existed between the witness and the plaintiff.

The rule that an attorney shall not be required, or even permitted, without the client's consent, to disclose the communications made to him by his client, has respect solely to the untrammeled administration of justice in the settlement of rights, and as this requires the assistance of professional advice, secrecy is enjoined, as a necessary security, without which no man could safely apply to counsel for advice; but as the rule has a tendency to prevent the full disclosure of the truth, it ought not to be extended to cases not strictly within the principle of the policy which gave it birth.

Though it be not necessary to give the rule operation, that there should be a regular retainer, or any particular form of application or engagement, or the payment of fees, nor that there should be a suit pending or in contemplation, yet it is to be confined to communications made to the attorney in his character of attorney, and does not embrace cases where the witness, though an attorney and consulted for that reason, was only applied to, and acted as, a friend. (*Granger* vs. *Warrington*, 3 Gilman, 309; *Beeson* vs. *Beeson*, 9 Barr., 301; Greenleaf on Evidence, §237, *et seq.*)

The witness in this case had been but recently admitted to the bar; the plaintiff casually met him in the street, and all the conversation they ever had about the matter in controversy occurred at that time, which was before the institution of the suit. The witness could not recover compensation for the opinion he gave, as he states expressly that he did not consider himself the attorney of the plaintiff; and it is apparent, from the time and place when and where the conversation occurred, as well as the subsequent conduct of the plaintiff in never afterward consulting the witness about the institution or prosecution

of the suit, that he did not regard him as his attorney in the matter. Where an attorney is consulted merely as a friend, and where neither he nor the person communicating with him supposes the relation of attorney and client to exist between them, the communications are manifestly not entitled to the sanction of secrecy extended to communications professionally made.

Judgment affirmed.

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### INNKEEPER'S LIABILITY FOR ANIMALS.

An innkeeper is, *prima facie*, liable for the death of an animal in his possession, but may free himself from liability by showing that the death was not occasioned by negligence on his part.

[*Metcalf* vs. *Hess*; 14 Ill. R., 129.]

This was an action brought to recover the value of a mare belonging to Metcalf, which died while in the stable of Hess, who was an innkeeper, and at whose inn the plaintiff, Metcalf, was stopping.

The judge at circuit instructed the jury, that if they believed that the defendant was the keeper of a common inn or tavern, and that the plaintiff with the mare stopped with him as such, then the defendant would be liable for the value of the mare if she came to her death from the negligence or default of the defendant or his servants. But if the mare came to her death in the ordinary course of nature, without any negligence or default on the part of defendant or his servants, then the defendant would not be liable.

The jury found a verdict for Hess, whereupon Metcalf moved to set the same aside, and for a new trial.

TRUMBULL, J.—If innkeepers, like common carriers, assume the responsibility of insurers, and are liable for all losses except such as happen from inevitable accident, without the intervention of man, or from public enemies, then the law was wrongly given to the jury; but if they are only *prima facie* responsible for a loss occasioned by the death of an animal while in their possession, then the instructions given were substantially correct.

It is a harsh rule which makes a person in any case responsible for a loss which has occurred without any fault of his, and it can only be justified upon grounds of public policy, and in consideration of the numerous opportunities afforded by the nature of his business for fraudulent combination and clandestine dealing, to the injury of the owner of the property. The rule ought not to be extended beyond the reason in which it originated. An innkeeper can have no motive to destroy the animal of his guest, and there is not the same reason for holding him responsible, at all events, for such a loss as there would be a common carrier, or even an innkeeper for the loss of goods which had disappeared from his possession; because in the latter case he may have converted the goods to his own use, while in the former he could gain nothing by the death of the animal. Accordingly, a distinction is made in the law books between the liability of innkeepers and common car-

riers, particularly for losses occasioned by the death of animals. (*Hill* vs. *Owen*, 5 Black., 323; Coke's Rep., part 8, 33; Story on Bailments, section 472; *Burgess* vs. *Clements*, 4 Mel. & S., 306; *Dawson* vs *Channey*, 5 Ad. & E., 165.)

The authorities all agree that an innkeeper is bound to look to the safe-keeping of every person's goods who comes to his inn as a guest, and that in case of loss, negligence is to be imputed to him, unless it appear that the loss is not attributable to any fault or want of care by him or his servants.

In cases where the loss is occasioned by the death of an animal, the requirements of public policy are fully answered by holding the innkeeper *prima facie* liable for the loss, leaving him to exonerate himself, if he can, by showing that the death was in no manner occasioned by a want of proper care and attention on his part.

In this case the evidence was such as to warrant the jury in finding that the mare came to her death by disease, or from her own viciousness, without any fault on the part of the innkeeper in taking care of her, and under such circumstances he ought not to be held liable; and such was in substance the law as given to the jury.

Judgment affirmed.

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CONTRACTS.—MATERIAL ALTERATION.

**The date of an instrument is so far a material part of it, that an alteration of the date, by the holder after execution, will avoid the instrument.**

[*Getty* vs. *Shearer*; 20 Penn. St. R., 12.]

This was an action of debt by one Shearer against Getty and another. The cause of action was stated to be an instrument under seal, signed by Getty and Thompson, by which they acknowledged the receipt from Shearer of $458 in goods, which they agreed to sell; they to retain all which they received from them over first cost and ten per cent. It was in evidence that the date of this instrument had been changed after its execution and delivery, from the 10th to the 16th of May.

One question which arose on the trial was whether this alteration was so far material as to avoid the instrument. Several other minor points arose during the trial, but none of them of very general interest.

Lewis, J.—We think that the judge erred in the instruction "that if the jury believed *the date* of the instrument on which the suit was brought, was altered from the 10th to the 16th May, if made after its execution and delivery, it would not avoid it, as its effect would be the same whether bearing date upon either day; and consequently the alleged alteration would not be a material one." The defense was, that the date was altered by the holder, and the instruction must be understood as having relation to an alteration thus made. In Shepherd's Touchstone, in Bacon's Abridgement, in Cruise's Digest, and in other works of authority, the principle is affirmed without qualification, that if a deed be altered in any material part, by the party himself that hath

the property of the deed, without the privity of the other party, it thereby becomes void. (Shep. Touch., 68, 69; Bac. Abr., 279; 4 Cruise's Dig., 368.) In one old case it was held, that where there was no appearance of a fraudulent design to cheat another, the alteration was not indictable as a forgery; but the obligee who made the alteration, thereby lost his security, which was wholly avoided by it. (Moor, 619.) And when a mere mistake in a deed was corrected, and it was not known by whom, it was presumed to have been done by the consent or default of the party who had the custody of it, and whose duty it was to preserve it from alteration; and that the alteration avoided it. (2 Rolle Abr., 29, pl. 6. See also *Bowers* vs. *Jewell*, 2 N. H., 543.) It is a mistake to suppose that the principle rests solely upon the rule in pleading, that the instrument after the alteration is no longer the same, and is no longer the deed of the party, so as to maintain the issue of *non est factum*. The true foundation of the doctrine on this subject is the dangerous consequences which would flow from permitting one of the parties to a written contract, without the consent of the other, to make any material change in it whatever. The alteration may be so artfully made as to render it difficult of detection; and if no penalty follows the discovery, every one may be led into temptation to alter the contracts in his possession, so as to make them more conformable to his interests. The law, therefore, in great wisdom, declares that an alteration by the holder of an instrument in a material part, destroys it altogether. (*Marshall* vs. *Gougler*, 10 Ser. & R., 164; *Miller* vs. *Masters*, 4 T. Rep., 323; 10 Ser. & R., 164.) The general doctrine of the law on this subject seems to be conceded by the learned and able judge who presided at the trial; but he appears to have been of opinion that the effect of the instrument was not changed by the alteration of the date, and "consequently that the alleged alteration was not a material one." In this we think there was an error. The date is a material part of the instrument. It is *prima facie* evidence of the time when the contract was signed by the parties, and establishes the relations in which the parties stood to each other at the time stated as the date. It is the period from which in general the day of payment or performance is calculated. It is also frequently the time from which the statute of limitations, or the presumption of payment arising from lapse of time, begins to run. An alteration in the date is to the prejudice of the other party, because it is the false making of evidence of a state of things not true in point of fact. Its legal effect in the present case would be to embarrass the defendant in respect to any payments or settlements made or receipts given after the original, and before the substituted date. Another effect of such alteration is to deprive the defendant of a portion of his defense arising from the lapse of time. The holder has no right to retard the running of the statute of limitations, or to extend the period established by law as furnishing a presumption of payment. Another effect of such an alteration in the case of an instrument requiring payment at the end of a fixed period after the date, is to deprive the debtor of his right to pay at the time fixed by the contract; to compel him to keep the money in readiness for a longer period at his own hazard, and to oblige him to pay interest for it when he does not wish to make use

of it, and can not conveniently invest it so as to be forthcoming at the time when it may be demanded. It was decided at an early day in Pennsylvania, that an alteration in the date of a contract, which protracts the payment (as changing the date of a bill at sixty days from the 9th to the 19th of June), avoids it. (3 Yeates, 391.) In a late case, *Miller* vs. *Gilleland*, 7 Harris, 119, the same principle was fully affirmed by this court. Where there is an obligation to pay a sum of money in installments, *with interest*, the legal construction of it is that interest is payable *on the whole sum*, so that an interlineation of the words "on the whole," would not change the legal effect of the instrument, and therefore would not avoid it. No one can be prejudiced by an erasure or interlineation which produces no change. But an alteration of the date is not of this character.

Judgment reversed, and *revenire de novo* awarded.

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PRACTICE.—ARREST IN CIVIL ACTIONS.

**A defendant who may have been liable to arrest for moneys received by him as agent, is not liable to arrest in a suit upon a judgment obtained against him in another state for that cause.**

[*Goodrich* vs. *Dunbar*. New York Supreme Court. Not yet reported.]

This was an action brought upon a judgment recovered in another state against the defendant for moneys received by him in a fiduciary capacity. The defendant was arrested upon the requisite affidavit, and now moved for a discharge.

MITCHELL, P. J.—The code (§179) allows the arrest of any person in an action for moneys received in a fiduciary capacity. The question is whether the defendant is liable to arrest in an action upon a judgment which was recovered upon such cause.

A judgment merges the original cause of action. In this case no action can be sustained for money received by the defendant as agent; it can only be sustained on the judgment. If the plaintiff had accepted a bond alone, or a bond with a mortgage, for his debt, he could not have sued for the original cause of action, nor held the defendant to bail. The judgment obtained by him was as much a voluntary act as the acceptance of a bond would be. He chose to sue the defendant; he was not compelled against his will to bring him into a court in California, or to take judgment against him. He has all the advantages of the judgment, and should take it with such inconveniences as necessarily attach to it.

The defendant might, perhaps (if the whole case were opened to him), show that the items of payment before disallowed to him should be allowed; and if he should succeed in this, he would nearly discharge the plaintiff's claim. But he is precluded from doing this on account of the high character of the evidence of his indebtedness contained in the record of the judgment and its merger of the original contract, and he should, therefore, be protected from having that judgment regarded as unimportant when the question is whether he should be imprisoned or not.

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MONTHLY

# LAW MAGAZINE.

VOL. II. JULY, 1854. No. VII.

## CONDENSED REPORTS OF RECENT CASES.

### PRIVILEGED COMMUNICATIONS.—VERDICTS.

**An action for libel will not lie, upon a communication published by jurors, acting in the exercise of their functions, whether the communication be a perfect verdict, or the expression of opinion by individual jurors, merely.**

[*Simard* vs. *Jenkins*. Canada Supreme Court. Not yet reported.]

THE defendant in this case was one of the members of a coroner's jury, empanneled to investigate the cause of the death of certain persons shot on the 9th of June, 1853, near Zion Church, in the city of Montreal. The plaintiff was one of the city police, present at the time these persons were shot, and was summoned to give his evidence before the coroner. The jury could not agree upon a verdict, and nine of the jurors, of whom the defendant was one, in giving their views as to the evidence, commented in particular on that of the plaintiff and of four other witnesses in the following terms: "The jurors can not omit finding that, in the course of their investigation, evidence of the most conflicting and irreconcilable character was given, which, however desirous they have been to attribute it to the mere erroneous impressions of witnesses, the jurors can not conceal, has painfully impressed them as willful and culpable perversions of truth, so injurious and dangerous in their consequences to society, that they desire to direct the attention of the authorities to the depositions of ———, ———, ———, J. B. Simard, and ———." The plaintiff in consequence brought this action against the defendant as one of the persons who had written, signed, and published the above, alleging that the said defendant was moved by malice to return this special verdict, and that it contained a defamatory libel. The defendant demurred, and the question arising upon the demurrer was, whether the fact that he was acting as juror at the time did not free him from liability.

DAY, J.—This case, with eight others, is submitted on a *defense en droit*. It involves a question of great importance, that of the immunity of persons engaged in the administration of justice.

This action is for damages for defendant having with eight others returned into coroner's court a special verdict, in which they directed

the attention of the authorities to the evidence given by the plaintiff as indicating perjury.

One point raised by the defendant is, that he was acting as juror. He says that this quality of juror is a bar to every form of action—that the plaintiff can not examine whether or not there was malice—that the conduct of no judge or juror is liable to examination in this way.

I do not think this proposition, in the unlimited way in which it is put, is supported by authority. If a judge go beyond the scope of his powers he may not be liable; but I would not extend this to jurors. The judge is a permanent officer, and has jurisdiction over every thing that comes within his court, and may be called upon to express his views on something that is not directly before him. The juror has a specific function and a specific case. If he goes beyond that case he is liable. In reference to the general reasoning as to the responsibility of a judge, I may remark, that no man can maliciously commit a willful act without being responsible. But this rule may sometimes be infringed on. So, in protecting the interest of society, the interests of the many may overrule those of the few. Thus has grown up a rule that, in certain cases, the party shall not raise the question of malice under any circumstances. The immunity of the judge rests on that. So does that of a juror.

The second proposition is, that the defendant acting as a juror is not liable for any thing done within the limit of his functions; and this raises three questions:

1st. Are jurors entitled to this immunity?

2d. Did the defendant keep within the limit of his functions?

3d. Does this immunity extend to one of twelve?

As to whether the defendant while acting within the limits of his authority has this immunity, the law raises a presumption in favor of jurors, and will not even admit of proof to the contrary, departing herein from the common maxim, that the presumption shall only stand till the contrary be proved. This rule must have been adopted on the principle stated by Lord Coke, namely, that it would deter jurors from the public service if they were liable to such an action in every case, where, in the opinion of the parties against whom they had decided, their decision proceeded from malicious motives, etc. The essence of the case is, that no action shall lie against the juror, that he shall not be questioned, that his office is an absolute bar. To adopt a different rule would be to fritter it away. Nobody is answerable if he shows that he had reason for saying what he did, and that it was true. The issue of slander in every case is whether the party accused acted maliciously. But the juror is put in a different position, and this is the intention of the law. (2 Hawkins' P. C., c. 73, § 8, p. 130; *Sutton* vs. *Johnson*, 1 T. R., 513; Bostwick's Libel, pp. 201, 202; Starkie on Libel, preliminary discourse, p. 29, note *k*.)

As to malice, there is a good deal of confusion among the early writers, but now the law is settled. Malice, in fact, means a sentiment of malignity or ill-will. This is not the signification in law books. A libel may be jocular, and yet there may be malice, and the party would

be liable. The state of the heart has nothing to do with liability. It is clear the ordinary meaning of malice is not the same as malice in law. Malice in law is the absence of legal justification. He that injures another without justification is liable. This inquiry is not as to the state of feelings, but whether the defendant acted with legal justification. If he did, it does not signify whether the words alleged be true or not. (Starkie on Libel, p. 220.) In cases of jurors, the justification is that they acted as jurors. This is where there is a perfect verdict—where twelve agree. In the present case there is nothing violent in the language. If what is said be true, it would be difficult to find expressions less harsh. The document shows great labor and toil in enouncing their views. It declares the result of their deliberations. It involved the necessity of inquiry into all the facts, the nature of the assemblage. It states the firing of the troops without the order of the officers, it reprobates the practice of parties carrying arms, and then comes the closing paragraph of which the plaintiff complains. Suppose a grand jury in coming into court were to say that a bill was not found, because the witnesses named were not to be believed, or that a petit jury should say so—could they be subject to an action of damages? Must the jury be silent in the chamber? How can they express their opinion if they can not canvass the evidence? Does not a judge give the grounds upon which his decision is based? The case of the juror and of the judge is the same. If this immunity be given to an ordinary jury, much more so should it be given to a coroner's jury.

There is a case which shows how far this immunity is carried. In the course of a trial a juror said to a witness: "You're a d—d perjured villain." Upon this an action was brought, and the juror was held not to be liable, because it was said when acting as a juror.

It therefore appears that if the words complained of by the plaintiff were part of a perfect verdict, there could be no action. But has a minority the same right? It is plain that the protection is to the individual, and not to the body. The responsibility and obligations are several. Each takes the oath himself, and he must, therefore, be protected individually for his own opinion. It was the coroner's duty, when they did not agree, to ask each juror his opinion, and he was obliged to give it. The protection is to each member of the body. For if they were obliged to give a full and a true opinion, and if they were not able to give a verdict, was it not their duty to express their view of the evidence? If it was their duty to express their opinion, they fall within the law. (Jarvis on Coroners; Impey on Coroners, p. 519; 2 Hale's Pleas of the Crown, p. 297, note *c*.) It appears therefore:

I. That jurors acting within the limits of their functions are to be protected without reference to their motives.

II. That the expression of opinion in this case falls within the legitimate functions of defendant as a juror.

III. That the same immunity that applies to jurors rendering a perfect verdict applies to all or to one juror if he keeps within the limits of his functions.

MANDELET, J., dissented. Let us suppose that these jurors, engaged

in the discharge of their public duty as jurors, and cloaking themselves under their position, had maliciously and corruptly charged the plaintiff with perjury. In this case would they be responsible? Can there be such a thing as irresponsibility on the part of any one? I hold that there can not. Neither judge nor juror is absolutely irresponsible. But the plaintiff has gone further, and declared that the requisite number of jurors could not agree on a verdict. There was, then, no presentment. These nine persons, therefore, were not acting as a "*corps de jury*." For if nine jurors are irresponsible, then so is one. What would this lead to? Suppose on a jury there is a juror who would not regard his oath, and who was desirous of wreaking his vengeance on one who had been a witness, he could do so with impunity. Nothing could touch him. Suppose the bishop of Montreal, or the chief justice of the Queen's Bench, or one of the first merchants of this city had been a witness, and that such an observation had been made of him by one juror, will it be said that his character must be left to the counteracting influence of public opinion? I have great respect for public opinion– "*mais combien faut il de sots, pour former le public?*" It has been said that judges are irresponsible; but it is not so, they are responsible to parliament. If a judge had the audacity to use his office to wreak his vengeance on his fellow-man, he would, and ought to be, responsible.

It is said we shall get no more witnesses if the jury are not to remark on contradictions; but that cuts both ways. Will not witnesses be less likely to go if any one juror may accuse him openly of perjury? To-day it is Simard; to-morrow it may be the first man in the community who is thus slandered. If such things were to be permitted by courts of justice, the difficulties arising out of them could be settled only by the bowie knife. I think the demurrer ought not to be sustained.

The action was dismissed.

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### PRACTICE.—ATTORNEY'S AUTHORITY.

**The courts should summarily dismiss a suit instituted by an attorney without the plaintiff's authority, although his course may have been subsequently ratified by the plaintiff.**

[*Frye* vs. *The County of Calhoun;* 14 Ill. R., 182.]

This was a suit instituted in the name of the county of Calhoun and others, as judgment creditors of Shaw, against Frye and Shaw, to set aside as fraudulent a mortgage made by Shaw to Frye. The suit was subsequently discontinued as to two of the complainants. Frye then entered a motion to dismiss the suit, and in support of the motion filed an affidavit, stating that the suit was commenced without the knowledge or authority of the complainants. In answer to this motion the complainants' solicitor made an affidavit admitting this, but stating that he believed the facts charged in the bill were true and could be proved, and that Frye might, and probably would, alienate the property mortgaged to him by Shaw, to an innocent purchaser, unless immediate proceed-

ings were taken, and that at the earliest practicable day he advised the complainants of what he had done, and they all approved of it and wished him to proceed with the suit, except two of the creditors whose judgments had been satisfied and as to whom the suit had been dismissed. The court overruled the motion to dismiss, the case was proceeded with, and a decree was rendered in favor of the complainant. The case then went up on a writ of error.

TREAT, C. J.—The merits of the controversy should not have been inquired into in this proceeding. There was an insuperable objection to such a course at the very threshold of the case. When the bill was filed and the process issued, the solicitor had no authority, express or implied, to act for any of the judgment creditors. The institution of the suit was an unwarrantable assumption of power on his part. The defendant presented the objection at the earliest opportunity, and called upon the court to dismiss the suit. And the court, instead of proceeding to a hearing of the case, should have promptly sustained the motion. An attorney is not permitted to commence a suit in the name of another without first receiving authority for the purpose. His position gives him a right to appear for a suitor when employed, but none to interfere in a case in which he is not retained. By the English practice, an attorney is not allowed to prosecute or defend a suit unless he has a written warrant of attorney from the party. The warrant constitutes his authority to act for the suitor, and it is filed in the court in which the action is pending. In this country a warrant of attorney is not generally required, but an attorney may be appointed by parol. It is, however, as necessary here as in England that he be authorized by the party to appear for him. The only difference in the practice relates to the mode of his appointment. He must be actually employed for the purpose, before he can represent the party in court. The relation of client and attorney must subsist between them. That relation can not be created by the attorney alone. The suitor has a right to select his own attorney. If an attorney brings a suit in the name of another, the legal presumption is that he has been retained for the purpose. It is only when his right to represent the plaintiff is questioned, and the presumption that he has been engaged by him is repelled, that he can be called upon to make proof of his authority. But in such a case, if he fails to show any authority to institute the suit, it should be immediately dismissed by the court. The process of the courts is not to be issued except at the instance of a suitor. It must be demanded by him in person, or by his authorized attorney. A defendant is not bound to answer to the merits of a suit commenced without authority from the plaintiff. Otherwise he might be twice compelled to litigate the same cause of action. A judgment in his favor in a suit prosecuted without authority would be no bar to a second action brought by the direction of the plaintiff.

The fact that some of the judgment creditors subsequently approved of this unauthorized act of the solicitor does not change the legal character of the case. The true question is, whether he had authority at the time to commence the suit for them, and not whether they afterward approved of what he had done. The power of the court was il-

legally called into exercise by him, and the law will not suffer them to profit thereby against the objections of the defendants. The latter were improperly brought before the court, and they had a clear right to be discharged. Attorneys are not to be tolerated in thus abusing the process of the courts. It is deemed unprofessional in them to stir up litigation, much more should it be to set it in motion without authority.

It is but justice to the solicitor to remark that he did not commence the suit with any design of defrauding the judgment creditors, or of harassing the defendants. On the contrary his object was to protect the interests of the creditors, by enforcing for their benefit what he believed to be a meritorious cause of complaint against the defendants. But for all the purposes of this case the motive with which the act was done is wholly immaterial. The act itself was unauthorized and illegal, and must be so pronounced at the instance of the defendants.

The decree must be reversed and the bill dismissed, but without prejudice.

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### PRACTICE.—PRIVILEGE FROM ARREST.

**A man charged with crime before a committing magistrate, but discharged on his own recognizance, is not privileged from arrest on civil process, while returning from the magistrate's office.**

[*Key* vs. *Latto*. Pennsylvania Supreme Court. Not yet reported.]

The question in this case is, whether a man charged with crime, before a committing magistrate, but discharged in his recognizance, for a further hearing, is subject, while returning from the office of the magistrate, to arrest on civil process for debt.

WOODWARD, J.—The defendant does not come within any of the classes of persons who are exempted by law, while going to, attending on, or returning from judicial proceedings in which they are interested. He is neither a suitor, witness, juror, nor officer of the court. Is he then exempt?

This exemption is a privilege which is sometimes said to pertain to the court, whose dignity and the order and dispatch of whose business requires that persons in attendance should be protected from arrest in other cases. This, however, can scarcely be the real ground of the privilege; for it forbids a summons as well as an arrest, and extends to persons attending before arbitrators, masters in chancery, bankrupt commissioners, auditors, and others, delegated to perform judicial duties, who have no intrinsic powers to punish for contempt, and therefore no such privileges to protect.

The dignity of the law is superior to that of any of its ministers, and the interests of justice far more important than the convenience of a particular tribunal. When the law gives a creditor a right of action, some graver reasons than these must be found for taking it away.

This privilege is, I apprehend, personal—part of a man's individual freedom—essential to the defense of his legal rights, and designed to

protect the feeble and the poor from oppression. It was established to promote an equal administration of justice, and to prevent the oppression of a rich and powerful man over a poor one, who is soliciting justice. (*Starrel's case*, 1 Dallas, 356.)

But whether this privilege extends to a party charged with a public offense, is a question which seems not to have been decided by the highest judicial authority in the state. The rule in England is, that it does not, unless the criminal proceeding be used as a mere pretext to bring the defendant within the jurisdiction of the court, for the purpose of proceeding against him *civiliter*. Of such a contrivance, *Wells* vs. *Gumey* (8 B. & C., 769) is an example, where the defendant was arrested on Sunday, by virtue of criminal process, for the purpose of detaining him till Monday, when he was arrested on civil process.

Considerable contrariety of opinion had prevailed in the professional mind on the subject; but I believe the weight of authority, and the principle on which our criminal legislation is founded, are against the privilege claimed by the defendant. (See *Bowis* vs. *Tuckerman*, 7 Johns., 538; *William* vs. *Bacon*, 10 Wend., 636; *The Commonwealth* vs. *Daniel*, 6 Penn., L. J., 330; *Goodwin* vs. *Lordin*, 1 Ad. & E., 378.)

And considering that the criminal law, while its demands are paramount, and to be first answered, ought not in the nature of things to furnish indemnity against civil obligations, nor to put unnecessary obstacles in the way of creditors asserting their subordinate rights against the accused, I have come to the conclusion that this defendant was not privileged from arrest, and accordingly direct the rule to be discharged.

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### PLEADING.—SPECIAL DAMAGES.

**Damages which do not necessarily result from the main act complained of, though they may be its natural effect, are regarded as special damages, and should be so set out in the declaration. The application of this rule illustrated.**

[*Ellicott* vs. *Lamborne*; 2 Md. R., 181.]

The plaintiff, Lamborne, was the owner of a paper mill, and brought this action against the defendant, to recover damages from him for depositing earth and sand in and about the stream on which the plaintiff's mill was situated, in such a manner that they were carried down into the mill-dam, so as to interfere with the working of his mill. Upon the trial, he offered to prove that he could not wash the rags used in manufacturing paper, because the water was rendered muddy by the earth and sand deposited in the stream by the plaintiff, and that by reason thereof he was unable to make *white* paper. This evidence was objected to by the defendant, but the objection was overruled by the court. A verdict was rendered for the plaintiff, and the defendant appealed.

MASON, J.—It will be observed, that the *gravamen* of the plaintiff's complaint, as set forth in his declaration, is, *that earth, sand, and other substances were washed into his mill-dam, and so filled and choked said*

*dam as to make it, in a great degree, useless to the said plaintiff in the working of his mill.*

Now what is the clear import of this language? It is that the machinery of the mill was retarded by means of the obstructions in the dam, whereby the plaintiff was prevented from manufacturing paper with the same facility which otherwise he might have done. *Manufacturing paper* is one thing, while the preparation of the materials is another distinct process. In this instance, the defendant avers that he was interfered with while *working his mill*, which means, while manufacturing paper, and under this averment he seeks to show in evidence that he was also prevented from preparing the materials to be used in his mill. Regarding the two as distinct and independent propositions, we do not think the evidence relating to the latter would be proper and legal, unless the fact had been expressly averred in the declaration.

In order to prevent a surprise upon the defendant, the plaintiff must specify particularly in his declaration all damages which are not the *necessary* consequences of the act complained of, and which are therefore not implied by law. Damages that do not necessarily result from the main fact alleged, though they might be the natural and even probable effect of it, are regarded as special damages, and as such must be set out in the declaration.

Unless, therefore, the inability of the plaintiff *to wash his rags and make white paper* were the necessary and inseparable consequences of the act complained of in his declaration, to wit, the washing of the earth into, and filling up of the dam, he can not recover for these particular injuries.

It is clear that those results might *or might not* have flowed from the acts complained of, and therefore they can not be regarded as the necessary and inseparable consequences of those acts, so as to be proved under the present declaration. The mere fact that the plaintiff owned a paper mill, which was worked by means of the water from the dam in question, does not necessarily suggest the additional facts that he made *white paper* in his mill, and that the rags for the same *were washed* from the water in his dam.

Judgment reversed.

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### DEED OF INFANT.—VOIDABLE.

**The deed of an infant is voidable only. He may ratify it, or not, upon attaining his majority.**

[*Cole* vs. *Pennoyer;* 14 Ill. R., 158.]

This was an action of ejectment.

It appeared that the land in suit had been entered by and patented to the plaintiff when about eighteen years old; that in 1833 the father of the plaintiff, being then in possession of the land, sold it to one Arthur on credit, and procured the plaintiff, then only nineteen years old, to make a deed to him. The land was never paid for. Arthur sold it to a third party, and it subsequently passed by a series of regular con-

veyances to the defendant, Pennoyer. The main question of interest in the suit was the right of Cole to avoid, upon coming of age, the conveyance which he had made when a minor. Upon the trial, judgment was rendered for the defendant, and the plaintiff appealed.

CATON, J.—The question as to what contracts by an infant are absolutely void or only voidable, is one upon which there has been a very considerable diversity of opinion in different courts. All agree that the implied contracts of an infant for necessaries are binding upon him, as in case of an adult, and all agree that the appointment of an attorney by an infant is absolutely void. The difficulty seems to have been in laying down a rule by which to determine satisfactorily what other contracts made by an infant are void, or merely voidable.

It was laid down by Lord Mansfield, in *Zouch* vs. *Parsons* (3 Burr., 1794), that all contracts which take effect by the delivery of another for the infant are absolutely void. Not long after Eyre, Ch. J., laid it down as a rule, that those deeds which the courts could see and pronounce to be prejudicial to the interests of the infant were void, while those which were manifestly to the advantage of the infant, as for necessaries, were binding, while all others were voidable, and might be confirmed or repudiated after he attained his majority. (*Keane* vs. *Boycott*, 2 H. Black., 511; see also 2 Kent, 236.) If literally understood, there are certainly serious objections to the rule, that the court must in every case inquire whether the deed is for the benefit or to the injury of the infant, and thence determine whether it is void or voidable. In such an inquiry is the court to look alone to the face of the deed, or shall it inquire into the circumstances of the transaction? If the former, the court must often be misled, for it is frequently the case that a deed for the conveyance of land shows but very little of the true character of the transaction, its object being merely to transfer the legal title, without a strict regard to the real inducements and considerations which moved the party to the conveyance. If the rule be established that the face of the deed shall determine whether it was to the advantage or injury of the infant, such deeds will always be framed with a view to that, and will never fail to show an advantageous bargain for the minor. There are serious objections also to requiring the court to hear evidence showing the circumstances of the sale, and thence determine the question of benefit or injury. In the first place, it would interrupt the regular progress of the trial by a collateral inquiry about facts which when ascertained might induce one to think the bargain advantageous, while another would think it ruinous to the interests of the infant. Moreover, in determining these questions, a certain regard must be had to the interests of the public, of those who may wish to purchase the estate. A subsequent purchaser finding a regular chain of title may be required to ascertain whether those through whose hands the title has passed, were capable of making an obligatory conveyance, and if he finds any of them are infants, take his chance of a subsequent ratification of the conveyance; but to require him to ascertain all the circumstances of the bargain, and from these to judge at his peril what the opinion of courts might be as to its beneficial character, would leave the common assurances of the country in quite

too uncertain a condition. It is far better in our judgment to hold all conveyances made by infants in person voidable only, to be confirmed or repudiated by them as they may choose after they arrive at years of legal discretion. A review of the authorities on this subject would show that this rule has been generally, if not universally, adopted, and it is certainly most to the advantage of the infant while it best subserves the public interests. (*Leslie* vs. *Frazier*, Riley's Ch. R., 76; *Cline* vs. *Beebe*, 6 Conn., 499; *Drake* vs. *Ramsey*, 5 Ohio, 152; *Freeman* vs. *Bradford*, 5 Porter, 270; *Brackenbridge* vs. *Ormsby*, 1 J. J. Marshall, 236; *Bool* vs. *Mix*, 17 Wend., 120; *Gillett* vs. *Stanley*, 1 Hill, 122.)

Were a deed to be held void, it would be binding upon neither party. The adult party might repudiate it as well as the infant; whereas, if held to be voidable only, the adult would be bound by it, leaving it optional with the infant after he attained his majority to ratify it, or not, With this option it can not prejudice his interests. He is left to claim the benefit of the bargain if a good one, or to reject it if he has been overreached or imposed upon in his infancy. We have no hesitation in holding in this case that the deed made by the plaintiff during his minority was voidable, but not void. He had a right to revoke it within a reasonable time after he became of age.

The judgment of the circuit was however affirmed, on the ground that the defendant had gained a title to the property by adverse possession.

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CONTRACTS.—PARTIES.

If a deed be *inter partes*, as between W. and P., a third party, H., can not sue thereon although it purport to be made for his sole advantage.

[*Huger* vs. *Phillips*; 14 Ill. R., 260.]

This was an action of covenant on an indenture between Bennell and Wilson of one part, and the defendant, Phillips, of the other. By this indenture Bennell and Wilson, who were overseers of the poor, bound the plaintiff as apprentice to the defendant, and the defendant agreed to instruct the plaintiff in farming, reading, writing, and arithmetic, and give him, at the expiration of his term of service, a new bible, two suits of common wearing apparel, and a horse, saddle, and bridle worth $40. This action was brought by the apprentice to recover damages for the non-performance of this contract. The defendant demurred, the demurrer was sustained, and judgment was rendered for the defendant. The plaintiff appealed.

TREAT, C. J.—It is very clear that the plaintiff can not maintain an action on the indenture. He was not a party to the instrument, and in the absence of express statutory authority has no right to sue upon it in his own name. The suit must be brought in the names of Bennell and Wilson, or their successors in office, in whom the legal interest is vested. (1 Chitty's Pl., 3; *Barford* vs. *Stuckey*, 2 Brod. & B.,

333; *Berkley* vs. *Hardy*, 5 Barn. & C., 355; *Strohecker* vs. *Grant*, 16 Serg. & R., 237; *Sanford* vs. *Sanford*, 2 Day, 559; *Chaplin* vs. *Canada*, 8 Conn., 286.)

Judgment affirmed.

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CONTRACTS.—SUBSCRIPTION PAPER.

P., in connection with some two hundred other subscribers, signed a paper, by which he promised to pay a certain sum of money for the erection of a church, the association for that purpose to be formed whenevers ufficient funds were raised—*Held*, that an action against his representatives, upon this subscription, could not be sustained.

[*Phipps* vs. *Jones*; 20 Penn. St. R., 260.]

This suit was founded on a paper signed some years prior to 1849, which was as follows:

"As the want of a house for public worship in the village of Doe Run has long since been noticed and lamented, and at this particular period a more general feeling is manifested to erect a house for the purpose aforesaid; in order to ascertain the amount of means that could be depended on for this purpose, we, the subscribers, do each of us agree to pay the sums set opposite our respective names, for the purpose of building a house for the purpose and in the place aforesaid, or its vicinity, to be under the control of the Presbyterian denomination of Christians; with the understanding, that when, in the opinion of at least *three* of the principal contributors, sufficient money is subscribed to justify the undertaking, they shall give notice to that effect by appointing a time and place of meeting of contributors, for the purpose of choosing a building committee, and making such other regulations as may be agreed upon."

This instrument was signed by about two hundred persons, including one Ellis Phipps. Phipps subsequently died, and a committee having been organized to proceed with the building, and to act as trustees of the funds contributed, this action was brought against the administrators of Phipps to recover the amount of his subscription. In the court below, judgment was rendered for the plaintiff, and an appeal was taken.

Lowrie, J.—There ought to be no doubt about the right of unincorporated religious societies to sue on a contract made with them in their associate capacity and for the legitimate purposes of their association, even though there be no persons named or described in the contract as trustees or committee-men on behalf of the society. Such associations have always been recognized as having an associate and *quasi* existence in law, with power to hold land and build appropriate houses, and of course with power to acquire rights by contract and to vindicate them. And if the English common law forms are insufficient for such cases, we admit the infusion into our law of the plain equity principle that allows a committee of voluntary societies to sue and be sued as representatives of the whole. (1 Bro. C. C., 101; 13 Ves., 544; Story's Eq. Pl., § 116.) There is, therefore, no difficulty about sus-

taining this action, if it has a contract to rest upon. In the present case the association was not finally formed, nor the erection of a house concluded on, until after the death of Ellis Phipps, one of the subscribers; and these facts raise the question, Was there a complete and binding contract at the time of the death of Ellis Phipps? If there was not, his administrators would not be bound by the inchoate agreement, and they would have no right to make it complete. They are bound to perform his contracts, not to complete his proposals.

This subscription paper refers to the general desire to have a house of worship, and declares "that in order to ascertain the amount of means that could be depended upon for this purpose," the subscription is made with the understanding that when enough is thought to have been subscribed, a meeting of the contributors should be called "for the purpose of choosing a building committee, and making such other arrangements as may be agreed upon."

Here was no association, when the subscription was commenced, to whom a promise could be made. The paper was itself the first step toward the formation of an association, and the means of ascertaining its feasibility. It sets out as an experiment, and we can not say that there was a complete contract by the first or second or twentieth or even by the last subscriber, unless we can say that there was an association formed by them that could claim its performance.

There can be no contract without correlative parties, and it is generally essential that there be something more than a moral duty as the bond of the relation and basis of the promise. Where the undertaking is entirely one-sided, there is no right of enforcement. There can be no relation without correlation. An engagement to subscribe for the benefit of an association is necessarily a mere proposal, and therefore revocable until the association is formed. It is a promise of each for the benefit of the associate whole, and remains unattached and incomplete until the association is complete. Until then there is no one to accept the proposal, and in this case it was withdrawn by the death of the subscriber before its acceptance. After his death his administrators could not and ought not to regard the proposal as open to acceptance. If, however, the association had been formed, and a contract for a lot or for a building entered into, on the faith of such subscription, in the lifetime of the subscriber, and with his express or implied consent, he, and of course his representatives, would have been bound to pay the subscription.

Judgment reversed.

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CONTRACTS.—STATUTE OF FRAUDS.

**The written memorandum of a contract for the sale of real estate, which is required by the statute of frauds in Pennsylvania, must state the consideration, as well as describe the subject-matter of the sale.**

[*Soles* vs. *Hickman*; 20 Penn. St. R., 180.]

This was an action of ejectment by Hickman against Soles. It seems that Soles purchased the lot in suit of one Brown, who claimed

under a tax title, by parol, for $175, part of the purchase money to be paid on July 4th, 1849. Brown having in the mean time died, he paid the money to his daughter and devisee, Martha Ann McGonigle, taking the following receipt:

"ALLEGHENEY, *4th July*, 1849.

"Received of Andrew Soles thirty dollars, on account of part payment of a lot in McKeesport, No. 47.

her
"MARTHA ANN ⋈ MCGONIGLE."
mark.

LOWRIE, J.—The question here is, will the court enforce specific performance of an agreement for the sale of land, of which there is no written evidence, except a receipt for part of the purchase money, defining the lot sold, but not defining the price or any other terms of sale?

The statute of frauds answers the question in the negative, when it declares that no estate granted by parol shall, either in law or equity, have any other effect than as an estate at will. This receipt is written evidence that there was an agreement of some sort about the lot, and that it has been partly performed. But it does not inform us of the terms of the agreement, and without this it is impossible to enforce it. With or without the statute of frauds, an agreement with unknown terms is void. We may know that there was an agreement, but without proper evidence of its terms our knowledge is useless, and such is this case.

In strictness, the agreement ought to be written; but we regard the law as satisfied if we have written evidence of all the parts of a complete parol agreement. But that we have not here. A contract is as much void when the consideration, as when the subject, is undefined. Where the parties have left either uncertain, the contract is legally incomplete, and therefore void. When the law requires the contract to be in writing, it means that the complete contract must be proved by the writing. That is not a written contract which is not self-sustaining. It is verbal if it requires verbal testimony to sustain it, by proving any essential part of it. So far as I know, this has been the uniform course of the decisions. (Sugden on Vendors, 89; 1 Johns. Ch., 273; 14 Johns., 15; 13 *ib.*, 297; 3 *ib.*, 210; 2 Des., 188; 4 Bibb, 102; 2 Wheaton, 336; 11 Ves., 550; 12 *ib.*, 446; 1 *ib.*, 326; 15 *ib.*, 552; 1 Sch. & Lef., 22; 2 *ib.*, 381; 1 Atk., 12; 5 Mason, 414; 15 Verm. Rep., 685; 7 Port., 73; 3 McCord, 458; 6 Alabama, 204.) And such is the course of decisions on other parts of the statute not in force with us. (5 Bar. & C., 583; 4 Bos. & Pul., 252; 4 Barn. & Ald., 595; 5 East., 10; 4 Conn., 442.) On this principle the cause was decided below.

Judgment affirmed.

CONTRACTS.—EVIDENCE OF PARTNERSHIP.

S. and B. contracted to make a tour of the United States, for the purpose of giving concerts. By the terms of their agreement S. was *to receive from B.* one third of the profits; and in the course of the tour S. was accustomed to style himself "agent" of B—*Held*, no partnership.

[*Bull* vs. *Schuberth*; 2 Md. R., 88.]

This was an action of *assumpsit*, brought by Schuberth against Bull.

It appears that Ole Bull, the celebrated violin player, and Schuberth, a music dealer in Hamburgh, Germany, agreed to make a musical tour through the United States, and accordingly executed a written agreement to that effect, by which it was agreed that Schuberth should arrange and direct the concerts, receiving therefor one third of the nett proceeds of each concert, with a proviso that if they amounted in any one concert to over four thousand francs, then he should receive one-fourth only, and that Ole Bull on his part should play at such concerts as Schuberth might arrange. This action was brought by Schuberth to recover one third of the proceeds of three concerts, two of which took place at Baltimore and one at Washington. A verdict was rendered for the plaintiff, and the defendant appealed. Several points were raised and discussed by the learned judge who delivered the opinion, but the only question of any very general interest was, whether the contract established a partnership, which precluded an action at law between the parties.

MASON, J.—The existence or non-existence of a partnership, as between the partners themselves, must be gathered from the intention of the parties, and the court, in arriving at that intention, must form their conclusions from deductions drawn by analogy from principles of law, applied to the facts and circumstances developed in the case. (*Kerr* vs. *Potter*, 6 Gill, 404.) It is true that there are certain expressions employed in the contract, which, standing alone, might indicate a purpose on the part of the contracting parties to regard this adventure in the light of a partnership transaction. But this inference is rebutted by certain other facts which conclusively settle, in our judgment, that the parties did not design that the contract should have such an interpretation or effect. In the first place, by the terms of the agreement itself, it is provided that Schuberth was to receive one third of the nett proceeds from Mr. Bull. Now, if this was a partnership, each party would have an equal right to claim his respective share of the profits, independent of the other. Instead of this, the relation of principal and agent is clearly recognized by requiring the plaintiff to look to Bull for remuneration for his services. In addition to this, Schuberth, before this suit was brought, and before he could have any motive in creating such an impression, expressly styles himself the *agent* of Bull. Again, Bull, in conversation with the witness, stated that he "*had dismissed Schuberth*, and had employed *another agent*," which manifestly indicated that he regarded Schuberth only as an agent or servant, and as such could dismiss him at any time. The mere fact that the remuneration

of the plaintiff was to depend upon the contingent profits of the concerts, does not, of itself, create a partnership. This is not, by any means, an uncommon mode of paying agents and servants, and it is not regarded in the books as necessarily creating a partnership relation between the parties, in the absence of other circumstances indicating such an intention.

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REAL ESTATE BROKERAGE.—BROKER'S AUTHORITY.

**An authority given to a broker to sell real estate, does not include an authority to sign the vendor's name to the contract.**

[*Coleman* vs. *Garrigues*. New York Supreme Court. Not yet reported.]

This was an action against Garrigues and others, the heirs of one Secor, to compel specific performance of an alleged agreement to sell real estate. The agreement was made through an agent, whose authority was denied by the defendants. It was in evidence that Secor told the agent that if he could get $3,000 cash on delivery of the deed, he might close the bargain. Upon this authority the agent signed an agreement in the name of Secor, selling the property for $3,000 cash on delivery of the deed. This action was brought to compel a specific performance of this agreement. Judgment was rendered for the defendant, and the plaintiff appealed.

MITCHELL, P. J.—The general agency of brokers in real estate is limited to finding a buyer or borrower who will assent to the terms of the seller or lender, and then bringing the parties together. The owner of real estate who authorized a broker to sell his land would be surprised to find a broker assuming to sign a contract for the sale, and the buyer would be no less surprised to find his name affixed by a broker to a contract to buy. In dealing in real estate, the authority to sign the contract is never understood to be granted from a mere authority to make a bargain. The proposed purchaser may be one with whom the seller would be very unwilling, for various reasons, to have any dealings. The power of the broker is, therefore, thus practically limited, and he does not exercise nor does he possess the power to sign the name of either of his principals.

Again, a contract for the sale of real estate needs the skill of a lawyer. After parties have verbally agreed, one to buy and the other to sell real estate, much still remains to be done before there is "a concurrence of minds." Who is to receive the rent in whole or in part? Who is to pay the taxes for the current year in whole or in part? If the house be burnt down is the contract still to be carried out? If so, who is to have the benefit of the insurance? What covenants are to be in the deed? These are matters which the law may supply when the parties do not; but they are matters in which it is well-known that the parties are apt to differ after they have agreed upon the price. and that circumstance makes it necessary that they be brought together before a binding bargain be made, unless they directly authorize their agents to sign for them.

An agent within the meaning of the statute of frauds, who can sign the name of the owner of lands to a contract for the sale, is not one who has a mere authority to make a bargain for the sale, but one who is made the owner's agent to sign his name to the contract. That agency may be by parol, but it is not included in a mere authority to sell.

Judgment for the defendant affirmed, with costs.

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RATE OF INTEREST.—LENDER'S HAZARD.

A note payable in specified bank notes, with twelve and a half per cent. interest, is not usurious, although there is no evidence that the bank notes are worth less than their nominal value.

[*Stevenson* vs. *Unkefer*; 14 Ill. R., 108.]

This was bill filed to foreclose a mortgage given as security for the payment of the following note:

"$800. Three years after date I promise to pay to Samuel Stevenson, or order, eight hundred dollars in Baltimore bank notes, with twelve and a half per cent. interest, the interest to be paid annually, for value received of him this first day of January, eighteen hundred and forty. The above note is given in lieu of one said to be lost, the amount and date the same."

This note was signed by Basil D. Stevenson, the defendant. Samuel Stevenson, the payee, having died, this action was brought by Unkefer, as his executor.

The defendant plead usury; and this was the only defense set up. At circuit a decree was rendered for the plaintiff for one thousand two hundred and seventy-three dollars, with costs, from which the defendant appealed.

CATON, J.—This note was for $800, payable "in Baltimore bank notes," with twelve and a half per cent. interest; and the question is, Was this usurious? The rule of law is well settled, that when the payee takes a risk, by which he runs the hazard of losing the principal sum, or of receiving less than the sum originally due, with lawful interest, it is not usurious for him to stipulate for or receive more interest than is prescribed by the statute. (*Cummings* vs. *Williams*, 4 Wend., 679; *Spencer* vs. *Tilden*, 5 Cowen, 144; *Hall* vs. *Haggart*, 17 Wend., 280; *Sharpley* vs. *Hurrell*, 3 Croke; *Hombert* vs. *Fitch*, Kirby, 265.) But it must not be understood that every hazard which the lender takes will justify him in taking usurious interest, for he who lends money can never know with absolute certainty that it will ever be repaid. It has been always held, that the risk necessarily incurred by every creditor, of the death or insolvency of the borrower, is not such a hazard as will authorize the lender to stipulate for more interest than is authorized by the statute of usury. (*Colton* vs. *Dunham*, 2 Paige, 273.) But this principle does not extend so far as to prevent the owner of a note originally untainted with usury from selling it at as great a dis-

count as he pleases without making the transaction usurious; and a majority of the court in the case of *Cram* vs. *Hendricks* (7 Wend., 569) held that the indorsement of the note by the person who transferred it, did not make the transaction usurious; but his liability upon the indorsement was limited to the amount of money actually received, with legal interest.

In the case before us, there was no doubt a palpable and substantial risk run by the payee of the note. The maker had a right to discharge the debt in Baltimore bank notes at their nominal value, and in this action no more than their real value could be recovered. (*Dunlap* vs. *Smith*, 12 Illinois, 399.) It is not necessary now to say whether it was the right of the payer to make the payment in the most depreciated of those notes, had there been a difference in their value, or whether he would have been liable to the extent of the most valuable. It is enough to know that, like every thing else except money, their value was liable to fluctuate, and that in the course of commercial changes they might become greatly depreciated, if not almost valueless in the market, by the end of the three years for which the credit was given, so that the lender would lose more than the whole interest agreed to be paid. With such a contingency, the authorities are uniform, that the excessive interest stipulated for did not infect the transaction with usury. In form, it is true, this was a loan, but the real character of the transaction was more in the nature of a speculation in bank paper than a loan of money. For eight hundred dollars paid down, one party agreed to pay to the other, at the expiration of three years, so many dollars in Baltimore bank notes, whether their value might be more or less. Upon the trial, there was no evidence showing that they were worth less than their nominal amount, and hence the judgment was not for too much, and the defendant below had no just cause of complaint.

The judgment of the circuit court must be affirmed.

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### EVIDENCE.—ENTRIES IN SHOP BOOKS.

**The plaintiff's clerk copied entries of goods sold, from the drayman's delivery-book every Saturday night, and the charges so copied were afterward compared and corrected by the drayman and himself—*Held*, that the books containing these entries were inadmissible to prove the delivery of the articles charged, when unsupported by the testimony of the drayman.**

[*Kent* vs. *Garvin*. Massachusetts Supreme Court. Not yet reported.]

This was an action of assumpsit to recover the value of several barrels of ale alleged to have been sold and delivered to the defendant. The plaintiff offered in evidence his book of original entries, together with the testimony of the clerk who kept the books. He testified that he took the entries in the book offered in evidence from the drayman's delivery-book every Saturday night; that the drayman read them off to him, and he copied them into the book; that the drayman again read them from the delivery-book and compared them; that this was done in the present case, and that the drayman was now in California. The introduction of the book was objected to on the trial, but the ob-

jection was overruled, and a verdict was rendered for the plaintiff. The defendant appealed.

BIGELOW, J.—It has long been the settled law of this commonwealth, that it is not a valid objection to the competency of a party's book, supported by his suppletory oath, that the entries therein were transcribed from a slate or memorandum-book in which they were first entered for a temporary purpose, although the entries on the slate or memorandum were made by a person other than the party who copied them on to the book. In such cases the entry of the charges in the regular day-book of the party is deemed to be the first and original entry, and as such, competent proof, with the oaths of the party, of the charges therein made. (*Faxon* vs. *Hollis*, 13 Mass., 427; *Smith* vs. *Sanford*, 12 Pick., 139; *Ball* vs. *Gates*, 12 Met., 491; *Morris* vs. *Briggs*, 3 Cush., 342.) But in all these cases it will be found, that in addition to the oath of the party who made the entries on the day-book, the testimony of the person who made the entries on the slate or memorandum-book was adduced to prove that articles were delivered or work performed of a character similar to those charged on the day-book, at or about the time of the entries therein. The charges in the book, supported by the oath of the party making the entries, are often the only evidence of dates, items and amounts, which individuals can not well retain in their memories. The case at bar goes beyond any adjudged case. The attempt is here made to put in evidence the book of a party, supported by the oath of his clerk who made the entries, for the purpose of proving the sale and delivery of articles made by a third person in the employment of the plaintiff, whose evidence is not produced in support of the charges; nor is any evidence offered from any source other than from the book, to show that at the time the charges were made, any articles, similar in character to those charged, were delivered by the plaintiff to the defendant. It is manifest that here an important link in the chain of evidence is wanting. The clerk who made the entries had no knowledge of the correctness of any charge on the book. All he can say is, that the drayman who delivered the articles for the plaintiff, gave to him from his memorandum-book the items which were entered on the book. The case, therefore, rests on the mere unsupported statement of a third person, whose fidelity and accuracy there are no means of ascertaining and testing. It is in its nature mere hearsay testimony. To permit the books of a party to be competent proof under such circumstances, would be extending the rule applicable to this anomalous and dangerous species of evidence quite too far.

Defendant's exceptions sustained, and verdict set aside.

CONSTRUCTION OF WILL.—MANUMISSION.

**B. left a will containing a bequest to his negro woman C., that she should go free at the age of thirty-six years, *both she and her increase*, together with a similar bequest of freedom to her child then living—*Held*, that her afterborn children were not entitled to freedom until they should respectively become thirty-six years old.**

[*Linstead* vs. *Green*; 2 Md. R., 82.]

This was a petition for freedom filed by the appellee, who was the slave of the appellant. She claimed her freedom under the two following items of the will of Ignatius Bright:

"Item.—I will and bequeath my negro woman Caroline to be and go free at the age of thirty-six years old, both she and her increase, she being at this time seventeen years old.

"Item.—I will and bequeath my negro boy Joshua to be and go free at the age of thirty-six years old, he being at this time four months old."

The petitioner was a child of the negro woman Caroline, and was not at the time of filing the petition thirty-six years old. A verdict was rendered for the petitioner, and the defendant appealed. The only question raised in the opinion of the court was as to the proper construction of this will.

Le Grand, C. J.—The rule of construction which obtains in all cases is, that the intention of the testator must prevail, unless it be opposed to some principle of, or to the policy of the law. This being so, we are then to determine what was the intention of the testator, in this respect, as displayed in his will. It is contended on behalf of the petitioner that the testator designed to manumit his slave Caroline when she should attain the age of thirty-six years, and her issue when the period arrived at which Caroline would be thirty-six years old. To this view we can not assent. Did the first item which we have quoted stand alone, there might be room for ingenious philological discussion as to the intention of the testator; but we think, when it is considered in connection with the succeeding clause, the intention of the testator becomes manifest, and is, that he designed to manumit Caroline when she should become thirty-six years old, and also, to manumit each and every of her children when they should respectively attain the same age, and not before. We are aware that this interpretation of the language is deemed opposed to that given in *Hart* vs. *Fanny Ann* (6 Monroe, 49), a case, in its general character, much resembling the one before us. With all respect for the judgment of that learned court, we can not admit its authority in this instance.

In the case before us, wherever Caroline or her child Joshua are mentioned by name, the age of thirty-six years is clearly and explicitly designated as the age at which each of them is to be entitled to her or his freedom, and from this circumstance but one conclusion can be properly drawn, and that is, that he had fixed in his mind the age of thirty-six years as the proper age at which each of his slaves should

go free. At the time of the making of his will, the proof shows that Caroline had but one child, Joshua, who was then four months old, and the testator, in forming his will, deals *eo nomine* with all his slaves then *in esse*, designating, in language beyond all dispute, the age of thirty-six years as that at which each of them should be entitled to freedom. In the absence of supposable reason for a different intention in regard to children thereafter to be born, we are forced to give such a construction to the first item of the will which we have quoted as will conform it to what is the manifest intention of the testator in regard to Caroline and her child living at the same time the will was proclaimed. In doing this, we but indulge the privilege which it is admitted on all sides belongs to the court, to transpose the words of the will, so as to make them read in a manner conformable to what appears to be the general and predominating intention of the testator. All the difficulty of interpretation which the first item presents grows out of the location in it of the words, "*both she and her increase.*" Situated as they are in the sentence, the latter clearly is susceptible of two meanings, of the correctness of each of which much may be said; but by transposing these words so as to introduce them after the word "Caroline," the whole instrument is made consonant in all its parts, and the wish of the testator effectuated. These words, thus transposed, would make the clause read as follows:

"Item.—I will and bequeath my negro woman Caroline, both she and her increase, to be and go free at the age of thirty-six years old, she being at this time seventeen years old."

In thus translating the will of Ignatius Bright, we give to it not only the meaning of the testator, as we understand it, but also observe the policy of the state as indicated in its legislation. The proof in the cause shows that Caroline had other children than the petitioner and Joshua. It is but fair to suppose that the testator contemplated that Caroline would have children up to the period fixed for her manumission, and it is equally just to suppose, that in regard to the children born within a period near to the time designated for her manumission, that he did not design to cast them unprotected upon the world. The 13th section of the act of 1796, ch. 67, forbids the manumission of any slave who shall not be, at the time of manumission, "*able to work and gain a sufficient maintenance and livelihood;*" and the court of appeals have recognized the binding force of these words of inhibition on the acts of testators (*Hamilton* vs. *Cragg*, 6 Harr. & John., 18). We are clearly of opinion that the petitioner is not entitled to her freedom.

Judgment reversed.

ESTATES TAIL.—PARTITION.

A bequest to one in fee, with a subsequent limitation to his issue, does not create an estate tail. Courts have no power to decree a sale in partition which will affect the rights of persons not in esse.

[*Woodham* vs. *Maverick*. New York Supreme Court, 1854. Not yet reported.]

Peter R. Maverick died in 1811, leaving a large estate to his widow for life, with a remainder over to his five children and two grandchildren. In 1844, and during the widow's life, one of the grandchildren died, leaving her interest in the property to her two brothers and three sisters, in unequal proportions, *to have and to hold the same, their heirs and assigns forever, and should any of the devisees die, leaving issue, the issue to be entitled unto and to take the share of their parent; but should such devisee die without issue, such share was to be divided among the brothers and sisters of such devisee in equal proportions.*

Mrs. Munn, one of the children, also died in 1844, leaving her share in the property to the same devisees, in different proportions, in the same manner precisely.

After the death of Peter R. Maverick's widow, a suit was commenced for the partition of the property, and under a decretal order of the court the property was sold to the highest bidder at public auction. In the course of the examination of the title, some question arose as to the validity of the sale, and the purchaser moved to be released from his purchase, on the ground that the proceedings under which the sale was had were invalid, and the title consequently bad.

CLERKE, J.—The purchaser objects to the title, and asks to be released from his purchase, and the plaintiffs apply, on their part, to compel the party to *take* title.

The counsel for the plaintiff contends that the wills of Ann Munn and Harriet M. Woodham devise absolute estates in fee simple to the devisees therein named, and that the limitations attempted to be created therein are invalid, on the ground that before the revised statutes they would have been void, because they are limited upon an indefinite failure of issue, and that the estates given in those devises being estates tail are converted into fee simple estates absolute, by force of the statute abolishing entails.

It did not, however, always follow under the former rule, that the words, "dying without issue," imported a general failure of issue, so as to make the limitation over of a term void. In many cases of executory devises, the court of chancery seized on any circumstance that indicated the testator's intention to confine the *generality* of the expression to a dying without issue living at some person's decease—thus effectuating the devise. It is, however, unnecessary to refer to authorities on this subject, as the statute expressly declares that the words *heirs* or *issue*, in such forms of expression, shall mean *heirs* or *issue* living at the death of the person named as ancestor. (1 R. S., 724, § 22, marginal.)

But the counsel maintains that, under the rule in Shelly's case, those devises would have created an estate tail, which, by force of the statute abolishing entails, are converted into fee simple estates absolute. This is a mistake. In the nicely drawn and purely artificial distinctions produced by the necessities and anomalies of a system too burdensome for us or our fathers to bear, one word made a most important difference. It was only to the word "*heir*" that the rule in Shelly's case applied; but "*issue*" was scot free, although it may be identical in meaning. (4 Conise, 261.)

Thus, if the grant is to the father for life, remainder to the issue of his body, the remainder is good, and the father has a life estate only; but substitute "heirs" for "issue," and you would give him a fee under the rule in Shelly's case.

Is there any other reason for supposing that the first takers under the devise in question have a fee simple absolute? No life estate—*eo nomine*—is given to the first takers; but, on the contrary, the estate is given, in express words, to them their *heirs and assigns*. Have they, therefore, a fee simple absolute, notwithstanding that their estate is limited over to their issue by a subsequent clause?

Where a testator has given the absolute ownership and disposal of the property, a limitation over, repugnant to the ownership and disposal, is void. (*Jackson* vs. *Bull*, 2 J. R., 19; *Kelmer* vs. *Shoemaker*, 22 Wend., 137; *McLean* vs. *McDonald*, 2 Barbour's (S. C.) R., 534; *Jackson* vs. *Robbins*, 16 J. R., 169, and numerous other cases.) But in all these cases, the power of *unqualified* disposition of the property was given either by implication or in express terms. But the mere formal use of the words "heirs and assigns forever"—words ordinarily creating a fee—when, at the same time, there is a limitation over, to take effect on the death of the devisee, is good as an executory devise. (*Wilkes* vs. *Sion*, 2 Comst., 333; *Jackson* vs. *Christmas*, 4 Wend., 277; *Jackson* vs. *Thompson*, 6 Cow., 178; *Jackson* vs. *Staats*, 11 J. R., 337; *Anderson* vs. *Eden*, 16 J. R., 383.)

In the case before us, the fee is, in terms, given to the first takers, but without any additional words of unqualified disposition over the property to warrant us in pronouncing subsequent limitations over, as substantially at variance with the words first employed. The repugnance is only apparent, and in the form of the expression.

I am therefore of opinion that the first takers under the devises in question have only an estate for life, with remainder to their children, if there shall be any living at their death; so that persons not yet in existence may be entitled to a future estate in the premises, for the partition of which this suit has been instituted.

The next question, then, and a very interesting and important one, is this:

Has this court power to make a decree for *sale*, which will cut off or affect the rights of persons not *in esse?*

After considering the powers given to the court by the statute, and showing that this power was not included among them, the learned judge proceeded as follows:

Does such a power spring from any of the inherent powers of this

court? The jurisdiction transferred to the supreme court from the late court of chancery never comprised any such power. That court did not possess any original jurisdiction, even in mere partition. It was a proceeding at law; and it is only since the 31 Henry VIII., c. 1, that the court of chancery made partition between joint tenants and tenants in common (1 Ves. & Bea., 555), and since the 32 Henry VIII., c. 32, that it has granted such relief in behalf of a tenant for life (6 Ves., 498) or for years. (1 Ves. & Bea., 551.)

Since those statutes, courts of equity, to acquire jurisdiction in such cases, assumed that joint tenants and tenants in common became trustees for each other. There were also insurmountable difficulties attending proceedings of partition at law, where the plaintiff was obliged to prove his title precisely as he declared, and the interests of all the parties in the manner exactly as prescribed by the statute; while in the court of chancery sufficient evidence may be derived from the admissions of the defendants on oath, and when the record itself, or the pleadings, did not contain the information, it could be referred to a master, to ascertain the respective interests of the parties. By analogy, therefore, to its jurisdiction in dower, it allowed a partition to be obtained by bill. Its authority, however, in this respect, was regulated, in a great measure, by the extent of the power of courts of law upon a writ of partition; and the statutes to which I have referred, not applying to copyholds, the court of chancery would not interfere to compel a partition of such property. The earliest instance, it is said, of a bill of such partition, was in the reign of Queen Elizabeth. (1 Mad., c. 198; Harg. Co. Litt., 169 A.) And such bills became frequent in the reign of James II. At length the jurisdiction was, by usage, so firmly established, that a party was entitled to proceed in a court of equity in all cases where he could proceed by law. It was, indeed, insisted that he could proceed in such a court even where a writ of partition would not lie at common law. (*Swan* vs. *Swan*, 8 Price, 519.) Certainly, whenever one of the parties interested was an infant, or when the estate of either was in remainder or reversion, after the court had assumed this jurisdiction, it was always necessary to file a bill.

But the court never thought of claiming the power to decree a sale, even when all parties who might be interested were in being, and were adults; and even now in England, since the abolition of the writ of partition at law (by 3 & 4 William IV., c. 27, § 36), where courts of equity have exclusive jurisdiction of the subject, they can not decree a sale. The power to sell, possessed by our courts, is given solely by the statute.

In the present case, as by the wills of Mrs. Munn and Miss Woodham, there are contingent interests in this property to which persons not yet in being may be entitled, and as this court can not decree a sale affecting such interests, the purchaser can not receive a good title.

I am therefore of opinion that he ought to be discharged from his purchase, and that the deposit paid to the referee should be returned to him.

DOWER.—RIGHT OF REPRESENTATIVE TO ARREARS.

Where a widow filed a bill against the alienee of her husband, to recover dower, but died before any decree was pronounced—*Held*, that her personal representative could not recover rents and profits of the estate accruing between the commencement of the suit and the death of the widow.

[*Turney* vs. *Smith*; 14 Ill. R., 242.]

The plaintiff, Turney, was the administratrix of one Keziah Arnett. In February, 1852, Keziah Arnett filed a bill against the defendants, Smith and others, to recover dower in certain real estate of which her husband was seized during coverture, but which was aliened before his death. During this suit she died intestate, and the plaintiff then filed a supplemental bill, praying that the defendants account for one third of the rents and profits from the commencement of the suit until the death of the widow. A decree was entered, dismissing this bill, and from this decree the plaintiffs appealed.

TREAT, C. J.—The right to dower of course terminated on the death of the widow. The only question is, Can her personal representative recover mesne profits from the time the dower was demanded? Damages for the detention of dower were not recoverable at the common law, but were given by the statute of Merton, where the husband died seized of the estate. After the passage of that statute, the widow recovered damages as against the heir, but not as against the alienee of the husband. The damages being a consequence of the recovery of the dower by the widow, could only be assessed when there was a judgment in her favor. The widow lost her damages if the heir died after judgment, and before they were assessed; and the damages were also lost to her personal representative if she died before they were ascertained. Such was the rule at law. (Bacon's Ab., Title Dower, let. I; *Mordant* vs. *Thorold*, 1 Salkeld, 252.)

But a different rule prevailed in equity. The widow might establish her right to dower at law, and then go into equity, and compel the representative of the heir to account for the mesne profits; or she might resort to equity in the first instance, and have an assignment of damages in the same proceeding. If she died after establishing her right to dower, either at law or equity, her personal representative could in equity recover mesne profits from the heir or his representative. (*Curtis* vs. *Curtis*, 2 Brown's C. R., 620; 1 Story's Eq., § 625.) And perhaps the doctrine in equity is, where the widow dies without establishing her right to dower, that her personal representative may recover arrears of dower from the heir or his representative. However that may be, there is no authority for holding that mesne profits can, in such a case, be recovered from the alienee of the husband. The precise question involved in this case arose in *Johnson* vs. *Thomas* (2 Paige, 377). The widow filed a bill to recover dower in real estate that had been aliened by the husband. She died after the cause was submitted, but before any decree was pronounced; and her executor applied to the court to revive the suit in his name, in order that he might recover mesne profits. The chancellor denied the application, and held, as

the widow died before her right was established, and as the husband did not die seized of the estate, that the executor was not entitled to recover any arrears of dower. It is clear, therefore, that this claim of the administratrix to mesne profits can not be sustained, either on the principles of the common law or of equity.

Decree affirmed.

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COMMON CARRIERS.—THEIR LIABILITIES.

Common carriers are not liable for remote and extraordinary results of their negligence, such as could not have been anticipated by ordinary skill and foresight.

[*Morrison* vs. *Davis & Co.*; 20 Penn. St. R., 171.]

This was an action of assumpsit to recover damages for the loss of merchandise, shipped in Philadelphia and to be delivered in Pittsburg, by the defendants, who were common carriers.

Upon the trial it appeared, among other things, that the defendants' canal boat in which the goods were carried, was wrecked below Piper's dam, by reason of the extraordinary flood in the Juniata division of the Pennsylvania canal, in the fall of 1847; and further, that the boat started on its voyage with one lame horse, and that by reason thereof great delay was occasioned in making the voyage, and that had it not been for this, the boat would have passed the point where the accident occurred before the flood came, and would have arrived safely and in time.

LOWRIE, J.—It is insisted by the plaintiff that inasmuch as the negligence of the defendants in using a lame horse for the voyage occasioned the loss, therefore they were liable. The court refused so to instruct the jury, and this is one of the principal assignments of error.

In answering this question we must assume that the proximate cause of the disaster was the flood, and the fault of having a lame horse was a remote one, which by concurring with the extraordinary flood became fatal. We assume that the immediate cause had the character of an inevitable accident; but that this cause could not have affected the boat had it not been for the remote fault of starting with a lame horse. The question then is, Does the law treat this fault and the consequent delay as an element in testing the inevitableness of the disaster at Piper's dam? We think it does not.

In any other than a carrier case, the question would present no difficulty. The general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast; and for those which arise from a conjunction of this fault with other circumstances that are of an extraordinary nature.

Thus, a blacksmith pricks a horse by careless shoeing; ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use; but it could not anticipate that by reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him, or injured his rider; and such injury would be no

proper measure of the blacksmith's liability. The true measure is indicated by the maxim *causa proxima non remota spectata.*

It is on the same principle that insurers against the perils of the sea are not liable for a loss immediately arising from another cause, though by the perils of the sea the ship had sustained an injury without which the loss would not have taken place. (12 East, 648; 2 Bing., 205; 12 Mass., 230.) And on the other hand, the insurers are liable in case of a loss produced by the perils insured against, though the loss would not have happened had it not been for remote negligence by the master or crew. (3 Sumner, 270; 14 Mees. & W., 476; 8 *ib.*, 895; 11 Peters, 213; 5 Barn. & A., 171; 7 Barn. & C., 214; 2 Camp., 149.)

The case of a deviation is no exception to this rule; for there the insurer is not liable because that act makes a different voyage from the one insured.

There are often very small faults which are the occasion of the most serious and distressing consequences. Thus, a momentary act of carelessness set fire to a little straw, and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this fault one third of a city (Pittsburg) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed? On the other hand, these very small acts are often the cause of incalculable blessings. A bucket of water promptly applied would have saved all that loss; but the amount saved would have been no proper measure of reward for such an act. There are thousands of acts of the most beneficial consequence that receive and deserve very little reward, because in themselves and in their purpose they have very little merit.

Now there is nothing in the policy of the law relating to common carriers that calls for any different rule as to consequential damages to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary; and this liability includes all those consequences which may have arisen from the neglect to make provision for those dangers which ordinary skill and foresight are bound to anticipate. Though they are held to the strictest care, as to the sufficiency of their ship and other vehicles, and the custody of the goods, yet no greater foresight of extraordinary perils is expected of them than of other men, and no greater penalty is visited for its failure. The consequence which ordinary foresight may anticipate from an insufficient ship is that all the goods may be lost; their value is, therefore, the proper measure of the damage. But the ordinary consequence of the fault charged in this case is the loss of time, and the penalty is measured accordingly, even though a concurrence of other extraordinary circumstances has greatly increased the extent of the loss. The law does not make this delay an element in testing the inevitableness of the final disaster. (14 Wend., 215.) So far, therefore, as relates to this question, there was no error, and the judgment as to it must be affirmed.

The judgment of the circuit, however, was reversed, and a new trial granted upon other grounds.

RAILROADS.—RIGHTS OF ADJACENT LAND OWNERS.

After the assessment and payment of damages by a railroad company for the right of way across a person's land, such person has no right to build cattle guards across the road without the company's permission, nor are the company under obligation to build fences on either side of the road.

[*Alton and Sangamon R. R. Co.* vs. *Baugh*; 14 Ill. R., 211.]

This was an appeal from an assessment of damages for the company's right of way over Baugh's land. On the trial in the circuit court the judge instructed the jury "that after the assessment and payment of damages in the case, the railroad company will not be bound to make fences for Baugh on either side of the road, or to make cattle guards for him across the road; nor will Baugh have a right without the consent of the company to make cattle guards across or under said road." The jury rendered a verdict of $480 damages for the plaintiff, and the defendant appealed.

TRUMBULL, J.—This case involves two propositions. First, whether after the assessment and payment of damages by the railroad company for the right of way across a person's land, such company is bound to make fences for the owner on either side of the road; and secondly, whether the owner has authority, without the company's consent, to make cattle guards across or under the road.

We know of no principle of the common law, and there is certainly no statute which compels one person or corporation to fence the land of another. It was never supposed, when a public highway was laid out, that the owners of lands over which it passed would have any right to require the authority by which it was constructed to inclose it by fences. And yet there is no distinction in principle between the obligation to fence a public highway and a railroad; and the obligation to construct cattle guards, which are a species of fence, is of the same character.

Upon the second point, it is clear, that after the condemnation of the land and the payment of the damages, the proprietor of the land over which the road passes would be prohibited from placing any obstruction upon it. Is the making of a cattle guard across or under a railroad an obstruction to it, or to the free use of the land condemned for the right of way of such road? The land condemned in this instance was sixty feet wide, only a small part of which would, in ordinary cases, be actually occupied by the track of the road, though it might be necessary at times to occupy the whole space for the construction and repair of the road, and its convenient use. In the construction of a cattle guard, it would be necessary to extend the fences on either side of the track of the road quite up to it, and this of itself might, and often would be, an obstruction to the free use by the railroad company, of the land condemned. But to construct the cattle guard across or under the road would be an interference, temporarily at least, with the track itself, as it would be necessary to excavate beneath the rails, and while the work was being done, and the necessary

supports being placed underneath, the road could not be used. To allow this to be done without the consent of the company would be to deprive them, for the time being, of the use and control of their own road, and of the right of way for which they had paid.

In our view it is wholly immaterial whether the railroad company acquired a fee-simple estate on the land condemned or not, as the construction of cattle guards without their consent would be a clear interference with their right of way over the land, if it were admitted that the fee still remained in the original proprietor.

Judgment affirmed.

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STOCK SUBSCRIPTIONS.—MISREPRESENTATIONS AND CONCEALMENTS.

**The directors forming a company and the persons taking shares on its formation, are contracting parties; and the latter may avoid the purchase of the shares on the ground of fraudulent representations or concealments in advertisements issued by the former. Two cases.**

[I. *Pulsford* vs. *Richards*; 19. Law & Eq. R., 387.]

The defendants were the directors of the West Flanders Railway. In June, 1845, they issued a prospectus of this company, stating its capital, the facilities for building the railroad, the rich land and the large population of the country through which it would pass, the great gains which might be expected from it, and generally setting forth the advantages of taking stock in it. The prospectus stated that the directors had reserved for themselves, by way of reimbursement for expenses, liabilities, and payments already incurred, a commission of three per cent. upon the capital, and that they had deposited the caution money, and complied with all the conditions rendered necessary by the Belgian laws under which the company was incorporated, but neglected to state that they had allotted to themselves 20,000 shares, and intended to reserve £25,000 as a bonus to themselves out of the first moneys paid on the deposit of the shares when allotted. The prospectus further stated that the directors had engaged the services of a most able and efficient *directeur*, who had been the chief manager of the traffic for the Belgian government on the state lines, but omitted to add, what was the fact, that they had allotted him 4,000 shares and guaranteed him a salary of £500 a year. The plaintiff, who purchased a number of shares in the railway company, having discovered these and some other facts, the statement of which had been omitted in the prospectus, filed a bill to recover back the deposits which he had paid on the shares which he had taken, he on his part returning the shares and accounting for the interest and dividends which he had received on them.

The Master of the Rolls.—The ground on which relief is asked is that principle of equity which declares that the willful misrepresentation of one contracting party which draws another into a contract shall, at the option of the person deceived, enable him to avoid or enforce that contract. It will be convenient in the present case to state my view of this principle before applying it to the facts as they appear

to be established on the evidence. The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth in all the dealings of mankind. This principle is universal in its application to cases of contract. It affects not merely the parties to the agreement, but also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements false in fact were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known or if they had formerly known, and ought to have remembered, the fact which negatived the representation made. (*Burrowes* vs. *Lock*, 10 Ves. Jun., 470; *Money* vs. *Jorden*, 21 Law J. Rep. (N. S.), Chanc., 511, 893; S. C. 11 Eng. Rep., 182; 13 *ib.*, 205.) This principle applies to all representations, on the faith of which other persons enter into agreements; so that whether the representation were true or false at the time when it was made, he who made it shall not only be restrained from falsifying it hereafter, but shall, if necessary, be compelled to make good the truth of that which he asserted. The results, however, which flow from the application of this principle, differ materially in different cases. In the case where false representation is made by one who is no party to the agreement entered into on the faith of it, the contract can not be avoided, and all that equity can then do is to compel the person who made the representation to make good his assertion as far as may be possible.

In cases, however, where the false representation is made by a person who is a party to the agreement, the power of equity is more extensive, and the contract itself may be set aside, if the nature of the case and condition of the parties will admit of it; or the person who made the assertion may be compelled to make it good.

The distinction between the cases where the person deceived is at liberty to avoid the contract, or where the court will affirm it, giving him compensation only, is not very clearly defined. This question usually arises on the specific performance of contracts for the sale of property; and the principle which governs the case, though it is in some instances of difficult application, and leads to refined distinctions, is the following, namely, that if the representation made be one which can be made good, the party to the contract shall be compelled, or may be at liberty, to do so; but if the representation made be one which can not be made good, the party deceived shall be at liberty, if he pleases, to avoid the contract. Thus if a man misrepresents the tenure or situation of an estate, as if he says an estate is freehold, which proves to be copyhold or leasehold, or if he describes it as situate within a mile of some particular town, when, in truth, it is several miles distant, such a misrepresentation of it, if it can not be made true, would, at the option of the party deceived, annul the contract; but if the property be subject to incumbrances concealed from the purchaser, the seller must make good his statement and redeem those charges. And, even in the cases where the property is subject to a small rent not stated, or the rent of it is somewhat less than it was represented, and the court does not annul the contract, but compels the

seller to allow a sufficient deduction from the purchase-money, it does so on this principle, that by these means he, in fact, makes good his representation, and that the statement made was not such as in substance deceived the purchaser as to the nature and quality of the thing bought.

With respect to the character or nature of the misrepresentation itself, it is clear that it may be positive or negative; that it may consist as much in the suppression of what is true as in the assertion of what is false, and it is almost needless to add, that it must appear that the person deceived entered into the contract on the faith of it. To use the expression of the Roman law, it must be a representation *daut locum contractui;* that is, a representation giving occasion to the contract, the proper interpretation of which appears to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether.

The application of these principles remains to be considered. I entertain no doubt that the persons who take shares in the formation of a company, and the directors who form it, are contracting parties to whom the principles I have stated are applicable, and the prospectus issued by the directors is a representation *quæ daut locum contractui.* The plaintiff and the defendants stand in the relation of shareholders and directors; the representation which created it was a prospectus issued on the 5th of June, 1845. I have to consider, therefore, whether the prospectus so issued contains such representation or such suppression of existing facts, as if the real truth had been stated, it is reasonable to believe the plaintiff would not have entered into the contract.

The learned judge then proceeded to consider at great length whether, from the evidence in the case, which was very voluminous, and the actions of the defendant in connection with the issuing of the prospectus, there was any proof of actual fraud or intentional misrepresentation.

The result was that the bill was dismissed with costs.

[II. *Jennings* vs. *Broughton;* 19 Eng. Law and Eq. R., 420.]

This was a bill filed to set aside a contract by which the plaintiff became the owner of 719 shares in a mining company, on account of fraudulent misrepresentations. These representations were contained in a report of the land agent and surveyor of the company which had been published by the defendant, and also in some of their advertisements. It appeared, however, that the plaintiff had visited and personally examined the mine before completing his purchase. The mine, however, after having been worked for some time proved unprofitable, and the plaintiff thereupon filed this bill to recover back the money which he had paid for the shares.

The Master of the Rolls.—I repeat the observations I made in *Pulsford* vs. *Richards,* that persons who take shares on the formation

of a company, and the directors who form it, are contracting parties; that the prospectuses and advertisements issued by the directors are the representations *quæ daut locum contractui*. If these representations contain false statements which can not be made good by the persons who made them, the person who took those shares on the faith of them may, in my opinion, avoid the contract, and require the founders of the company to restore him to the position he was in when he took these shares. The question, then, in the present case is, whether the prospectuses and advertisements so issued contained such misrepresentations, or such suppressions of existing facts, as that, if the real truth had been stated, it is reasonable to believe that the plaintiff would not have entered into the contract. But even if this should be determined in the affirmative, it would not be conclusive in the plaintiff's favor; because if the plaintiff knew what the circumstances connected with the mine really were, and was cognizant of the fact that these representations were inaccurate, he can not afterward complain, and it is always to be borne in mind that the burden of proving that the representations were false, and that he acted upon the faith of them, lies upon the plaintiff.

After reviewing at length the evidence in the case, the Master proceeded as follows:

I see no evidence of *mala fides* or fraud in the defendants; they knew apparently as little of the mine as he did. They were desirous to enter into a speculation to work this mine. They did not sell the whole concern. They retained three eighths of the interest and the entire control of the working of it, and both they and the plaintiff were so satisfied with it, that in January, 1851, they refused to part with any shares, although a considerable premium was offered to induce them to do so. If it had been shown that the defendants had worked the mine unprofitably for several years, and then, finding that no profit could be derived from it, had determined to make it profitable by getting up a bubble company, the case would have borne a very different aspect. This, however, was not the case.

The real state of the facts I believe to be, that the plaintiff embarked in this scheme with his eyes open, knowing all that was then to be known, but with an exaggerated and undue expectation of success, and he has now fallen into the opposite extreme.

In adventures of this kind, so little can ever be accurately known of the future production of the mine that the expectations of success in a great degree depend upon the temperament of the person who engages in them; most persons are apt to believe that present appearances will continue, whether for good or evil. But reviewing the whole matter carefully and attentively, I think the plaintiff did not embark in this speculation on the faith of any misrepresentation made by the defendants respecting the character of this mine.

Bill dismissed.

DAMAGES.—PROCURING BREACH OF CONTRACT.

J. W. contracted to sing at the plaintiff's theater, and nowhere else, during a specified time. G. procured her to break this contract—*Held*, on demurrer, that he was liable in damages, under the rule of law giving a remedy for enticing away servants.

[*Lumley* vs. *Gye*; 20 Eng. Law & Eq. R., 168.]

The facts in this case are probably familiar to most of our readers. The difficulties out of which the suit arose excited great public interest at the time. The facts are briefly as follows: The plaintiff, the manager of her majesty's theater, London, engaged one Mlle. Wagner to sing certain parts in stipulated operas, for three months, she binding herself not to sing during that time at any theater or concert, public or private, without Mr. Lumley's written consent. She subsequently entered into an agreement with the defendant, Gye, whereby she agreed to abandon her contract with Mr. Lumley and to sing at the royal Italian opera, Covent Garden, instead of her majesty's theater. The plaintiff thereupon filed a bill praying for an injunction to restrain Mlle. Wagner from singing at Covent Garden, or anywhere else, without his written permission, during the existence of the agreement between them. This injunction was granted. The case was reported, it will be remembered, in *Livingston's Law Magazine* for September, 1853. (*Lumley* vs. *Wagner*, 1 Liv. Law Mag., 553.) The plaintiff then commenced a suit at law against Gye to recover damages for procuring Mlle. Wagner to break her contract with the plaintiff. The defendant demurred, and the case was argued on the demurrer.

CRAMPTON, J.—It is now clear law that a person who wrongfully and maliciously, or, what is the same thing, with notice interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, or by harboring and keeping him as a servant, after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act by which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue. And I think that the relation of master and servant subsists sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service can make any difference. The wrong and injury are surely the same whether the wrong-doer entices away the gardener who has hired himself for a year, the first night before he is to go to his work, or after he has planted the first cabbage, on the first morning of his service; and I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that distinction exists. The proposition of the defendant, that there must be a service actually

subsisting, seems to be inconsistent with the authorities that show these actions to be maintainable for receiving or harboring servants after they have left the actual service of the master. In *Blake* vs. *Langon*, it was held by the court of King's Bench, in accordance with the opinion of Gandy, J., in *Adams* vs. *Bafealds* (1 Leo., 240), and against the opinion of the two other judges who delivered their opinions in that case, that an action will lie for continuing to employ the servant of another, after notice, without having enticed him away, and although the defendant had received the servant innocently. It is there said that "a person who contracts with another to do certain work for him, is the servant of that other, till the work is finished; and no other person can employ such servant to the prejudice of the first master. The very act of giving him employment is the means of keeping him out of his former service." This appears to me to show that we are to look to the time during which the contract of service exists, and not to the question whether an actual service subsists at the time. In *Blake* vs. *Langon*, the party, so far from being in the actual service of the plaintiff, had abandoned that service and entered into the service of the defendant, in which he actually was, but inasmuch as there was a binding contract of service with the plaintiff, and the defendant kept the party after notice, he was held liable to an action. Since this decision, actions for wrongfully hiring or harboring servants, after the first actual service had been put an end to, have been frequent. (See *Pilkington* vs. *Scott*, 15 Mee. & W., 657; *Hartley* vs. *Cummings*, 5 Com. B. Rep., 247; *Sykes* vs. *Dixon*, 9 Ad. & E., 693.)

But it was further said, that the engagement, employment, or service, in the present case, was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law, giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts, for services of any particular description, and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labor or service for a given time, under the direction of a master or employer, who is injured by the wrongful act, more especially when the party is bound to give such personal services exclusively to the master or employer, though I by no means say that the service need be exclusive.

It is clear that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in *Taylor* vs. *New*. (*Blake* vs. *Langon*, 6 T. R., 221; *Sykes* vs. *Dixon*, 9 Ad. & E., 593; *Pilkington* vs. *Scott*; *Hartley* vs. *Cummings*.)

In deciding this case on the narrower ground, I wish by no means to be considered as deciding that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract, to the injury of the person with whom such contract

has been made. It does not appear to me to be a sound answer to say that the act in such cases is the act of the party who breaks the contract, for that reason would apply in the acknowledged case of master and servant; nor is it an answer to say that there is a remedy against the contractor, and that the party relies on the contract, for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrong-doer may be for a different matter, and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt, which might be the only sum recoverable on the contract. Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party, I am by no means prepared to say that an action could not be maintained, and that damages beyond the amount of the debt, if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment or a writ of conspiracy at common law might perhaps be maintained; and where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action. In this class of cases, it must be assumed that it is the malicious act of the defendant, and that malicious act is one which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay any thing like the amount of the damage sustained entirely from the wrongful act of the defendant; and it would seem unjust and contrary to the general principles of law, if such wrong-doer were not responsible for the damage caused by this wrongful and malicious act; without, however, deciding any more such general questions, I think that we are justified in applying the principle of the action for enticing away servants, to a case where the defendant maliciously procures a party who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such service during the period for which she had so contracted, whereby the plaintiff was injured. I think, therefore, that our judgment should be for plaintiff.

Erle, J.—The question raised upon this demurrer is, whether an action will lie by the proprietor of a theater against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theater for a certain time, whereby damage was sustained; and it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principles involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed; and the present

case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided; and that as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theater, therefore they are no authority for an action in respect of a contract for such a performance, the answer appears to me to be, that the class of cases referred to rest upon the principle that the procurement of a violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong; as in violations of a right to property, whether real or personal, or to personal security, he who procures the wrong is a joint wrong-doer, and may be sued either alone or jointly with the agent in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party, and if he is made to indemnify for such breach, no further recourse is allowed, and as in case of a breach of contract, the action is for a wrong, and can not be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the actions for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to me sufficient to show that the principle has been recognized. (*Winsmore* vs. *Greenbank*, Willis, 577; *Green* vs. *Button*, 2 Cr. M. & R., 707; *Shepherd* vs. *Wakeman*, 1 Sid., 79; *Bird* vs. *Randall*, 3 Burr., 1345.) This principle is supported by good reason; he who maliciously procures a damage to another by violation of his right, ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract, may inflict an injury the same as he who procures the abstraction of goods after delivery, and both ought on the same ground to be made responsible. The remedy on the contract may be adequate as where the measure of damage is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or in the case of the non-delivery of goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time; but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach of the agreement. In such cases, he who procures the damage maliciously, might justly be made responsible beyond the liability of the contractor.

With respect to the objection, that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defense. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my judgment ought to be equally actionable. The relation of em-

ployer and employed is constituted by the contract alone, and no act of service is necessary thereto. The result is that there ought to be, in my opinion, judgment for the plaintiff.

COLERIDGE, J., dissented.

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INSURANCE.—INSURER'S INTEREST.

A party entering upon the lands of the state without license, and there erecting a house, has no interest therein sufficient to constitute a foundation for a contract of insurance.

[*Sweeny* vs. *The Franklin Fire Insurance Comp.*; 20 Penn. St. R., 337.]

This was an action on a policy of insurance. The defense set up was, that the plaintiff was not interested in the building insured, and at the time of the insurance had falsely represented himself to be the owner of the building, when, in fact, he was not.

It appeared that in 1834, a number of persons agreed to form a company for the purpose of erecting a hotel on the beach near the town of Lewes, Delaware. The company was not incorporated, the hotel being built *upon vacant land belonging to the state.* The plaintiff, Sweeny, was one of the stockholders, and was also engaged by the company to build the hotel. The carpenter work alone, which he did, amounted to more than the sum insured. Most of the stockholders, not being able to pay the plaintiff and other creditors, transferred all their right and title to the creditors, over three years before the date of the policy sued on. The plaintiff was the principal creditor. He held possession of the hotel prior to this transfer, and after it was made he had entire control of it. In 1841, three years after the transfer, he insured the hotel in the office of the defendants for $1,800. On the 14th of De cember, 1841, the hotel was destroyed by fire.

Upon the trial a verdict was rendered for the plaintiff for $2,880. The court, in full bench, afterward ordered this verdict to be set aside, and a judgment of nonsuit to be entered. This was an appeal from this order.

LOWRIE, J.—The rule is valuable and well founded, that he who has no interest can have no insurance. That he must show his interest, and that it is necessary for his recovery, are the corollaries of the rule. Without this, insurances would soon become a mere system of gambling. These principles are sufficient to affirm the judgment.

It matters not what contracts or conveyances passed between the plaintiff and the company by which this house was erected. The company had no title to convey to him. So far as the evidence of title goes, it shows that the company entered upon land belonging to the state of Delaware, and erected their house there without any shadow of title, or even license, general or special. They were mere intruders, and if the plaintiff has their whole title, it is a mere intruder's title. This is not such an interest as the law recognizes as a sufficient foundation for the contract of insurance.

Judgment affirmed.

INSURANCE.—AGENT'S AUTHORITY.

An "agent and surveyor" of an insurance company, "authorized to take applications for insurance and to receive the cash per centage to be paid thereon," has no power to effect insurances.

[*N. Y. Mutual Insurance Comp.* vs. *Johnson.* Pennsylvania Supreme Court. Not yet reported.]

The facts in this case sufficiently appear in the opinion of the court.

LOWRIE, J.—This is an action on a contract to insure, and the question whether or not there was insurance, depends very much upon the authority of the company's agent through whom the business was transacted. He was appointed "agent and surveyor" of the company, and was "authorized to take applications for insurance and receive the cash per centage to be paid thereon." Now it does not seem easy to make it plainer, that this is not an authority to bind the company by effecting insurances. He was to survey property proposed to be insured, as we infer from the name of his office, and to receive applications for insurance, and of course to transmit them to the company; but no word indicates that he could bind the company by accepting a proposition or making a contract of insurance for them. He might spring the game—not seize it.

It is argued that it has often been declared that taking a man's application, fixing the terms and receiving the premiums, are sufficient evidence of an insurance; and so they are when it thereby appears that the contract is complete, and nothing wanting but the issuing of the policy. But when, as here, it is plain that the application and payment of the premium amount only to a proposition for insurance, we can not make a contract out of it.

When we turn to the certificate of the agent taken by the plaintiff below, this point becomes, if possible, more clear. It certifies that the plaintiff had "made application for insurance"—and had "paid cash premium of $25 00—if not approved by the directors, money to be returned." It is impossible to read this as a contract of insurance. It seems a proposition to the directors, that is to become a contract when they accept it.

The proposition and the premium advanced with it go together. If the proposition be withdrawn or rejected, the premium must be returned. At any time before the acceptance of the proposal, the plaintiffs could have withdrawn it and demanded re-payment of the premium. They were never bound as by contract, and of course the defendants were not.

But it is said that the loss did not take place for near six months after the application, and that during that time the defendants neglected to refund the money, and to notify the plaintiffs that their proposal was rejected. And this is thought to be such negligence on the part of the defendants below as justifies and requires the inference that they had approved or accepted the proposal, and here is the root of the error of the court below.

A principal is bound by the authorized acts of his agent whether notified of them or not, and therefore the defendants are chargeable with having received this proposal, but that does not help the plaintiffs; for receiving it is not an acceptance of it. A principal is also bound by the unauthorized acts of his agent if, on being notified, he does not disavow them; but neither does this help the plaintiffs, for the agent made no contract to insure; and even if he did, no notice of such contract is proved.

What is the true effect of the delay? It can not of itself make a contract. A proposal can not become a contract by delay in rejecting or answering it. A delay in paying twenty-five dollars can not make a man liable for twenty-five hundred dollars. A neglect or delay that has properly a tendency to mislead another, and which is incompatible with honesty, may be charged as a ground of liability, as, where one knows that another is acting as his agent, in a particular matter, without or beyond his authority, and does not promptly disavow his acts. But in this case, the plaintiffs had in their own hands the power of correcting the delay, for undue delay in accepting a proposal may be, and ought to be, treated as a rejection of it, and the proposer may refuse to be bound by a tardy acceptance. A proposal not answered, remains a proposal for a reasonable time, and is then regarded as withdrawn. Both parties are interested in its acceptance, and both are expected to attend to it with reasonable diligence.

Judgment reversed, and new trial ordered.

WOODWARD, J., dissented.

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INSURANCE.—AGENT'S AUTHORITY.

**The agent of an insurance company has the power of receiving notice of other insurances on the same property, and indorsing them on the policy.**

[*Wilson* vs. *The Genesee Mutual Insurance Company*. New York Supreme Court. Not yet reported.]

This was an action on a policy of insurance issued by the defendants to the firm of A. H. Dixon & Co. on the goods, etc., in their store. By the terms of the policy it was provided, as usual, that the policy should be void if the insured should obtain other insurance on the property without notifying defendants and obtaining their consent indorsed on the instrument. It appeared that Dixon had obtained a further insurance, and that he gave notice of it to Park, the agent of the defendants, who indorsed acceptance of the same on the policy in suit. The defendants contended that this was no notice to the company.

The verdict below was for the plaintiff, and defendants appealed.

ROOSEVELT, J.—Was the notice of the second insurance in the Columbus Company sufficient?

These insurance companies, it appears, are frequently and very naturally more anxious to obtain premiums than to pay losses. "Let each man," say they, in the *nota bene* printed at the foot of every

policy, "induce his neighbors to insure, and the security and business can speedily be doubled." And in pursuance of the same system they established agencies in numerous and even distant places to such an extent, that every person dealing with them would seem, from their by-laws, to have an agent, or, rather, the agent of the company, in his vicinity. Under the circumstances, is not notice to such an agent notice to the principal?

Every agent is presumed by law, and may also be presumed by all persons innocently dealing with him, to possess every power necessary or naturally incident to his agency. In the case, then, of an insurance company systematically transacting and even soliciting business at points remote from its primary location, what power might reasonably be assumed to have been conferred by it upon a person permanently established and publicly held out to the world as "the agent of the Genesee Mutual Insurance Company," or, rather, for that is the only point necessary to be considered, was the power of receiving notice of other insurances on the same property, and indorsing them on the policy, among the reasonably-to-be-presumed powers? That Dixon, the insured, so supposed, is fully proved; and that Park, the agent, entertained the same belief, is shown by his indorsement on the policy signed "G. L. M. Park, agent." The policy provides that "notice shall be given to the company," but specifies no particular agent through whom it is to be given. It also provides that the insured "shall have the same indorsed" on the instrument, but it does not say by whom the indorsement shall be made. In the absence, then, of all express indication on the part of the company, what more natural on the part of the dealer than to look to the agent in his vicinity, the person held out and publicly advertised as such by the company itself?

There is no pretense of fraud, no attempt was made at concealment, no effort to recover from both companies in the aggregate more than the actual loss. The defense, therefore, in this point, is purely technical. Such defenses, where there had been perfect fair dealing on the part of the assured, in modern times are not favored either by judges or jurors; nor are they in accordance, as I conceive, with the true interests of the insurers themselves, or with the general sense of the community. That sense is usually common sense, and it can not be too often repeated, that common sense and common honesty are the true sources of common law.

Judgment entered on the verdict for plaintiff.

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TRADE MARKS.—NAME OF ARTICLE.

**Where the plaintiff's trade-mark was calculated to deceive the public, and the defendant was infringing it—*Held*, that equity would suspend the decision of a motion to enjoin the defendant, to give time for a determination of the rights of parties at law.**

[*Flavell* vs. *Harrison*; 19 Law & Eq. R., 15.]

In this case the facts were, that the plaintiff's father, to whose business the plaintiff had succeeded, contrived a particular description of

kitchen range, to which, for the better distinguishing it, and for the sake of euphony, he gave the name of "Flavell's Patent Kitchener," but no patent had ever been taken out respecting the article in question. In the latter part of 1850, the plaintiff took the defendant into his service, who formed the intention of setting up an opposition, and accordingly secretly took plans and drawings of all the plaintiff's models and works, and lists of his customers; and in the year 1852, while still in the service of the plaintiff, solicited his customers on his own account, and took (but apparently without a felonious intention) articles of stationery, bearing the plaintiff's name and address, for his own use in business correspondence. In the summer and autumn of 1852, these acts of the defendant came to the knowledge of the plaintiff, who thereupon discharged the defendant; and in October, 1852, placards appeared, in which the defendant, putting his own name prominently forward, advertised for sale "Flavell's Patent Kitchener," at reduced rates, "warranted the same as the articles in the Great Exhibition, 1851."

This was a motion for an injunction to restrain the defendant from using the plaintiff's name in such a manner.

Wood, V. C.—The plaintiff rests his case upon the title which he has acquired to this particular manufacture, and to the name which it has acquired with the public, and that name he states on his bill to be "Flavell's Patent Kitchener." Now it turns out that neither the plaintiff nor his father, the original contriver, ever had any patent in the article —that it never was a patented article at all; and this brings the case within the doctrine of *Perry* vs. *Truefitt*. The plaintiff, by using this appellation, misleads the public. Every body knows that patented articles are dearer, and therefore purchasers are more readily inclined to give a higher price for a patented article than if it were open to unrestricted competition. Moreover, by this word "patent," the public are prevented from testing it as they otherwise might; they are dissuaded from examining it with a view to imitating it; and it is in evidence that they were prevented from making that free use of it which every purchaser has a right to make of an unpatented article. Every ironmonger, for example, who bought the article, would have a right to imitate it, and pull it to pieces, and examine and take copies and models of all the parts for that purpose, which he would never think of doing to a patented article. In a case before Lord Eldon, he said, "that although there was in reality no patent at all, still a person might sustain an action where the name has been used." In that case, however, there had been a patent taken out, which had never been repealed, although an action had been brought at *nisi prius*, and decided against the patentee, so that the description had been originally true, and had never been finally decided to be wrong. I could have wished to see a higher degree of morality in the plaintiff. He comes here with a direct misrepresentation, which he asks this court to protect him in using. On this ground I feel inclined to retain the bill, as in *Perry* vs. *Truefitt*. I do not like to say that a court of law would wholly disregard the plaintiff's case against the use of his name by the defendant. I shall therefore direct this motion to stand over for six months, with liberty to bring an action.

PATENTS.—INFRINGEMENT.

**Where an invention consists of several parts, each of them new inventions, the imitation of any of them is an infringement of the patent.**

[*Smith* vs. *The London & North Western R. R. Co.*; 20 Eng. Law & Eq. R., 94.]

Action to recover damages for infringement of patent. The patent was for an improved wheel for carriages of different descriptions. The claim of the patentee stated that the invention consisted in the circumstance of the center boss, or nave, arms, and rim of the wheel being wholly composed of wrought or malleable iron, welded into one solid mass. The evidence showed a clear imitation and infringement, on the part of the defendants, of the manner of forming the boss, or nave, into one piece of malleable iron with the rest of the wheel; but it was stated that the mode which the defendant had used of forming and welding the spokes and rim did not amount to any infringement. The question was whether the imitation of a part of the invention was sufficient to constitute an infringement of the patent. Verdict for the plaintiff, and defendant moved for a rule to show cause why the verdict should not be set aside, and a new trial granted.

CAMPBELL, C. J.—It was contended that the words of the claim restricted the patent to the invention of a wheel made in every respect "in the manner aforesaid," and that, as the defendants had not used the same mode with regard to the spokes and rim as the patentee had specified, there could be no infringement of the patent. My brother Martin, who tried the cause, intimated his opinion that the claim was for the invention of a wheel as described in the claim, but that if the defendants had imitated or pirated the mode of welding the nave, and that were a material part of the invention, there was an infringement of part of the patent, for which the action was maintainable.

We are of opinion that this ruling was quite correct. Where a patent is for a combination of two, three, or more old inventions, a user of any of them would not be an infringement of the patent; but where there is an invention consisting of several parts, the imitation or pirating of any part of the invention is an infringement of the patent. Suppose that a man invents a machine consisting of three parts, of which one is a very useful invention, and the two others are found to be of less practical use, surely it could not be said that it was free to any person to use the useful part, so long as he took care to substitute some other mode of carrying out the less useful parts of the invention. We should be sorry to throw any doubt upon the question of an infringement of a material part of such an invention being an infringement upon which an action is maintainable, by granting a rule to show cause upon such a point.

There will therefore be no rule

SALVAGE.—CREW'S RIGHT THERETO.

When a merchant ship is abandoned, *bona fide*, by order of the master, "*sine spe revertendi aut recuperandi*," for the purpose of saving life, and a part of the crew subsequently meet the abandoned ship, return to her, and bring her safe ashore, they will be entitled to salvage.

[*The Florence;* 20 Eng. Law & Eq. R., 607.]

The Florence, on her voyage from Liverpool to the coast of Africa, met with bad weather, and was, by order of the master, abandoned in the Bay of Biscay, and her crew taken on board the steamer Montrose, and landed at Vigo, where they were, by direction of the British consul, put on board the steamer Madrid, for the purpose of being conveyed to England. On the day after leaving Vigo, the Madrid fell in with the Florence, near which, at the time, was the smack Rising Sun. The mate and part of the crew thereupon volunteered to return to the Florence, the master and the rest of the crew remaining on board the Madrid. The mate and seventeen men were accordingly put on board the Florence, and that ship, navigated by them, and assisted by the smack and other boats, was subsequently brought to Corunna. Some of the crew were there settled with by the agent of the vessel, but the mate, boatswain, and carpenter entered their actions as salvors. The claim of the mate and two seamen of the Florence was opposed on the ground that, being part of the crew, they were not entitled to any salvage.

Dr. Lushington.—I will commence this judgment by a consideration of that very important legal question, which was so fully and carefully discussed by counsel at the hearing; and I shall, in the first instance, state what I apprehend that question to be, without reference to the particular circumstance of this case. I conceive the question to be this—Whether, when a merchant ship is abandoned at sea, *sine spe revertendi aut recuperandi*, in consequence of damage received and the state of the elements, such abandonment taking place *bona fide*, and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to, or whether it is merely interrupted, and capable, by the occurrence of any and what circumstances, of being again called into force. I think all the circumstances I have stated are indispensable to the just framing of the proposition. First, the abandonment must take place at sea, and not upon a coast; for if a ship be driven upon a coast, and become a wreck, and the mariners escape to the shore, the contract enures to this extent at least, that if they act as salvors, and successfully, so as to save enough to pay their wages, they will be entitled to them, though not to salvage; if they do not so exert themselves, their wages are lost. (*The Neptune*, 1 Hagg., 227.) Secondly, the abandonment must be *sine spe revertendi;* for no one would contend that a temporary abandonment, such as frequently occurs in collisions, from immediate fear, before the state of the ship is known, would vacate the contract. Thirdly, the abandonment must be *bona fide*, for the purpose of saving

life. Fourthly, it must be by order of the master, in consequence of danger by reason of damage to the ship, and the state of the elements.

The master is, as I conceive, the proper person to form a judgment whether abandonment be absolutely necessary or not. He is the person whom the owners have voluntarily intrusted with the command of their vessel and the care of the property embarked in it; they must be taken to have deemed him competent to the discharge of the duties committed to him, and especially that he would not, without adequate cause, leave to destruction their property. Again, there can not be a reasonable doubt, I think, that in all cases of *bona fide* abandonment, the crew are justified in obeying the orders of the master to quit the ship; it must be presumed that he is the most competent judge of the degree of danger, and the last who would quit without a rational belief that there existed that degree of danger to life which rendered the abandonment a duty—I say a duty, for I consider it clearly to be a duty not to sacrifice human life. What the degree of danger is which would justify the master in adopting this measure can not be defined. Assuming, then, all the circumstances I have stated to be combined, let me, before I consider whether the contract is put an end to, inquire what the contract is which is made with the mariner.

The contract itself is for the services of the mariner, as a mariner, during a given voyage; the services are not defined in the contract; the duration is for a voyage or voyages, and sometimes for a specified time. In some special cases, provision is made for the termination of the contract, on the occurrence of other circumstances, as the sale of the ship or the impossibility of getting a cargo. The services, though not defined in writing, are so by usage; and so is the duration of them in some cases, as in the case of shipwreck, capture, etc. In shipwreck, the contract continues so long as a plank can be saved. By capture, certainly, if there be no recapture, the contract is at once put an end to, and this, I apprehend, whether by an enemy or by pirates. And here I may observe that, by their calling, mariners are bound to incur a certain degree of danger, whether it proceeds from any enemy, or from pirates, or from the tempestuous state of the elements; but there is a limit to the risk to which any seaman is bound to expose himself. Human life is more valuable in the sight of God and man than any property, and if it should so happen that the choice should lie between them, there can be no doubt as to which should prevail. Fortunately, however, this state of things can seldom occur, for if there be a reasonable chance of saving the ship, and consequently the cargo, there must, in almost all cases, be the same reasonable chance of saving the lives of the crew.

Presuming, then, such an abandonment to have taken place, let us see what follows. The mariners, having left the vessel, seek a place of refuge—perhaps on board a ship bound to a foreign port, distant or not, as the case may be; perhaps, taking to their boats, they seek some port of safety. I should write a treatise, instead of a judgment, if I attempted to describe all the circumstances which might occur, but it must be understood that my present observations apply only to the proposition I have stated, as if I were discussing the law applicable to

a special verdict. What is generally the state of a ship so abandoned at sea? In a large number of cases the ship is never heard of more; in some, she is found by other vessels, which are enabled, from their own undamaged condition, and perhaps from a change in the weather, to effect the salving of the ship abandoned.

So far as my experience enables me to judge, there is not one case in ten thousand in which the seamen obtain possession after an abandonment at sea. I use the words "at sea" emphatically, for I hold there to be a very wide distinction between an abandonment at a distance from land, in the open ocean, and the quitting the ship on the coast, when there may exist a fair expectation of returning, where the *spes recuperandi* is probable. Then what is the general condition of the seamen in the case put—what are the consequences to them? They are either left in a foreign port, to be sent home by the British consul, or to shift for themselves, or it may happen that they are brought back to England, to any port in this country. If the original contract to serve on board the ship quitted be a substituting contract, how and when can the seamen enter into a fresh one? It would, I conceive, be absurd to say that the seamen should wait, for the very act of abandonment is the strongest proof of there being no *spes revertendi;* and as to fixing any particular time, either absolutely or by reference to circumstances, it is manifestly impossible. The seamen, save where assisted by the consul to return home, are persons without resources, without the means of waiting or maintaining themselves; they must of necessity act without delay—they have no means of subsistence.

Take the crew of a vessel abandoned coming to any port—the distance from home, or from the place where the ship was left, must be circumstances ever varying—are they not immediately at liberty to form a fresh contract? If not, I again ask, how long are they to wait, and what is to become of them in the interval? If in a foreign port, is the consul prohibited from finding them a fresh ship? If in a British port, are the men to be left in a state of suspension, which is to them starvation? But upon what principle does the consul send them home but upon the principle of necessity? And is not the very act of sending them home the strongest proof that they are, and are treated as, no longer bound by their former contract? But if a crew so circumstanced are at liberty to form a fresh engagement, is not the former necessarily at an end? What owner or master could legally or would willingly engage a seaman still fettered by a former contract? Then suppose the mariner hired, and by an accident of very rare occurrence, the ship he is serving on board should fall in with the original ship abandoned; could the former engagement be said to have been in abeyance, and then fortuitously resuscitated? What would become of the contract last entered into, if the mariner was bound to leave the new ship, and return to his own former ship? Why should the latter ship possibly be exposed to perish in consequence of an accident which had previously happened to another ship? What law can provide for such unusual occurrences? Can there be any possible motive, as the law now stands, to induce a mariner to abandon his vessel *sine spe revertendi?*—for

that is the proposition. Clearly none, for he loses his wages. There is no fear, then, to be fairly entertained that a seaman will hastily abandon his ship, *sine spe revertendi*, and consequently no injury can arise from holding that such an abandonment, or rather the circumstances occasioning such abandonment, should vacate the contract.

It appears to me, then, looking at this question without reference to authority, at present, that the contract of the mariner is vacated by the act of God when distress at sea compels him to abandon, *sine spe revertendi*. Then if the mariner's contract be at an end, may he not be a salvor? He then becomes precisely in the situation which belongs to a salvor, according to Lord Stowell's description of him in *The Neptune* (1 Hagg., 227). Why should he not be? Why should the owners of ships be deprived of such possible services, or the mariners of such possible reward? Were such the law, an injury would be inflicted on both, and for no sound reason that I can perceive. But if it should be said, that allowing a seaman who had belonged to the ship to become a salvor might lead to an improper and hasty abandonment, I think the answer is twofold: first, that the proposition which I am considering is a *bona fide* abandonment—and if it be right in such cases, an abuse scarcely possible is no argument against it, if it be otherwise right; secondly, that the occurrence of salving of a ship by mariners who have abandoned her at sea is so rare, and necessarily so rare, that the danger of mariners being tempted to abandon by the hopes of future salvage is all but imaginary.

I am now come to consider whether there is any authority or legal decision upon this question entitled to weight. I think I am not wrong in saying that it was admitted on all sides, during the argument, that there was no direct authority to be found in our books—in fact, that this question had never been determined or even discussed; and, consequently, if the principle applicable to it could be extracted at all from our books or decisions, it could only be so indirectly and inferentially. I have made no new discovery of authorities; I have searched, but in vain. I am indebted to the industry of counsel for the cases to which I am about to advert.

His honor then quoted and commented on the following cases: *Mason* vs. *Blaireau*, 2 Cranch, 240; *Hobart* vs. *Drogan*, 10 Peters, 108; 3 Kent's Com., 246; *Beale* vs. *Thompson*, 3 Bos. & P., 405; *The Governor Raffles*, 2 Dods., 18; and after commenting at length upon the evidence, decided that the mate and crew were entitled to salvage.

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### RIGHTS OF MARRIED WOMEN.—EQUITABLE PROTECTION.

A court of equity will not restrain the husband or his assignee from collecting a *legal chose in action* due the wife, until suitable provision be made for her, where the aid of such court is unnecessary, in order to reduce the *chose in action* into possession.

[*Wiles* vs. *Wiles*; 3 Md. R., 1.]

The plaintiff in this case was the wife of the defendant. At the time of, and previous to, her marriage, she was the owner of a certain prom-

issory note, made to her by one Ramsburg, who was made a defendant in this suit. In 1849, after her marriage and after the birth of a child, the husband applied for the benefit of the insolvent laws, and one Keller, also made a defendant in the suit, was appointed his permanent trustee. He was proceeding to collect the note when the wife filed her bill for an injunction to restrain him from thus proceeding, and for a suitable provision out of the note for herself and children.

Le Grand, C. J.—The question for this court to determine is, whether the wife is entitled to the relief sought. There is no doubt of the general proposition, that when a husband or his assignee asks the intervention of a court of equity to obtain the possession of a wife's personal property, the court will require him to do what is equitable, by making a suitable provision out of it for her maintenance and that of her children; and if the fund be under the control of the court, she may proceed by original bill. (*Duvall* vs. *Farmer's Bank of Md.*, 4 Gill & John., 282.)

But the doctrine contended for on behalf of the appellant extends beyond this principle. It in substance asserts, that a court of equity will restrain a husband or his assignee from collecting a *legal chose in action*, even where it is not necessary for him or his assignee to invoke the aid of a court of equity, until such time as a suitable provision be made for the wife. The propriety of such a doctrine is strongly urged by the reasoning of learned jurists, but we have not been able to find, with but one exception, that it has ever been so *decided*.

The subject has undergone a very full review in many cases, both in England and in this country. The principal cases in which it has been considered in this country have been very fully brought together in the notes to the case of *Murray* vs. *Lord Elibank* (65 Law Lib., 329).

The wife's equity does not, *according to the adjudged cases*, attach except upon that part of her personal property in action which the husband can not acquire without the assistance of a court of equity. And if the husband can acquire possession without a suit at law, or in equity, *or by a suit at law*, without the aid of a court of chancery, (except perhaps as to legacies and portions by will or inheritance), the husband will not be disturbed in the exercise of the right. (2 Kent, 141.)

This rule, we take it, is the substance of the principles established by the adjudged cases, both in England and in this country. It is true that learned jurists have suggested the inquiry, whether a court of chancery ought not on just principles to restrain the husband from availing himself of any means, either at law or equity, of possessing himself of the wife's personal property in action until he makes a suitable provision for her. Indeed, some of the courts have gone so far as to say, that if it were in their power to do so, and the circumstances of the case required it, they would enforce by their decision such a doctrine. But in none of the cases in which this opinion is expressed, with one exception, is the case presented which required the application of such a principle. They were all cases of which the court had an *equitable* cognizance; and it is clear, that whenever the jurisdiction of a court of equity properly and legitimately attaches to the fund or to the subject, it is competent to provide for the wife out of the fund. In

all the cases, with the exception already mentioned, cited by the counsel of the appellant in support of his view, a court of equity, *as such*, had jurisdiction over the subject-matter. They were either cases of trust, of distributive shares, account, legacies, or where the husband had abandoned his wife, refusing to contribute to her support. In the latter case a court of chancery has the right to grant alimony, and until the assignee of the husband actually reduces into possession the choses in action of the wife, her right of survivorship exists, and a court of equity will interfere to provide her alimony if her life has been such as to entitle her to its protection.

The case of *Bell et al* vs. *Bell* (1 Kelly, 637), undoubtedly establishes the proposition, that the wife's equity attaches upon her *legal choses in action*, and will be protected by a court of equity irrespective of the necessity of its aid to enable the husband or his assignee to reduce them into possession. Although we fully appreciate the ability and legal erudition which the learned judge in that case employs to sustain his position, we are unable to agree with him in his opinion as to the purport of the decisions on which he relies.

We have already seen that Chancellor Kent has not deduced the same conclusion from the *adjudged cases*. (See also Clancy on Married Women, B. 5, ch. 2, pp. 466–470; *Thomas* vs. *Sheppard*, 2 McCord's Ch. R., 36; *State* vs. *Krebs*, 6 Harr. and John., 31.) In the latter case it was distinctly held, "that wherever a husband can come at the estate of the wife, without the aid of a court of chancery, that court can not interfere in her behalf."

Decree affirmed.

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### AGENCY.—COMPENSATION.

**A factor is to be considered as undertaking to hold the funds of his principal subject to his order, and he can not retain them upon the ground of having paid claims against him, which he had received notice from the principal not to pay.**

[*Nolan* vs. *Shaw*; 6 Louisiana R., 40.]

The plaintiff was a sugar dealer, living upon his estate in the country, and the defendants were his commission merchants in New Orleans. They were also the agents of Goodloe, an engine builder, living at Cincinnati. In November, 1845, the defendants, acting as the agents both of Nolan and Goodloe, made a contract which they signed for both principals, for the building and putting up of a sugar mill and engine for Nolan, the price to be paid by Nolan to Goodloe in March, 1847. In December previous, Nolan, who had then a large amount in the hands of his factors, addressed them a note, expressing dissatisfaction with the machinery furnished by Goodloe, and directing them to pay him no money on his account. To this letter they replied, acknowledging its receipt, and saying that they should settle nothing without his orders. Subsequently, however, Goodloe being indebted to Shaw & Co. in an amount exceeding the debt due from Nolan to Goodloe, they paid themselves by debiting Nolan with the amount and

crediting Goodloe. Nolan then brought this action to recover this amount. Judgment was rendered for the plaintiff, and the defendant appealed.

SLIDELL, J.—We will assume, for the purposes of the present inquiry, that Nolan was justly indebted to Goodloe. The question, then, is substantially one of the right to compensation. I owe you, say the defendants, the proceeds of your crops placed in my hands for sale, but you owe me a debt which was justly due by you to Goodloe, whose rights, against your orders and in furtherance of my own interests, I have acquired by paying him. Is a factor permitted to make such a defense?

The relation between factor and principal is not the ordinary relation of debtor and creditor. It is a relation of trust and confidence. In the absence of any agreement to the contrary, the factor is to be considered as undertaking to hold the funds confided to him by his principal, subject to his order, deducting only his own charges and advances made in the course and within the scope of his employment. In the present case there was superadded to the implied agreement to hold Nolan's funds subject to his order, a positive promise not to use them in paying Goodloe.

Compensation does not take place against a party who has confided his funds to another under such circumstances. It must rest upon the basis of good faith. It is not permitted where its operation would involve a deception and a disappointment of the just expectation and confidence of the party against whom it is set up. Hence, if a creditor should buy goods at the shop of his debtor in such a manner as to hold out the idea that he would pay for them in cash, and after receiving the goods should propose a set-off, his conduct would be considered as not in good faith, and compensation would not be allowed. (Pardessus, Droit Commercial, Vol. 2, No. 325.) So it would be with one who, under representation of a pressing exigency and a promise of an early repayment, should borrow money of another and afterward refuse to pay, upon the ground that the lender was his debtor. Such artifices, says Mr. Pardessus, are unworthy of the good faith of commerce. (See also Merlin Rep., *verbo* Compensation, ss. 2; Russell on Factors, 170; *Child* vs. *Maley*, 8 Tenn., 610; S. C., Paley on Agency, 110.)

It is in vain for the defendants to say that the debt which they have paid for Nolan to Goodloe was a just debt. Nolan thought, or professed to think, it was not. He could have withdrawn his funds out of his factor's hands if he had chosen, for aught that appears to the contrary. He left them there, and permitted them to accumulate under the express promise that they should not be used to pay Goodloe. The payment was a breach of the confidence reposed, and the defendants can not profit by their own wrong. They must pay over to the plaintiff upon his demand the funds intrusted to them, and bring their separate action upon Goodloe's claim, as Goodloe would have been obliged to do, if they had not thought proper, by paying him to take his place.

PRESTON, J., concurred; EUSTIS, C. J., and ROST, J., dissented. The court being equally divided in opinion, the judgment was affirmed.

RAILROAD COMPANIES.—THEIR LIABILITIES

The plaintiff, a passenger in the defendants' cars, being about to be carried beyond the station where he intended and had a right to stop, jumped from the train, notwithstanding the warnings of the conductor and brakeman, and was injured—*Held*, that he could not recover damages from the company.

[*Pennsylvania R. R. Company* vs. *Aspell*. Pennsylvania Supreme Court. Not yet reported.]

This was an action to recover damages for injuries occasioned to the plaintiff by the negligence of the defendants. The plaintiff was a passenger in defendants' cars, from Philadelphia to Morgan's Corner. The train should have stopped at the latter place, but some defect in the bell rope prevented the conductor from making the proper signal to the engineer, who, therefore, went past, though at a speed somewhat slackened, on account of the switches which were there to be crossed. The plaintiff, seeing himself about to be carried on, jumped from the platform of the car, and was seriously hurt in the foot. He brought this action, and the jury, with the approbation of the court, gave him fifteen hundred dollars damages.

BLACK, C. J.—The persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance. They must convey the passengers to their respective places of destination, and set them down safely, if human care and foresight can do it. They are responsible for every injury caused by defects in the road, the cars, or the engines, or by any species of negligence, however slight, which they or their agents may be guilty of; but they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness or folly. One who inflicts a wound upon his own body must abide the sufferings and the loss, whether he does it in or out of a railroad car. It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery from an injury caused by the mutual default of both parties. When it can be shown that it would not have happened, except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained. A railroad company is not liable to a passenger for an accident which the passenger might have prevented by ordinary attention to his own safety, even though the agents in charge of the train are also remiss in their duty.

From these principles it follows, very clearly, that if a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back, because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence for which he can blame nobody but himself. If there be any man who

does not know that such leaps are extremely dangerous, especially when taken in the dark, his friends should see that he does not travel by railroad.

It is true that a person is not chargeable with neglect of his own safety when he exposes himself to one danger by trying to avoid another. In such a case, the author of the original peril is answerable for all that follows. On this principle, we decided last year, at Pittsburg, that the owners of a steamboat which was endangered by a pile of iron, wrongfully left on the wharf, and to get clear of it backed out into the stream, where she was struck by a coal boat and sunk, had a good cause of action against the city corporation, whose duty it was to have removed the iron. If, therefore, a person should leap from the car under the influence of a well-founded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief had been done by the apprehended collision itself. When the negligence of the agents puts a passenger in such a situation that the danger of remaining on the cars is apparently as great as would be encountered in jumping off, the right to compensation is not lost by doing the latter, and this rule holds good even where the event has shown that he might have remained inside with more safety. Such was the decision in *Stokes* vs. *Saltonstall* (13 Peters, 181), so much relied on by the defendant in error. A passenger in a stage coach, seeing the driver drunk, the horses mismanaged, and the coach about to upset, jumped out, and was thereby much hurt. The court held the proprietors of the line responsible, because the misconduct of their servant had reduced the passenger to the alternative of a dangerous leap or remaining at great peril. But did the plaintiff in the present case suffer the injury he complains of by attempting to avoid another with which he was threatened? Certainly not. He was in no possible danger of any thing worse than being carried on to a place where he did not choose to go. That might have been inconvenient; but to save himself from a mere inconvenience by an act which puts his life in jeopardy was inexcusable rashness.

Thus far I have considered the case without reference to certain facts disclosed in the evidence, which tend to diminish the culpability of the defendants' agents, while they aggravate (if any thing can aggravate) the folly of the plaintiff. When he was about to jump, the conductor and the brakeman entreated him not to do it—warned him of the danger, and assured him that the train should be stopped and backed to the station. If he had heeded them, he would have been safely let down at the place at which he desired to stop in less than a minute and a half. Instead of this, he took a leap, which promised him nothing but death, for it was made in the darkness of midnight, against a wood pile, close to the track, and from a car going probably at the full rate of ten miles an hour.

Though these facts were uncontradicted, and though the court expressed the opinion that no injury would have happened to the plaintiff but for his own imprudence, the jury were, nevertheless, instructed that the defendants were bound to compensate him in damages. The learned judge held that the cases of mutual neglect did not apply, be-

cause this action was on a contract. Now, a party who violates a contract is not liable any more than one who commits a tort for damages which do not necessarily or immediately result from his own act or omission. In neither case is he answerable for the evil consequences which may be superadded by the default, negligence, or indiscretion of the injured party. There is no form of action known to the law (and the wit of man can not invent one) in which the plaintiff will be allowed to recover for an act not done or caused by the defendant, but by himself.

When the train approached Morgan's Corner, some one (probably the conductor) announced it. Much stress was laid on this fact. The court said, in substance, that to make such an announcement before the train actually stopped was a want of diligence, whereby the plaintiff was thrown into a position of danger, and though he was warned not to jump, yet having done so, he could make the company pay him for the hurt he received. We think this is totally wrong. It is not carelessness in a conductor to notify passengers of their approach to the station at which they mean to get off, so that they may prepare to leave with as little delay as possible when the train stops. And we can not see why such a notice should put any man of common discretion in peril. It is scarcely possible that the plaintiff could have understood the mere announcement of Morgan's Corner as an order that he should leap without waiting for a halt. If he did make that absurd mistake, it was amply corrected by the earnest warnings which he afterward received.

The remark of the court, that life and limb should not be weighed against time, is most true; and the plaintiff should have thought of it, when he set his own life on the hazard of such a leap, for the sake of getting to the ground a few seconds earlier. Locomotives are not the only things that may go off too fast, and railroad accidents are not always produced by the misconduct of agents. A large proportion of them is caused by the recklessness of the passengers. This is a great evil, which we would not willingly encourage, by allowing a premium on it to be extorted from companies. However bad the behavior of those companies may sometimes be, it would not be corrected by making them pay for faults not their own.

The court should have instructed the jury, that the evidence, taken all together—or even excluding that for the defense—left the plaintiff without the shadow of a case.

Judgment reversed, and *ven. fa. de novo* awarded.

EVIDENCE OF CUSTOM.—DELIVERY BY CARRIER.

By the contract expressed in the bill of lading, the defendant agreed to transport from Buffalo to Chicago certain goods, and deliver them to the plaintiff, who was the consignee at Chicago, where the plaintiff had a wharf at which he was doing business, and where the goods might have been delivered from the propeller; but the defendant also had a wharf to which his vessel was accustomed to run, and where she delivered her freight—*Held*, that it was competent for the defendant to set up a custom or usage in the port of Chicago, that goods should be delivered at the wharf selected by the master of the vessel, and that consignees should receive their goods there, with averment of knowledge of such custom in the plaintiff, and that this contract was made in accordance with it.

[*Dixon* vs. *Dunham*; 14 Ill. R., 324.]

The plaintiff in error was the master of the propeller Illinois, navigating between Buffalo and Chicago. The defendant in error shipped certain goods on this propeller at Buffalo to be conveyed to Chicago. The plaintiff in error brought the goods and delivered them on the wharf of Dole, Rumsey & Co., and gave notice to the defendant in error of the arrival of the goods. The defendant in error refused to receive them at the wharf where they had been left, and demanded that the goods should be delivered to him in person, or at his own wharf. This being refused, the defendant in error made a tender of the amount of freight and replevied the goods.

To the action in replevin two pleas were interposed. The first averred that there was established a custom and usage of trade in Chicago among the masters of vessels, forwarders, business men, etc., well established, known, certain, uniform, and reasonable, and not contrary to law, that goods shipped from other ports and places should be delivered upon such dock and wharf in the city of Chicago as should be selected by the masters of vessels, etc., which amounted to a delivery of goods to the consignee. The second plea set up the custom and usage, averring that the defendant in error knew it, and shipped his goods subject to it, and a delivery of the goods and an offer to deliver in accordance with the custom.

The replication to these pleas averred that defendant in error, being a merchant in Chicago, doing business as such on a certain dock or wharf in Chicago, shipped the goods, to be delivered to him at that place, etc., sets out the bill of lading, which is in the usual form, the tender of the freight, etc., and alleged that defendant requested the delivery of the goods at his place of business, which, by the bill of lading, the plaintiff was bound to do. By the bill of lading the goods were "to be delivered in like good order unto the consignee named in the margin, or to his assigns."

To this replication the plaintiff in error demurred. The court below overruled the demurrer, and the plaintiff in error excepted. And by agreement, the question presented upon the appeal was, whether the replication was a good answer to the pleas?

CATON, J.—From the diversified character of our commerce, this question, which is now for the first time presented to this court for adjudication, is one of considerable importance. While the convenience of commerce may require different rules for the delivery of goods,

when transported by sail or steam vessels on the great lakes, on the rivers, on the canal or by railroad, by plank or the common roads, it would be very inconvenient for each commercial point on these thoroughfares to establish an independent usage by which the same contract would receive different constructions depending upon the place at which it was to be performed. Where the necessities of any particular line of commerce may render a particular usage so indispensably necessary as to commend itself to, and force itself upon, all those engaged in that line of commerce, there may be great propriety in allowing such usage, when it has become universal and well understood, and acquiesced in by all, to be proved, in order to explain the intention of parties upon points as to which the contract itself is not explicit, although without such usage the law might give it a different construction. This is allowed upon the same principle which allows extraneous facts to be proved, in view of which parties have entered into engagements, and by the aid of which their intentions are ascertained, where otherwise they might be doubtful. Hence, in construing a bill of lading or other contract for transporting freight, we must look to the mode of transportation by means of which the contract is to be performed; as if by water craft, navigating either the lakes, rivers or canal, it is not to be presumed that the delivery is to be made away from the water course, or if by railroad, away from the track or depôt of the road, unless it is otherwise expressly stipulated in the contract; if, however, this is expressly stipulated, that would show an intention that the carrier should use other means of transportation than those usually employed in the course of such trade. Such expressed intention would destroy the presumption that the contract was to be performed by the means of transportation in ordinary use by the party undertaking to perform it. In construing contracts of affreightment, the courts themselves take notice of the course of trade and the means of transportation in use in carrying on that commerce, and in aid of the means of information which the courts are supposed to possess in reference to commercial transactions, usages which the necessities of a particular trade have established, have been allowed to be proved to the courts, to aid them in giving a construction to contracts made in reference to such trade.

No usage or custom can be admitted to vary or control the express terms of a contract, but they may be admitted to determine that which by the contract is left undetermined. The parties, by their contract, may abrogate any custom, no matter how ancient or uniform, but such custom can not abrogate the terms of a contract. Whenever there is a conflict, the contract must control. The reason why a custom is allowed to be proved for the purpose of interpreting a contract is, because both parties are supposed to have been acquainted with it, and to have contracted in reference to it. The custom does not become a part of the law of the place, but rather a part of the contracts which are to be performed at the place. Hence, if the usage is excluded by the contract, it can not constitute a part of it. (*The Schooner Reeside*, 2 Sumner, C. C. R., 567.)

Some diversity will be found in the cases, in reference to the anti-

quity. extent, and universality of the custom, before it shall be permitted to enter into and form a part of the contract. It must be such at least as to warrant the conclusion that it was known to the contracting parties, and that they made their contract in view of and with reference to the particular usage, and that it was their intention that the contract should be executed conformably to it. (Angell's Law of Carriers, § 301; *Singleton* vs. *Hillard*, 1 Strobhart, 203; Co. Litt. 113.) Uniformity as well as antiquity is essential to the validity of such a custom. Where it has been the subject of controversy and contention, claimed by one class and denied by another, and only submitted to under protest and to avoid litigation, it can not be presumed to have been so acquiesced in as to have entered into and formed a part of the contract. A valid usage must not only be submitted to, but should receive at least the tacit acquiescence of all classes engaged in the trade which it is sought to affect and control. These customs are established and approved from the necessities of trade, growing out of peculiar circumstances connected with it, and hence may have a greater or less territorial extent, or more general or restricted application, according to the circumstances which gave rise to them. The custom must also be reasonable in view of these circumstances. For instance, supposing a vessel had but a single package for a consignee in the port of Chicago, it might be very unreasonable to require her to remove from her usual dock, where she is accustomed to land and discharge her freight, and a custom absolving her from such duty might very readily acquire stability among all parties, whereas, were she loaded with an entire cargo for one consignee, as timber, or pig or railroad iron, it might be very unreasonable for the captain to claim the right to deliver the cargo at a distance from the wharf of the consignee, where he would not only be compelled to have it reshipped or transported by land, but also to pay wharfage; and a custom which would secure that privilege to a carrier would be likely to meet with opposition, if not with continued resistance, and from its character a very long and entirely uniform custom would have to be clearly proved, before it would be allowed to prevail, if it would not be rejected altogether as unreasonable. Customs are instituted and admitted to promote the interests and convenience of trade under the supposition that the slight inconvenience which one class suffers by reason of them is more than counterbalanced by the benefits to another class, and that the inducements thus offered compensate the lesser loss by the reduced charges which are thereby induced.

By the contract expressed in the bill of lading, the defendant agreed to transport from the port of Buffalo to the port of Chicago the goods in controversy, and to deliver them to the plaintiff, who was the consignee, at the port of Chicago. The plaintiff had a wharf or dock, at which he was doing business, and at which the goods might have been delivered from the propeller. And the question is, whether the terms of the bill of lading are so specific as to require the carrier to deliver the goods at the wharf of the consignee at all events, or whether he might, in pursuance of the custom or usage of trade in the port of Chicago, deliver the goods on the wharf to which the vessel was ac-

customed to run, and where she was accustomed to deliver her freight? In the absence of any usage to the contrary, there is no doubt that under the contract the captain would have been bound to deliver the goods to the consignee at his place of business, if he had one within the port of Chicago, which was accessible to the vessel and convenient for the delivery of goods, and yet this would have been but an inference or implication of law arising from, but not expressly stipulated by, the terms of the contract of affreightment. The terms of the contract do not define the place within the port of Chicago where the goods are to be delivered, but only the person to whom they are to be delivered. They might have stipulated the place of delivery, which might have been the plaintiff's wharf, or any other place. In the absence of such stipulation the place must be determined either by presumption of law or the usage of trade. In either case this is done in pursuance of the supposed intention of the parties. Where the goods are to be transported in vessels, it can not be supposed that it was the intention of the parties that the carrier should convey the goods to a place inaccessible to the vessel; or if by railroad, to a place which the cars could not reach. Where there is a usage of trade, in reference to which the contract is made, that usage becomes a part of the contract, and determines the intention of the parties as satisfactorily as if that intention had been expressed upon the face of the bill of lading. It contradicts and is inconsistent with none of its express provisions. Had this bill of lading provided that the goods should be delivered to the consignee at the wharf of Dole, Ramsey & Co., there would have been nothing inconsistent or contradictory in its terms. The designation of the place of delivery would have been but filling up a blank which was left in the contract, which must be filled up either by intendment of law, or by extraneous circumstances, which may serve satisfactorily to show what was the real intention of the parties. This may be done either by a long and uniform course of dealing between the parties themselves, or of all persons engaged in that trade. The presumption of law as to the place or particular mode of performance is but a presumption, and may be overcome, and another presumption substituted in its place, by facts and circumstances indicating clearly and satisfactorily that the parties intended that the contract should be performed in a different mode or in another place. The pleadings in this case show that the parties did intend that the contract should be performed in a way different from such legal presumption. The pleas aver that there had been for a long time a custom and usage at the port of Chicago, among the masters of vessels, shippers, and consignees, that goods transported to that port in vessels should be delivered at the wharf selected by the master of the vessel, and that consignees should receive the goods at such wharf; and that such custom was well established, known, certain, uniform, reasonable, and not contrary to law, and well known to the plaintiff previous to the time when the goods were shipped, and acquiesced in by him; and that the goods were received on board the propeller to be transported to Chicago, in accordance with said custom. And the pleas further show, that the goods were delivered at the dock in Chicago selected by the cap-

tain of the vessel, and that the plaintiff was duly notified thereof; but that he refused to receive them there, and pay the freight thereon; wherefore the defendant retained the goods, etc. Indeed, no question was made upon the argument that the usage was well pleaded, if this is such a contract as may be explained by a usage of trade. We have already seen that such is the case. Had the plaintiff not desired to receive the goods according to the custom of the port of delivery, knowing as he did what that custom was, and that it was uniform and well established, he should have instructed his forwarder at Buffalo to have inserted a special clause in the bill of lading, stipulating that the goods should be delivered at the plaintiff's wharf, thus abrogating the custom in the particular instance. He did not do this; and the inference is, that he intended to conform to the custom in view of which the contract was made. The bill of lading set up in the replication is not an answer to the pleas, and the demurrer should have been sustained.

The judgment of the common pleas must be reversed, and the cause remanded.

Judgment reversed.

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FORWARDING MERCHANTS.—RIGHTS AGAINST CARRIERS.

A. & Co., forwarding merchants at Philadelphia, paid freight on goods in transit from New York, consigned to several firms in Cincinnati, and delivered the goods to B., a carrier, on a promise to deliver them to a second carrier to be sent to the agents of A. & Co., in the line of their destination. In a suit brought by A. & Co. against B., who lost the goods—*Held*, that the plaintiffs could maintain the action and recover the entire amount of the loss for the benefit of the several owners.

[*Baltimore Steamboat Company* vs. *Atkins & Co.* Pennsylvania Supreme Court. Not yet reported ]

This was an action of assumpsit brought by Atkins & Co. against the Baltimore and Philadelphia Steamboat Company, on a contract to carry certain goods from Philadelphia to Baltimore. The breach alleged was that the goods were not delivered, but were wholly lost by the negligence of the defendants. The goods were purchased at New York by two separate firms in Cincinnati, and the plaintiffs, who were forwarding merchants, received the separate lots of goods from the New Jersey Transportation Company, paid the freight from New York, and delivered them to defendants. While in their custody, and by their negligence, they were damaged, and this action was brought by Atkins & Co. for the use of the legal owners, to recover the damages sustained.

KNOX, J.—The only question properly before us is, whether this action can be sustained by Atkins & Co.? To determine this question we must inquire into the extent of their interest in the goods.

By receiving the goods in Philadelphia, and paying the freight from New York, Atkins & Co. certainly obtained an interest in them, subject of course to the general property of the owner, but good as against

any other person, and even superior to the general owner upon the question of possession until repayment.

If the defendants had complied with their contract, and delivered the goods to the Baltimore Railroad Company, they would again have been restored to the actual custody of the plaintiffs, through their agents at Cumberland, and by them forwarded to Pittsburg, where, according to the evidence, upon delivery on board of a steamboat, charges of every description would have been paid to the plaintiffs; but from Philadelphia to Pittsburg, they must be considered in the light of the principals, the carriers using the defendant's Company and the Baltimore and Ohio Railroad Company as the means of transporting the goods from Philadelphia to Cumberland.

At the time of the injury, the interest of the plaintiffs, Atkins & Co., in the property was, first, to the extent of the advances made by them to the New Jersey Transportation Company; second, the right to receive the goods at Cumberland, and transport them to Cincinnati, or, at least, to Pittsburg, and to retain the possession until all charges were paid. This interest gave to Atkins & Co. a special or qualified property in the subject-matter of their agreement with the Baltimore Steamboat Company; and, according to all the authorities, both in England and in this country, the action of assumpsit may be maintained in the name of one having such special property.

In general, a mere servant or agent with whom a contract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, can not support an action thereon. But when an agent has any beneficial interest in the performance of the contract, as for commission, or a special property in the subject-matter of the agreement, he may support an action in his own name upon the contract, as in the case of a factor or broker or a warehouseman or carrier or a policy broker whose name is on the policy, or the captain of a ship. (*Grow* vs. *Dubois*, 1 T. R., 112; *Atkins* vs. *Amber*, 2 N. C., 493; *Geo* vs. *Clagget*, 7 T. R., 359; *Johnson* vs. *Hudson*, 11 East., 180; *Saddler* vs. *Leigh*, 4 Comp., 195; Park on Ins., 403; *Shields* vs. *Davis*, Thornton, 65; *Brown* vs. *Hodgson*, 4 Lawton, 189.)

Judgment affirmed.

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REPLEVIN.—TITLE TO CHATTELS.

H. contracted to make three lumber wagons for U. He subsequently made three such wagons, but refused to deliver them—*Held*, that U. could not maintain an action of replevin for them.

[*Updike* vs. *Henry*; 14 Ill. R., 378.]

This was an action of replevin brought by Updike against Henry to obtain possession of three lumber wagons, which the defendant had agreed to make for the plaintiff, but which he refused to deliver. Judgment was rendered for the defendant, and the plaintiff appealed. The facts of the case appear in the opinion of the court.

TREAT, C. J.—The plaintiff was not entitled to a verdict. The

evidence failed to show that he was the owner of the property in question. The defendant agreed generally to make three lumber wagons for the plaintiff within a given time. The contract did not relate to any particular wagons. It was in the power of the defendant to fully perform it by the delivery of three lumber wagons of his manufacture within the time limited. It was not like a contract of sale of the three wagons that should be first made, or of that number of wagons to be made out of certain specified materials. In the case of such a contract, the wagons, when finished, might perhaps, without any further act on the part of the seller, become the property of the purchaser. But upon this contract, the title to the wagons replevied did not vest in the plaintiff on their completion. Something more had to be done by the defendant. The wagons had to be delivered to the plaintiff, or appointed out as those which he should receive under the contract. He had no right to go to the defendant's manufactory and select any particular wagons. The articles in question were never delivered to him, nor set apart for him. As that was not done, they continued to be the property of the defendant, and the plaintiff could not maintain replevin for them. (*Low* vs. *Freeman*, 12 Ill., 467.) His remedy was an action on the contract for the failure to deliver the wagons according to its terms.

Judgment affirmed.

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LARCENY.—OWNERSHIP OF GOODS

Where a person stole at one time goods which severally belonged to five different owners—*Held* that he was liable to indictment and conviction for five distinct larcenies.

[*United States* vs. *Beerman*; 5 Cranch's C. C. R., 412.]

The grand jury found five separate indictments against the defendant for larceny in stealing the goods of five different persons, the property stolen being in each case of the value of five dollars and upward. In each indictment the offense was stated to have been committed on the 4th March, 1838. On the 5th of April the defendant was found guilty in each case; and on the 21st of April the court sentenced him to the penitentiary for one year in each case.

THURSTON, J. concurred in the judgment in the first of the five cases, but dissented in the other four cases; and on the 30th April read in court, and directed the clerk with the leave of the court to file the following opinion:

The grounds of my refusal to concur with the court in more than one sentence against the convict are, that the stealing of goods at one and the same time, belonging to different persons, is but one act of larceny, and therefore one indictment is sufficient. And where one indictment is sufficient, to harass and oppress the accused with more than one is oppressive and vindictive, against the maxim, "*Nemo debet bis puniri pro eodem delicto*," and against common justice and common sense.

What is an act of larceny? When the larcener contemplates the commission of a theft to the extent of the theft actually committed and proved, no matter how many persons the stolen goods belong to, it is the consummation of a single intent only. If a thief contemplates stealing certain goods belonging to different persons, and carries his intent into execution at one and the same time, or at least by one continuous operation, it is but one offense, and subject to but one punishment. For instance take this case; the defendant stole sundry articles of clothing from the inmates of a boarding-house, belonging to different persons, the whole together to the value of some sixty or seventy dollars. Did he take these articles at one time, or by one continuous operation, and pursuant to one preconceived intent, or at different times and in pursuance of separate and distinct intents? or, in other words, did he steal from one boarder only, and in pursuance of a preconceived intent to steal from that person only, and then steal from another in execution of another distinct intent conceived after the consummation of the first larceny, and so on with the larcenies committed on all the boarders, with the stealing from whom he was charged? If he stole from all of them with a preconceived intent so to do, at one time, or by one continuous operation, it constituted but one larceny; if the second way, the acts constituted separate and distinct larcenies. In order to estimate properly the soundness of this doctrine, in contrast with the view taken of the law by the other two judges, let us test it by reason, justice, and common sense. As to the first, will any man say that by the magic of some senseless, antiquated, technical conceit, an old rule which the human understanding revolts at as silly, irrational, and barbarous, and which, as it is against common right, I deem it in no wise irreverent to impeach, that you can change, as you would change a half-eagle into five dollars, one crime into four or five, and thus enable this court to invest themselves with an arbitrary and dangerous power of punishing transgressors to four or five times the extent allowed by law, against not only the letter but the spirit of the law, and in direct contravention of its obvious policy? That you should have power to punish a citizen, merely because the goods belonged to different persons, with fifteen years' confinement in the penitentiary, when the value of the goods stolen taken together amounted to about sixty or seventy dollars only—nay, even twenty dollars—and yet if he stole to the value of a million of dollars, the property of one person only, you could not, and dare not, inflict over three years' confinement on the convict! Can common sense bear for one moment such a construction of the law as this? of a law, too, founded on and suggested by the very purpose of equalizing punishments with crimes. As to common justice, such a construction is so obviously against it, that I should deem it a waste of words to attempt to prove or illustrate so self-evident a proposition. This construction is also against the constitution of the United States, protecting the citizens from "cruel punishment." If confinement in the penitentiary be not intrinsically and characteristically a cruel punishment, yet I should deem it very cruel if you multiply it on the offender to four or five times beyond what the law allows. To these great considerations of violence done to the safeguards provided for the citizens

by the constitution of the United States, the common law, the utter confounding of common sense and common justice urged by me in support of my opinion against that of the two other judges, I have been met only with the old technical rule, that in spite of all those great and weighty objections, the goods stolen, although taken at one time, belong to different persons, and for each person there is by that old rule a distinct larceny; as if an old rule, bearing absurdity upon its very face, must overawe and bear down the constitution of the United States, the Bill of Rights of Maryland, together with common sense and common justice.

CRANCH, C. J.—The ground taken by Judge Thurston is in substance that the stealing of the goods of divers persons at the same time constitutes but one offense, and can not in law be the subject of diverse indictments or prosecutions. This position, I think, can not be maintained. (*Hammond's case*, 2 Leach, 1089; S. C., 2 Russell on Crimes, 102; 4 Bl. Com., 362, C. 27; Dalton's Justice, C. 122, p. 346; *William Turner's case*, Kelyng's Rep., 30; *Jones and Bevers' case*, *ib.*, 52; *Rex* vs. *Vandercour and Abbott*, 2 East. Cr. Law, 519; 2 Hawk, C. 35, § 3; Foster, 361–2; *Rex* vs. *Pedley*, B. R. Tr., 1782; Chitty, vol. i., p. 457.)

From these cases it appears to have been the unanimous opinion of at least sixteen judges in England, that the stealing of the goods of two separate owners, at the same time, by the same person, and in the same place, constitutes two separate offenses; and that this proposition or doctrine, which does not appear to have been controverted, was so clear as to have been the admitted ground of the judgments of the courts in three cases of burglary.

This proposition, then, being established beyond all controversy, it follows that these separate offenses may be the subject of separate indictments; and there are some reasons why it is not always "repugnant to common sense and common justice" that they should be, sometimes at least, thus prosecuted.

I. A count charging two distinct felonies would be liable to the objection of duplicity, and might be quashed, either upon motion before trial, or upon demurrer, or on motion in arrest of judgment; and even if charged in separate counts of the same indictment, although it would be no cause for demurrer, nor for arresting the judgment, because each count is to be considered as for a separate offense, and liable to a separate judgment, yet in England the practice of the judges is, if the objection is discovered before plea, to quash the indictment, and if not discovered until the trial, to put the prosecutor to his election for which offense he will proceed. (See Starkie's Cr. Plead., C. 2, § 2, p. 42; East's P. C. 515–522; *Young* vs. *The King*, 3 T. R. 106; Leach, 531, 568; *Rex* vs. *Jones*, 2 Camp., 132; Archbold's Cr. Plead., 54, 59, 60; *Rex* vs. *Fuller*, 1 B. & P., 181; *Rex* vs. *Galloway*, R. & M., 234; *Rex* vs. *Flower*, 3 Car. & P., 413; *Rex* vs. *Madden*, Moody, C. C., 277; *Commonwealth* vs. *Symonds*, 2. Mass. Rep., 163, 164; 1 Chitty Cr. Law, 168, 172, 248, 252, A.; *Thomas' case*, 2 East's Cr. Law, 934; Co. Lit., 304 A.; *Commonwealth* vs. *Dove*, 2 Vir. Ca. 26.)

If an indictment charging several distinct offenses be thus liable to be quashed, the prosecutor ought not to be compelled to include them in one indictment, when there never has been a question that they may be indicted separately.

II. To charge the defendant with two distinct felonies in one count, or even in one indictment, may embarrass him as to his challenge of jurors. He might have good cause of challenge as to one of the offenses, and not as to the other. If a juror should be found not indifferent as to the trial of one of the offenses, and indifferent as to the other, the United States might claim him as a competent juror as to this offense, while the prisoner might insist upon his being rejected as to the former; and if the juror should be rejected, it must be because the prosecuting attorney, by joining the two offenses in one indictment, had subjected himself to this inconvenience. He ought not, therefore, to be compelled thus to join them.

III. If the prosecutor is obliged to charge in one count all the goods of divers persons stolen at the same time, he may be obliged against his will to charge the defendant with a penitentiary offense; for, if charged in separate indictments, or even in separate counts, neither of them might be of sufficient value to send him to the penitentiary.

IV. The prosecuting attorney may not know how the evidence may turn out, as to the time and manner of taking the goods. They may all have been found in the defendant's possession at the same time; but there may be no evidence that they were all taken at the same time. The attorney of the United States would probably charge them as having been stolen on the same day; but the day laid in the indictment is immaterial, and need not be proved.

If he should not be able to prove that the goods were taken at the same time, then he might be put to elect for the goods of which owner he would prosecute, and abandon the rest; and then one of the owners only would be entitled to restitution of his goods, for the defendant could be convicted of taking the goods of one only.

These are some of the inconveniences of charging separate offenses in the same indictment, all of which may be avoided by charging them separately; and as the propriety and legality of joining them may at least be questionable, a prudent prosecutor would generally charge them in separate indictments.

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It has been our purpose in the preparation of this Magazine to give our readers the best reports of recent legal decisions. We propose to add to this a brief notice of recent legal publications. We already give a statement of the latest law, we shall now attempt to give a list of the latest law books. The success of the attempt must necessarily depend somewhat upon our friends the publishers. If we can obtain from them monthly lists of their latest issues, we shall hereafter give our readers concise information concerning all the recent valuable publications. In this respect we mean that our "Library" shall differ from the ordinary book notices. For while they contain mere occasional notices of the more valuable of new publications previously unknown to the profession—letters of introduction to the public as it were—we mean to give, as far as practicable, a list of all works published in this country without often discussing their merits. Thus in our Library the profession will find all the more recent publications, and in the body of our Magazine the more valuable cases contained in them.

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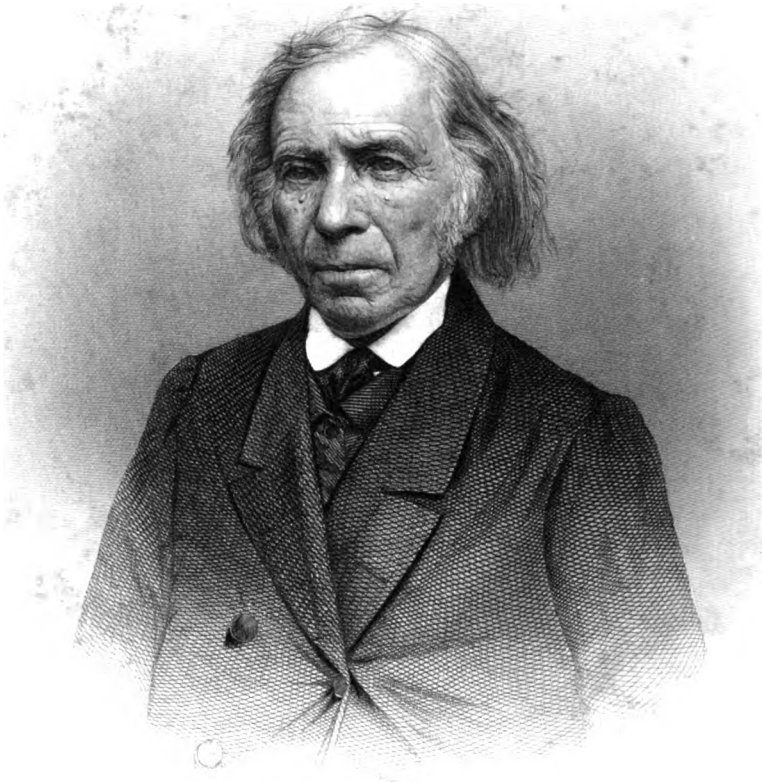

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FREDERICK CREY.

OF BALTIMORE, MARYLAND

Engraved for Biographical Sketches of Eminent Americans

# LIVINGSTON'S
# MONTHLY
# LAW MAGAZINE.

CONTENTS OF No. VIII.

FREDERICK CREY.

# LIVINGSTON'S
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CONTENTS OF No. VIII., Vol. II., AUGUST, 1854.

## CONDENSED REPORTS OF RECENT CASES.

LIVINGSTON'S

MONTHLY

# LAW MAGAZINE.

VOL. II. AUGUST, 1854. No. VIII.

## CONDENSED REPORTS OF RECENT CASES.

### PATENT LAW.—MAGNETIC TELEGRAPH.

History of the invention of the electric telegraph.
A claim to the exclusive right to every improvement in which electric or galvanic current is the power, and the result the marking of signs or letters at a distance, is too broad, and covers too much ground.

[*O'Reilly* vs. *Morse*; Howard's (U. S.) Supreme Court R., 62.]

THIS was a bill filed in equity for an injunction against O'Reilly to forbid him from hereafter using his telegraph, on the ground that it was an infringement of Morse's patent. The injunction was granted, and the defendant appealed. The material facts and the parties are already well known to the public, the suit being one which has attracted no little general interest. Such facts as are essential to an understanding of the case will be found in the opinion of the court.

TANEY, C. J.—In proceeding to pronounce judgment in this case, the court is sensible, not only of its importance, but of the difficulties in some of the questions which it presents for decision. The case was argued at the last term, and continued over by the court for the purpose of giving it a more deliberate examination. And since the continuance, we have received from the counsel on both sides printed arguments, in which all of the questions raised on the trial have been fully and elaborately discussed.

The appellants take three grounds of defense. In the first place they deny that Professor Morse was the first and original inventor of the electro-magnetic telegraphs described in his two reissued patents of 1848. Secondly, they insist that if he was the original inventor, the patents under which he claims have not been issued conformably to the acts of Congress, and do not confer on him the right to the exclusive use. And thirdly, if these two propositions are decided against them, they insist that the telegraph of O'Reilly is substantially different from that of Professor Morse, and the use of it, therefore, no infringement of his rights.

In determining these questions, we shall in the first instance confine

our attention to the patent which Professor Morse obtained in 1840, and which was reissued in 1848. The main dispute between the parties is upon the validity of this patent; and the decision upon it will dispose of the chief points in controversy in the other.

It is obvious that for some years before Professor Morse made his invention, scientific men in different parts of Europe were earnestly engaged in the same pursuit. Electro-magnetism itself was a recent discovery, and opened to them a new and unexplored field for their labors; and minds of a high order were engaged in developing its power, and the purposes to which it might be applied.

Professor Henry, of the Smithsonian Institute, stated in his testimony, that prior to the winter of 1819–20, an electro-magnetic telegraph—that is to say, a telegraph operating by the combined influence of electricity and magnetism—was not possible; that the scientific principles on which it is founded were until then unknown; and that the first fact of electro-magnetism was discovered by Oersted of Copenhagen, in that winter, and was widely published, and the account everywhere received with interest.

He also gives an account of the various discoveries, subsequently made from time to time, by different persons in different places, developing its properties and powers, and among them his own. He commenced his researches in 1828, and pursued them with ardor and success from that time until the telegraph of Professor Morse was established and in actual operation. And it is due to him to say, that no one has contributed more to enlarge the knowledge of electro-magnetism, and to lay the foundations of the great invention of which we are speaking, than the professor himself.

It is unnecessary, however, to give in detail the discoveries enumerated by him—either his own or those of others. But it appears from his testimony, that very soon after the discovery made by Oersted, it was believed by men of science that this newly-discovered power might be used to communicate intelligence to distant places. And before the year 1823, Ampere, of Paris, one of the most successful cultivators of physical science, proposed a plan for that purpose to the French Academy. But his project was never reduced to practice. And the discovery made by Barlow, of the Royal Military Academy of Woolwich, England, in 1825, that the galvanic current greatly diminished in power as the distance increased, put at rest for a time all attempts to construct an electro-magnetic telegraph. Subsequent discoveries, however, revived the hope; and in the year 1832, when Professor Morse appears to have devoted himself to the subject, the conviction was general among men of science everywhere, that the object could, and sooner or later would, be accomplished.

The great difficulty was the fact that the galvanic current, however strong in the beginning, became gradually weaker as it advanced on the wire, and was not strong enough to produce a mechanical effect after a certain distance had been traversed. But, encouraged by the discoveries which were made from time to time, and strong in the belief that an electro-magnetic telegraph was practicable, many eminent and scientific men in Europe, as well as in this country, became

deeply engaged in endeavoring to surmount what appeared to be the chief obstacle to its success. And in this state of things it ought not to be a matter of surprise, that four different magnetic telegraphs, purporting to have overcome the difficulty, should be invented and made public so nearly at the same time, that each has claimed a priority, and that a close and careful scrutiny of the facts in each case is necessary to decide between them. The inventions were so nearly simultaneous, that neither inventor can be justly accused of having derived any aid from the discoveries of the other.

One of these inventors, Doctor Steinheil, of Munich, in Germany, communicated his discovery to the Academy of Science, in Paris, on the 19th of July, 1838, and states in his communication that it had been in operation more than a year. Another of the European inventors, Professor Wheatstone, of London, in the month of April, 1837, explained to Professors Henry and Bache, who were then in London, his plan of an electro-magnetic telegraph, and exhibited to them his method of bringing into action a second galvanic circuit, in order to provide a remedy for the dimunition of force in a long circuit; but it appears, by the testimony of Professor Gale, that the patent to Wheatstone and Cook was not sealed until January 21, 1840, and their specification was not filed until the 21st of July, in the same year; and there is no evidence that any description of it was published before 1839.

The remaining European patent is that of Edward Davy. His patent, it appears, was sealed on the 4th of July, 1838, but his specification was not filed until January 4, 1839; and when these two English patents are brought into competition with that of Morse, they must take date from the time of filing their respective specifications. For it must be borne in mind, that as the law then stood in England, the inventor was allowed six months to file the description of his invention after his patent was sealed, while in this country the filing of the specification is simultaneous with the application for patents.

The defendants contend that all, or at least some one, of these European telegraphs were invented and made public before the discovery made by Morse; and that the process and method by which he conveys intelligence to a distance is substantially the same, with the exception only of its capacity for impressing upon paper the marks or signs described in the alphabet he invented.

Waiving for the present any remarks upon the identity or similitude of these inventions, the court is of opinion that the first branch of the objection can not be maintained, and that Morse was the first and original inventor of the telegraph described in his specification, and preceded the three European inventors relied on by the defendants.

The evidence is full and clear, that when he was returning from a visit to Europe in 1832, he was deeply engaged upon this subject during the voyage; and that the process and means were so far developed and arranged in his own mind, that he was confident of ultimate success. It is in proof that he pursued these investigations with unremitting ardor and industry, interrupted occasionally by pecuniary embarrassments; and we think it is established by the testimony of Professor Gale and others, that early in the spring of 1837, Morse had

invented his plan for combining two or more electric or galvanic circuits, with independent batteries for the purpose of overcoming the diminished force of electro-magnetism in long circuits, although it was not disclosed to the witness until afterward; and that there is reasonable ground for believing that he had so far completed his invention, that the whole process, combination, powers, and machinery were arranged in his own mind, and that the delay in bringing it out arose from his want of means. For it required the highest order of mechanical skill to execute and adjust the nice and delicate work necessary to put the telegraph into operation, and the slightest error or defect would have been fatal to its success. He had not the means at that time to procure the services of workmen of that character, and without their aid no model could be prepared which would do justice to his invention. And it moreover required a large sum of money to procure proper materials for the work. He, however, filed his caveat on the 6th of October, 1837, and on the 7th of April, 1838, applied for his patent, accompanying his application with a specification of his invention, and describing the process and means used to produce the effect. It is true that O'Reilly, in his answer, alleges that the plan by which he now combines two or more galvanic or electric currents, with independent batteries, was not contained in that specification, but discovered and interpolated afterward; but there is no evidence whatever to support this charge. And we are satisfied, from the testimony, that the plan, as it now appears in his specification, had then been invented, and was actually intended to be described.

With this evidence before us, we think it is evident that the invention of Morse was prior to that of Steinheil, Wheatstone, or Davy. The discovery of Steinheil, taking the time which he himself gave to the French Academy of Science, can not be understood as carrying it back beyond the months of May or June, 1837. And that of Wheatstone, as exhibited to Professors Henry and Bache, goes back only to April in that year. There is nothing in the evidence to carry back the invention of Davy beyond the 4th of January, 1839, when his specification was filed, except a publication said to have been made in the London Mechanics' Magazine, January 20, 1838; and the invention of Morse is justly entitled to take date from early in the spring of 1837. Moreover, in the description of Davy's invention as given in the publication of January 20, 1838, there is nothing specified which Morse could have borrowed; and we have no evidence to show that his invention ever was or could be carried into successful operation.

In relation to Wheatstone, there would seem to be some discrepancy in the testimony. According to Professor Gale's testimony, as before mentioned, the specification of Wheatstone and Cook was not filed until July 21, 1840, and his information is derived from the London "Journal of Arts and Sciences." But it appears, by the testimony of Edward F. Barnes, that this telegraph was in actual operation in 1839. And in the case of the *Electric Telegraph Company* vs. *Brett & Little*, (10 Common Pleas Reports, by Scot,) his specification is said to have been filed December 12, 1837. But if the last-mentioned date is taken as the true one, it would not make his invention prior to that of

Morse. And even if it would, yet this case must be decided by the testimony in the record, and we can not go out of it, and take into consideration a fact stated in a book of reports. Moreover, we have noticed this case, merely because it has been pressed into the argument. The appellants do not mention it in their answer, nor put their defense on it. And if the evidence of its priority was conclusive, it would not avail them in this suit. For they can not be allowed to surprise the patentee by evidence of a prior invention, of which they gave him no notice.

But if the priority of Morse's invention was more doubtful, and it was conceded that in fact some one of the European inventors had preceded him a few months or a few weeks, it would not invalidate his patent. The act of Congress provides, that when the patentee believes himself to be the first inventor, a previous invention in a foreign country shall not render his patent void, unless such discovery or some substantial part of it, had been before patented or described in a printed publication.

Now, we suppose no one will doubt that Morse believed himself to be the original inventor when he applied for his patent in April, 1838. Steinheil's discovery does not appear to have been ever patented, nor to have been described in any printed publication until July of that year. And neither of the English inventions are shown by the testimony to have been patented until after Morse's application for a patent, nor to have been so described in any previous publication as to embrace any substantial part of his invention. And if his application for a patent was made under such circumstances, the patent is good, even if in point of fact he was not the first inventor.

In this view of the subject, it is unnecessary to compare the telegraph of Morse with these European inventions, to ascertain whether they are substantially the same or not. If they were the same in every particular, it would not impair his rights. But it is impossible to examine them, and look at the process, the machinery, and the results of each, without perceiving at once the substantial and essential difference between them, and the decided superiority of the one invented by Professor Morse.

Neither can the inquiries he made, or the information or advice he received from men of science, in the course of his researches, impair his right to the character of an inventor. No invention can possibly be made, consisting of a combination of different elements of power, without a thorough knowledge of the properties of each of them, and the mode in which they operate on each other. And it can make no difference, in this respect, whether he derives his information from books or from conversation with men skilled in science. If it were otherwise, no patent, in which a combination of different elements is used, could ever be obtained; for no man ever made such an invention without having first obtained this information, unless it was discovered by some fortunate accident. And it is evident that such an invention as the electro-magnetic telegraph could never have been brought into action without it. The fact that Morse sought and obtained the necessary information and counsel from the best sources.

and acted upon it, neither impairs his rights as an inventor, nor detracts from his merits.

Regarding Professor Morse as the first and original inventor of the telegraph, we come to the objections which have been made to the validity of his patent.

We perceive no well-founded objection to the description which is given of the whole invention and its separate parts, nor to his right to a patent for the first seven inventions, set forth in the specification of his claims. The difficulty arises on the eighth; it is in the following words:

"*Eighth.*—I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs or letters, at any distances, being a new application of that power of which I claim to be the first inventor or discoverer."

It is impossible to misunderstand the extent of this claim. He claims the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs or letters, at a distance.

If this claim can be maintained, it matters not by what process or machinery the result is accomplished. For aught that we now know, some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the galvanic or electric current, without using any part of the process or combination set forth in the plaintiff's specification. His invention may be less complicated—less liable to get out of order—less expensive in its construction and in its operation. But yet, if it is covered by this patent, the inventor could not use it, nor the public have the benefit of it, without the permission of this patentee.

Nor is this all. While he shuts the door against the inventions of other persons, the patentee would be able to avail himself of new discoveries in the properties and powers of electro-magnetism which scientific men might bring to light. For he says he does not confine his claim to the machinery or parts of machinery which he specifies, but claims for himself a monopoly in its use, however developed, for the purpose of printing at a distance. New discoveries in physical science may enable him to combine it with new agents and new elements, and by that means attain the object in a manner superior to the present process, and altogether different from it. And if he can secure the exclusive use by his present patent, he may vary it with every new discovery and development of the science, and need place no description of the new manner, process or machinery upon the records of the patent office. And when his patent expires, the public must apply to him to learn what it is. In fine, he claims an exclusive right to use a manner and a process which he has not described, and, indeed, had not invented, and therefore could not describe, when he obtained his patent. The court is of opinion that the claim is too broad, and not warranted by law.

No one, we suppose, will maintain that Fulton could have taken out a patent for his invention of propelling vessels by steam, describing the process and machinery he used, and claimed under it the exclusive right to use the motive power of steam, however developed, for the purpose of propelling vessels. It can hardly be supposed that, under such a patent, he could have prevented the use of the improved machinery which science has since introduced, although the motive power is steam, and the result is the propulsion of vessels. Neither could the man who first discovered that steam might, by a proper arrangement of machinery, be used as a motive power to grind corn or to spin cotton, claim the right to the exclusive use of steam as a motive power, for the purpose of producing such effects.

Again, the use of steam as a motive power in printing-presses is comparatively a modern discovery. Was the first inventor of a machine, or process of this kind, entitled to a patent giving him the exclusive right to use steam as a motive power, however developed, for the purpose of marking or printing characters? Could he have prevented the use of any other press subsequently invented, where steam was used? Yet, so far as patentable rights are concerned, both improvements must stand on the same principles. Both use a known motive power to print intelligible marks or letters, and it can make no difference in their legal rights under the patent laws, whether the printing is done near at hand or at a distance. Both depend for success, not merely upon the motive power, but upon the machinery with which it is combined. And it has never, we believe, been supposed by any one, that the first inventor of a steam printing-press was entitled to the exclusive use of steam as a motive power, however developed, for marking or printing intelligible characters.

Indeed, the acts of the patentee himself are inconsistent with the claim made in his behalf; for in 1846 he took out a patent for his new improvement of local circuits, by means of which intelligence could be printed at intermediate places along the main line of the telegraph; and he obtained a reissued patent for this invention in 1848. Yet in this new invention the electric or galvanic current was the motive power, and writing at a distance the effect. The power was undoubtedly developed by new machinery and new combinations; but, if his eighth claim could be sustained, this improvement would be embraced by his first patent; and if it was so embraced, his patent for the local circuits would be illegal and void, for he could not take out a subsequent patent for a portion of his first invention, and thereby extend his monopoly beyond the period limited by law.

(See *Neilson* vs. *Hartford*, Web. Pat. Ca., 333; *Leroy* vs. *Tatham*, 14 Howard, 156; *Wyeth* vs. *Stone*, 1 Story R., 270, 285; *Blanchard* vs. *Sprague*, 3 Sumn., 540.)

The patent, then, being illegal and void, so far as respects the eighth claim, that portion of it must be disclaimed, in order to save that portion of the claim to which he is entitled.

Decree affirmed without costs to either party.

CRIMINAL LAW.—RIGHTS OF JURIES.

Juries are not judges of the law in criminal cases. Their power, in that respect, is no greater in criminal than in civil cases.

[*Seltzinius* vs. *The United States*; 5 Cranch's C. C. R., 573.]

The question in this case was as to the right of the jury to judge of the law, in criminal cases. The court below, in the charge to the jury, instructed them that they had no right to decide upon the law of the case in opposition to the opinion of the court. To this instruction the defendant excepted, and, being found guilty, he appealed upon this, and other exceptions, to the ruling of the court.

CRANCH, C. J.—The right of the jury to find a general verdict upon the general issue, in a criminal cause, is not disputed nor doubted; and as guilt consists of law and fact, and can not be ascertained but by coupling them together, and comparing them, and applying the facts to the law, the jury must, in finding such a general verdict, decide the law thus coupled with the facts in that cause.

But when the jurors thus took upon themselves to decide the law by a general verdict of not guilty, they subjected themselves, under the old English statutes, to very severe punishment, upon a writ of attaint, if the grand inquest should convict them of finding a false verdict. To avoid this risk, it was formerly common for the jurors to render special verdicts, stating all the facts of the case, and referring the question of law to the court; but the practice of setting aside verdicts upon motion, and granting new trials, has so superseded the use of attaints, that there are few instances of an attaint in the books later than the sixteenth century. (3 Bl. Com., 406.) Yet as late as Sir Matthew Hale's time, according to his opinion, the king might have attaint upon a verdict of acquittal, although the prisoner, if convicted, could not; because his guilt is confirmed by two inquests—the grand and the petit jury.

The right and the power of the jury to decide the law and the fact together, by a general verdict, upon the general issue, is not greater in criminal causes than in civil. The effect only is different. In civil causes, the court will set aside the verdict, if against its opinion of the law, whether the verdict is against the defendant or the plaintiff. But in criminal causes, if the verdict be in favor of the defendant, inasmuch as the king might have a writ of attaint and reverse the judgment; and as the prisoner is not to be put twice in jeopardy, nor to be twice vexed for the same offense, and as he could not have attaint if the verdict should be against him, the courts have uniformly, for more than two centuries, refused to award a new trial when the prisoner has been acquitted upon a general verdict of not guilty. This conclusive effect of a verdict of acquittal does not arise from the right of the jury to decide the law definitely in the case, because if the verdict of the jury had been against the defendant, contrary to law, or to the court's exposition of the law, the court unquestionably had the right and the

power to set aside the verdict as being contrary to law, and to award a new trial. This could not be the case if the jury had the exclusive right to decide the law. If they had, the verdict would be as conclusive in the one case as in the other.

Whenever, by the pleadings, the law was separated from the fact, so that each could be seen and considered by itself, no pretense that the jury had a right to decide the pure, unmixed question of law has ever been set up by the wildest advocate of the rights of juries.

The learned judge then quoted and commented upon the following authorities: (*Crosswell's case*, 3 Johns. Ca., 346; Hargrave's Co. Lib. 155, b. note 7; 4 Bl. Com., 361; H. H. P. C., 313; 1 Erskine, 150; 7 Dane's, Ab., c. 222, art. 18 & 19, p. 382; *United States* vs. *Battiste*, 2 Sumner's R., 243.) He then proceeded as follows:

From these authorities we think we may draw the following conclusions:

I. That the judges are to decide every question of law, when the facts upon which the question arises are found or stated, and in all cases where, by the pleadings or the proceedings, the law and the facts are separated. It has never been pretended that the jury are to decide a pure question of law unmingled with the facts. The law and facts are separated by a demurrer to the evidence, by a special verdict, by a special plea, and by the hypothetical statement of facts, when in the trial of a cause before the jury the court is moved by the counsel on either side to instruct the jury as to the law arising from such supposed facts, if they should be found by the jury. This latter proceeding is in the nature of an anticipated special verdict, and, as far as it goes, separates the law and the facts as completely as could be done by a special verdict actually finding the same facts.

This is a proceeding which either party has a right to adopt, if in the opinion of the court sufficient evidence has been given in the cause to justify the party in assuming the legal possibility that the jury may find the facts to be as he has stated them in his motion for the instruction. This statement and motion to direct the jury upon the point of law, withdraws it from the jury and submits it to the judges, as in a special verdict; the only difference is, that in the latter case the law is decided by the court upon an actual finding, and in the former, upon on assumed or supposed finding; and the court is as much bound to decide the question of law upon such a motion, as upon a demurrer to evidence, or a special verdict. This proceeding is as applicable to criminal cases as to civil, and shows that the court is the proper and exclusive tribunal to decide the law in both classes of cases, whenever it can be decided without deciding the fact at the same time.

II. That the power of the jury to find a general verdict upon the general issue in a criminal case does not imply a right to decide the law of the case. The power is the same in a civil case, and yet it has never been supposed that the power of the jury, in a civil case, to render a general verdict on the general issue was a right, or implied a right, to decide the law of the case. The right and the power of the jury, whatever they may be, as to deciding the law of the case, are exactly alike in both classes of cases; in both the right and the power

of the court are the same to set aside the verdict, if against the defendant, on the ground that it was a verdict against law, thereby clearly showing that the jury has no right to decide the law in either case, but that the court has. The most that can be said is, that the jury has the power of rendering a general verdict upon the general issue, either according to law or against law; but no one can suppose that they have a right to render a verdict against law. If in a criminal case they render a general verdict against the defendant, upon the general issue, against law, the court will at once set it aside, because it is against law; but if the verdict be for the defendant, the court *in favorem vitæ*, will not set it aside, although against law; and this practice or maxim is probably grounded on the reasons before mentioned, and not upon the admission that the jury is the exclusive judge of the law, as well as of the fact, in criminal cases.

If the jury, as some have contended, "are the sole judges of the law in criminal cases," the prisoner, however erroneously the law may be laid down by the prosecutor to the jury, would have no more right to ask the court to expound the law to them, than to ask the court to ascertain the facts; and if the verdict should be against him, would have no right to ask the court to grant a new trial on the ground that the jury had either mistaken or disregarded the law. If juries are the exclusive judges of the law in criminal cases, there can be no appeal, no writ of error, no new trial, even if the prisoner be convicted.

The act establishing the criminal court of this district provides for a writ of error to bring the cause into this court. If the jury is to decide all the law in criminal cases, their decisions of the law can never be reversed; for there are no means of ascertaining their decision upon a question of law, so as to bring it into review before this court. But when the judge decides the law, a bill of exceptions may be taken, and his judgment, if against the defendant, may be either affirmed or reversed upon a writ of error.

In this very case the defendant's counsel, by asking the court to instruct the jury as to the law, has admitted the right of the judge to decide the law.

Again, the same act establishing the criminal court, provides that that court may, in any case, with the consent of the person accused, adjourn any question of law to this court, where it may be argued and decided. It is the court, and not the jury, who adjourn the question of law. It is to the court, therefore, that the question of law is to be made.

These provisions of the act establishing the criminal court are totally inconsistent with the doctrine that, in criminal cases, the jury are the sole judges of the law. They show that when a question of law arises, either party may require the judge to decide it, or to adjourn it to this court to be decided here.

III. If, then, it is the province of the judge to decide conclusively every question of law arising in the case, which may be judicially presented to him, unmixed with the facts, and if every question of law arising in the trial of a cause may be thus separated and presented to the judge, either by a demurrer to the evidence, or a special verdict, or by motion to the court to instruct the jury as to the law arising upon

an hypothetical statement of such facts as the party supposes the jury may find from the evidence, it follows that it is not only the right, but the duty of the judge to decide every question which may be thus presented to him, and, upon the motion of either party, to give to the jury, during the trial, such instruction and opinion upon the law, arising upon such hypothetical statement of facts, as such supposed facts would justify him in giving, if found in a special verdict. But the right of the judge to instruct the jury as to the law of the case is not confined to the giving of such instruction as he may be asked to give. After the argument of counsel has been closed on both sides, he may, if he will, instruct the jury as to the law arising upon the whole evidence, leaving the question of fact with the jury. This is the practice in the courts of England, and in those of many of the states of the Union.

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### INTERNATIONAL LAW.—LAW OF THE CEDED COUNTRY.

**In California, a contract entered into antecedent to the passage of the act abolishing all laws previously existing in California, will not be rendered nugatory by the fact that at the time of its execution it was void, under the Mexican laws, by reason of usury.**

[*Fowler* vs. *Smith*; 2 California R., 39.]

This was an action brought by the plaintiff to foreclose a mortgage given as security for the payment of certain promissory notes. The defense set up was, that the contract was usurious and void, upon the ground that all contracts to pay a higher rate of interest than six per cent. per annum, either upon money loaned or otherwise, were made void by the laws of Mexico, which were in force at the time when the notes in suit were given. The principal question of interest arising in the case was, whether the principles of Mexican law were applicable to all contracts entered into before the passage of the act abolishing all laws previously existing in California.

Murray, J.—The argument for the defense is based upon the well-recognized principle of international law, that the laws of a ceded country remain in force until changed by the conquering or acquiring power. This principle is to be found in almost every work upon the subject of international law, and is reiterated and affirmed by the courts of England and the United States. Its application to this case can, however, only be determined by an examination of the rule, and the particular circumstances under which it is sought to be applied.

The law of nations is said to be founded on right reason, sound morality, and justice; but although it is said to be binding upon nations in their intercourse and transactions, still we find the courts of the United States and Europe, in many instances, differing in the application of its rules, and even disregarding them.

As the world has advanced in civilization and learning, the influence of religion has been felt and recognized by the Christian countries of Europe, in their intercourse with each other. War has been stripped of many of its most disgusting features. It is no longer considered as

the moral condition of man and nations; but only justifiable when resorted to, to preserve national honor, prosperity, and happiness. Under this enlightened policy, more sympathy has been shown to the unhappy sufferers by these great public calamities. Instead of the confiscation of property, the loss of liberty, and all the horrors of barbarous warfare, their rights are respected, and their municipal regulations remain in force until changed by the conqueror; and it needs no argument or illustration to show the justice of the rule. This is also the rule in countries acquired by purchase. The transfer of sovereignty should not and does not affect vested rights; and this was precisely the meaning of CHIEF JUSTICE MARSHALL, in *Percheman's Case* (7 Peters), where he lays down the doctrine, that the relation and rights of property of the inhabitants remained unchanged; that the land in question did not pass to the United States by the treaty of cession; and that the government of Spain, having parted with it to one of its citizens, had no power to dispose of it to another. This is founded on absolute principles of right, and will admit of no departure; while the justice of the rule, that the laws of the ceded country remain in force until changed by the new sovereign, may in many instances depend on the peculiar circumstances of the case. In an acquired territory, containing a population governed in their business and social relations by a system of laws of their own, well understood and generally accepted, it is but reasonable that the inhabitants should continue to regulate their conduct and commercial transactions by their own laws, until the same are changed. The reason is obvious, and founded in many instances, on the difference of language and systems of jurisprudence, the peculiar circumstances of the country, the confusion consequent on a change, and the time necessary to ascertain the applicability of the new laws. It will be observed, that the rule presupposes that the acquired country contains a population governed by well-settled laws of their own. Let us inquire whether these reasons apply with equal force to this case.

California, at the time of its acquisition by the United States, contained but a sparse population. It had long been looked upon as one of the outposts of civilization. Its commercial, agricultural, and mineral resources undeveloped, it was considered of little importance by the Mexican government. The body of Mexican laws had been extended over it; but there was nothing upon which they could act; and they soon fell into disuse. The system of government was a patriarchal one, and administered without much regard to the forms of law, which were scarcely alike in any two districts. Such was the state of the country when the discovery of our mineral wealth roused the whole civilized world to its importance. In a few months the emigration from older states exceeded five times the original population of the country. A state government was immediately formed to meet the wants of this unexpected population. The whole world was amazed by our sudden progress; and even the federal government, startled from her usual caution by so novel a spectacle, beheld us take our place as a sovereign state before her astonishment had subsided. Emigration brought with it business litigation, and the thousand attendants that

follow in the train of enterprise and civilization. The laws of Mexico, written in a different language, and founded on a different system of jurisprudence, were to our inhabitants a sealed book. The necessities of trade and commerce required prompt action. This flood of population had destroyed every ancient landmark; and finding no established laws or institutions, they were compelled to adopt customs for their own government. The proceedings in courts were conducted in the English language; and justice was administered by American judges, without regard to Mexican law. Custom was, for all purposes, law. No law concerning usury was recognized, or supposed to exist. Under this peculiar system, this country acquired its present wealth and prosperity. But it would have been much better for the permanent interests of this country that its progress had been less rapid, if, after escaping from the tutelage of a territorial government, we are to be fettered by the dead carcass of a law which expired at its birth, for want of human transactions on which to subsist; the application of which would overturn almost every contract entered into before the act abolishing all laws previously existing, would unhinge business, and entirely destroy confidence in the country.

There is no case like the present to be found in the history of the world. In every instance cited in the books, the acquired territory had a population of its own, governed by known laws; and the rate of emigration was small compared to the number of original inhabitants. History may be searched in vain for an instance parallel with the emigration to this country. If it would be unjust to compel a densely populated state to take notice of the laws of the conqueror or acquiring power, without any other act than that of submission or cession, it would be still more unjust in this country, where the American population so greatly outnumbered the natives, to compel us to apply their law, instead of our own, to contracts. In this case the rule consequent upon the discovery or acquisition of an uninhabited territory might almost apply; and to construe these contracts by a system of laws not adapted to the age, nor to the spirit of our institutions, altering the plain meaning of parties, and giving to them conditions which were never intended, would work the grossest injustice. (*Center* vs. *the American Insurance Company*, 1 Peters; *Mitchell* vs. *The United States*, 9 Peters; *Canal Appraisers* vs. *The People*, 17 Wendell.)

I shall not endeavor to institute a comparison between acts of sovereignty expressed through orders and patents of the crown, and the acts of the citizens of California; although there might be some plausibility in the argument, that in a republican government like our own, where all power belongs to and emanates from the people, the strongest evidence of sovereign will is the acquiescence and concurrence of the people in a custom. If there is any case in which custom should be regarded as law, or where the principle "*communis error facit jus*" applies, it seems that this should be the case. Perhaps no stronger example of the injustice of the rule contended for could be instanced, than that this court has been unable to procure a copy of the law on which this contract is sought to be avoided.

From these considerations, I am of opinion, that, from the adoption

of our state constitution—a period antecedent to the execution of the present contract (or even a still more remote period), courts ought not, on grounds of public policy, to disturb these contracts whenever they have been entered into under the sanction of well-known and recognized custom. There are doubtless many cases arising to which it will be the duty of the courts of this state to apply the rules of the Mexican law; but this is not one of them.

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CONTRACT.—PART-PERFORMANCE.

Where A. agrees to do a specified thing, for which B. is to make a specified compensation, and A. only performs his contract in part, he may recover for such part-performance *pro rata*, subject to the deduction of special damages caused by his default. Two cases.

[I. *Epperly* vs. *Bailey*; 8 Indiana R., 72.]

Assumpsit by Bailey against Epperly.

By a written contract between the parties, Bailey agreed to deliver to Epperly sixty thousand pounds of meat and sixty barrels of lard, Epperly, upon his part, agreeing to pay three dollars and sixty-five cents for each one hundred pounds of meat, and six cents per pound for the lard. Only a part of the meat and lard was ever delivered, and the only material question in the cause was whether Bailey might recover *pro rata* for the meat actually delivered.

PERKINS, J.—There are many cases, especially among the earlier ones, that lay down the general principle, that where the contract is entire, as where A. agrees to do a certain thing for which B. is to make a certain compensation, the doing of the entire thing by A. is a condition precedent, and he has no remedy, in any form, until he has fully performed his part of the contract; but this principle being found to operate inequitably in many cases, exceptions to it have been established, and justly; and we think the general proposition may now be asserted, that where a party has sold and delivered chattels or performed labor for another, under a special contract, which, for any cause, he has failed to complete, and such part-performance has been a benefit to the party recovering it, which benefit he retains after the time for the completion of the contract has expired, an action on the *quantum valebat* or *quantum meruit* may be supported, and the question of difficulty in each of these cases now is, the amount of damages that may be recovered. This depends much upon the course of the defendant on the trial.

According to the leading *American* authorities, which differ on this point from some, at least, of the *English*, but which we prefer to follow, a defendant may show all the damages he has sustained by the non-completion of the special contract, in reduction of the amount to be recovered by the plaintiff for what he did do or render in part-performance of such contract, instead of resorting to a cross action for such damages. Some of the *English* authorities hold that a cross action must be resorted to. (See *Mondel* vs. *Steel*, 8 Mees. & W., 858.)

Preferring the rule of the *American* cases, however, we shall not stop to examine the *English*. The *American* cases concede the right to the defendant of waiving his damages in defense of such action, and of resorting to a cross action at his election. It is very manifest, therefore, that the instruction to be given by the court, in the case under consideration, must vary according to course pursued by the defendant in such actions. If the defendant waives his damages and resorts to a cross action, then the instruction, as given in this case, that the plaintiff may recover the reasonable value of his work done or property delivered, not exceeding the contract price, will be correct.

But should the defendant set up his damages in such suit, then the instruction should be, that the plaintiff recover the reasonable value, etc., after deducting all damages occasioned by his breach of the special contract.

[II. *McKinney* vs. *Springer*; 8 Indiana R., 59.]

Assumpsit by Springer for work and labor in building a house for McKinney. It appears that the plaintiff entered into a contract in writing, by which he agreed to build a house of specified dimensions, to be completed on the first day of August, 1838. The house was not finished by that time, however, and there was evidence tending to show that the plaintiff continued to work upon it, with the knowledge of, and without objection by, the defendant, until some time in the year 1839, when the work was abandoned, and the defendant took possession of the house which was still incomplete. The plaintiff abandoned the contract, and sued in assumpsit, proving the work that he had done, and the value of the work according to customary prices.

Smith, J.—It is a well-established principle, that where one has entered into a special agreement to perform work and furnish materials for another, and work is done and materials furnished, but not in the manner stipulated in the contract, yet, if they are accepted, and used by the other party, he is answerable to the amount whereby he is benefited, on an implied promise to pay for the value he has received, though no action can be maintained on the special contract. The doctrine is stated in general terms in *Lomax* vs. *Baily* (7 Black., 603), though that was an action of covenant on the special agreement, and the plaintiff failed. (See, also, *Hollingshead* vs. *Matchee*, 13 Wend., 276; *Van Deusen* vs. *Blum*, 18 Pick., 229; *Adams* vs. *Hill*, 16 Maine R., 215.) In this case, therefore, if the defendant had the benefit of certain labors and materials of the plaintiff, the latter was entitled to recover a compensation equal to the benefit the defendant had so received; and his right to recover did not depend upon the question whether the work was finally abandoned at the requirement of the defendant, or not, as is assigned in the instructions. The plaintiff was clearly in default in not having completed his contract in the time and manner specified, and therefore he does not bring his action on the agreement, but relies on a general count for work and labor. The defendant can not say, in defense, that he rescinded the contract in consequence of the default of the plaintiff, inasmuch as he has received

some benefit from the plaintiff's part-performance; and whether the plaintiff finally abandoned the work, voluntarily or not, is immaterial. But the defendant may show the agreement to limit the damages; and the value of the work done and materials furnished is to be estimated in such cases according to the actual benefit received by the defendant from such part-performances in obtaining the completion of the work stipulated to be done. The plaintiff having contracted to furnish the work in a finished state, is not entitled to have the value of his services estimated according to the customary prices paid under other circumstances, for that would not be a fair criterion of their value to the defendant. (*Koon* vs. *Greenman*, 7 Wend., 121; *Gadue* vs. *Seymour*, 24 Wend., 60; *Vanderbilt* vs. *The Eagle Iron Works*, 25 Wend., 665; *Brewer* vs. *The Inhabitants of Tyring*, 12 Pick., 547; Chitty on Con., 493, 8th Am. ed.)

The judge upon the trial instructed the jury that if the defendant had the benefit of the plaintiff's work and materials, the latter should recover their reasonable value. This instruction, as applied to the circumstances of this case, is erroneous, and the error is not fully remedied by the instruction relative to the measure of damages, which limits such reasonable value to the amount the plaintiff would have received for the same quantity of work, if he had completed his contract. The jury would understand, from these instructions, in applying them to the evidence given, that the value of the labor and materials was not their reasonable value to the defendant under the particular circumstances of the case, but their reasonable value to be estimated according to the customary prices charged by the other workmen. By the rule thus given, if a man contracts with another to build a house for a certain price, and leaves the house half finished, he would be entitled to recover half the stipulated price, when that did not exceed the customary rates, if the owner took possession of the unfinished building, which in most cases he could not well avoid doing. It would give the builder a very unfair advantage, for he could stop when he pleased, and compel the owner of the property to pay him a full price for what work he had done, whatever losses might have been sustained by his failure to complete his undertaking. In such cases the owner of the property contracts to pay a gross sum for a house when complete, not a ratable proportion of that sum for as much of the building as should be erected; and if, through the default of the builder, he obtains only an unfinished house, the proper mode of ascertaining the real benefit received by him from such part-performance, is to estimate the whole work at the price the parties had agreed upon, and deduct from that the amount necessary to complete the portions of the work left unfinished; and if there is any loss, occasioned by such unfinished work costing more in proportion than the whole work was undertaken for, such loss is a consequence of the default of the party who originally contracted to do it, and upon him it ought to fall. There may be cases in which the builder would not be entitled to recover so much as the proportion which the work done would bear to the cost of the whole, but he ought never to recover more than that proportion. It seems that the defendant may, in an action of this kind, reduce the amount to be recovered,

by showing that he has sustained special damages by reason of the non-performance of the contract by the plaintiff, or he may waive the recoupment of such damages, and bring a cross action to recover them. In the present case, the plaintiff was to be compensated for building the house in question by receiving the conveyance of a lot of ground; but this fact will not occasion any difficulty in the application of the proper measure of damages. If the plaintiff had finished his contract, and brought an action for the special agreement, the measure of damages would have been the value of the lot he was to have received, not the reasonable or customary value of the work done. (*Elison* vs. *Dove*, 8 Black, 571; *Lucas* vs. *Heaton*, Ind. R., 184.) So in this suit the value of the lot must be considered as representing the compensation the plaintiff was to receive for the whole work, and from it must be deducted the amount necessary to make up the plaintiff's deficiencies in the completion of his contract.

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CONTRACT.—PAROL EVIDENCE.

**Parol evidence can not be admitted to vary the terms of a written contract. Illustration of this rule.**

[*Lennard* vs. *Vischer*; 2 California R., 37.]

This was an action brought by Lennard, the plaintiff in the court below, upon the following written agreement: "This is to certify that Thomas Lennard is to have ninety dollars per month as long as he works for me, payable monthly from this date, May 10th, 1850, one year from date. Sebastian Vischer." The plaintiff alleged an indebtedness of $720 arising from said contract. The defendant set up the board of the plaintiff and money paid on account by way of set-off. Upon the trial of the cause in the court below, the defendant proved by way of set-off that the plaintiff had received some $200 on account of his services and had boarded with the plaintiff for a period of eight months, and that said board was worth $11 per week. The plaintiff then introduced testimony to prove that his services were worth $150 per month without board, and $90 with board, which testimony was excepted to. A judgment was rendered for the plaintiff for $500. From this judgment the defendant appealed.

MURRAY, J.—Parol evidence can not be admitted to alter or vary the terms of a written contract. It is contended that the evidence admitted in the present case did not have the effect to alter or vary, but only to explain the terms of the contract. The intention of the parties seems to have been expressed with sufficient certainty, and it does not require the light of surrounding circumstances to arrive at their meaning. The current rate of wages was a matter of no consequence, so long as the parties had stipulated for a specific sum. The fact that the plaintiff's services were worth more than $90 per month did not warrant the court, in the face of a direct contract, in presuming that board was included.

Judgment reversed and new trial ordered.

SALE AND DELIVERY.—FRAUDULENT REPRESENTATIONS.

When one has been induced to sell goods by means of false pretenses, he can not recover them from one who has *bona fide* purchased and obtained possession of them from the fraudulent vendee.

[*Keyser* vs. *Harbeck*. New York Superior Court. Not yet reported.]

This was an action to recover $8,000, the value of goods alleged to have been procured from the plaintiff by false pretenses, and subsequently sold to the defendant, who purchased them in good faith, and without notice of the fraud. The plaintiff brought this action to recover from the defendant, on the ground that no title whatsoever passed to the property, the obtaining of goods by false pretenses being a felony under the New York revised statutes.

BOSWORTH, J.—The question argued by the counsel of all the parties as being the principal one arising in this case is this: Can a party who has been fraudulently induced to sell and deliver goods by means of false pretences indictable under the revised statutes, reclaim them from one who has *bona fide* bought and obtained possession of them from the fraudulent vendee? When a party is deprived of his goods by acts amounting to a felony at common law, his title can not be divested by a sale to a *bona fide* purchaser; and it is insisted that the revised statutes having made the obtaining of goods by false pretenses a felony, it follows that the general rules of law applicable to the rights of an owner of property feloniously taken are applicable with equal force to property taken from him by false pretenses, indictable by the revised statutes.

The section defining the word "felony" reads thus:

"The term 'felony,' when used in *this* act, or in any other *statute*, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a state prison." (2 R. S., 702, § 30.)

Does the term, as thus defined, mean an offense for which the offender on conviction must necessarily be punished by imprisonment in a state prison, or it is that he is liable to be so punished, although the punishment may in fact be only a fine?

If sentenced merely to pay a fine, is he rendered incompetent as a witness under § 23, 2 R. S., 701? If sentenced to imprisonment in a state prison, does that render him incompetent? Whatever may be the sentence, it is pronounced "upon a conviction of having obtained property by false pretenses." The offense in the case supposed is necessarily a felony or no felony, irrespective of the degree or character of the punishment that may be adjudged, or else it depends upon the sentence that may be pronounced, and not upon the nature of the offense alone.

I think that the definition of the term "felony," found in the statute, was enacted for the mere purpose of giving it a definite meaning when found in statutory law, and without any intention of affecting by it the

rights or liabilities of third persons, resulting from ordinary and *bona fide* business transactions between them and any one who may have obtained the property to which the transactions relate, by acts which were not a felony at common law, but which, by the revised statutes, may possibly be an offense coming within the definition of a felony. Petit larceny was a felony at common law. Under the statutory definition it is not, being punished by imprisonment in a county jail not exceeding six months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment. Accordingly, it has been held, that a person who had been convicted of petit larceny was a competent witness; that though still a felony at common law, it was not by statute, and that the statute declaring a person convicted of a felony incompetent to be a witness, excluded only such as were guilty of the offense as defined by the statute. (*Carpenter* vs. *Nixon*, 5 Hill, 260. *Ward* vs. *The People*, 3 Hill, 395.) Conceding that the question is not affected by the revised statutes, it remains to be considered how it should be determined on principle and authority.

There is no question that a vendor who has been induced by false pretenses, within the meaning of those terms as used in the revised statutes, or by fraud not indictable, may reclaim the property from the fraudulent vendee; but when a question of right or title arises between the vendor and a *bona fide* purchaser from the fraudulent vendee, an entirely different case is presented, and other considerations are to be taken into account. Hence it has been held, that when the owner of property is induced to sell it, though by fraud, and actually delivers possession of it, intending at the time *to then part with his title to it*, a *bona fide* purchaser from the fraudulent vendee will hold it against the defrauded vendor. In such a case one of two persons must suffer—the original vendor or the last purchaser. Either the party who has actually consented to sell and deliver his property, or the one who bought it in good faith from the person to whom such sale and delivery were made.

His honor next proceeded to consider and comment upon the following cases: (*Murray* vs. *Walsh*, 8 Cowen, 238; *Parker* vs. *Patrick*, 5 T. R., 175; *Peer* vs. *Humphrey*, 2 Ad. & E., 495; *Earl of Bristol* vs. *Wilsmore*, 1 Barn. & C., 514; *White* vs. *Garden*, 5 Law & Eq. R., 379; *Lord* vs. *Green*, 15 Mees. & W., 216; *Rowley* vs. *Bigelow*, 12 Pick., 307; *Hoffman* vs. *Noble*, 6 Met., 68.) He then proceeded as follows:

It may be contended, with much force, that when a person obtains property by false pretenses, he acquires no right either of property or possession, and the false pretenses can convey none; that such a party may be sued in *trespass de bonis asportatis* or by replevin. (*Carey* vs. *Hotailing*, 1 Hill, 311; *ib.*, 302; *ib.*, 319.)

I think it a more accurate statement of the rule which protects a *bona fide* purchaser from a fraudulent vendee, to say, "that when there has been a contract of sale, and a delivery under it, sufficient in law to vest the property in the first purchaser, and make good a title, if not tainted with fraud, the *bona fide* vendee of such a purchaser, buying and

obtaining possession before the contract has been rescinded, will acquire a perfect title against the first vendor."

So if the true owner has intrusted to a third person written evidence of title or of an absolute and unqualified power of disposition, any one who advances his money, and obtains possession of the property from such third person, in good faith, relying on the facts being in conformity with this written evidence of their truth will acquire an indefeasible title as against the true owner. In the case of a sale, the property is sold and delivered with an actual intent that the purchaser may sell or otherwise convert it to his own use. A third person buying and taking a delivery of the property from the first purchaser does only what the first vendor actually expected would be done by some one in respect to the property. He has enabled his vendee, and intended to enable him, to sell and deliver the property to others, who might, *bona fide*, part with their money, and take the property in entire confidence of acquiring a perfect title. If in such a case the vendor can afterward rescind the sale and treat it as absolutely void, as between himself and such a purchaser, then every *bona fide* purchase of chattels may be avoided by any former owner from whom they may have been obtained by a fraud which would avoid the sale as between him and his immediate vendee. No one could buy chattels with security of acquiring a title, even in the cases in which a former owner had made a sale in fact and a delivery under it with intent to then pass the title, for it might subsequently appear that he had been induced by fraud to sell and deliver them. When goods have been stolen, or taken by an actual trespass, or have been delivered for a special purpose, without any authority to sell, a different principle applies—for in the first two cases supposed, the owner never made any delivery of the property, nor gave any actual or constructive assent to it; he never intended to part with the title or possession in any event; he has done nothing which could aid the efforts of the felon or trespasser to defraud third persons. It is not a case in which his acts have enabled a third person to commit a fraud by which one of two persons, equally innocent of any actual bad faith, must suffer. In the case last supposed, he parted voluntarily with the possession. It is true, that the only difference between that case and the case of a sale and delivery of goods not accompanied by a bill of sale, or a bill of parcels with payment receipts, so far as third persons can ascertain the truth of the transaction from *appearances only*, is hardly perceptible. In either case the only evidence of title which the possessor of the property has, or can exhibit, is the fact of actual possession. In either case a person wishing or solicited to purchase, sees him in the actual possession, claiming to be owner. Why, then, should a vendee acquire a title, if it turns out that possession was acquired under a fraudulent purchase, and none where it was obtained for a special purpose and without any authority to sell in any event. It is difficult to find any principle on which to discriminate between them, except that above stated. The cases already cited, as well as numerous others, protect the *bona fide* purchaser on that principle. The rule is briefly and clearly stated in the recent case of *Stevenson* vs. *Newman* (16 Law & Eq. R., 401, 408). "The fraud only gives a right

to rescind. In the first instance, the property in the subject-matter passes. An innocent purchaser from a fraudulent possessor may acquire an indefeasible title to it, though it is voidable between the original parties. It must be considered, therefore, as established, that the fraud only gives a right to avoid a contract or purchase; that the property rests until avoided, and that all the mesne dispositions to persons not parties to, or, at least, not cognizant of the fraud, are valid." (See also *Colton* vs. *Gage*, 13 Ill. R., 510; *McMahon* vs. *Sloan*, 2 Jones, 283; *Kinsbury* vs. *Smith*, 9 N. H., 109.)

A judgment of nonsuit must be entered.

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### AUCTION SALES.—BIDDER'S RIGHT TO RETRACT.

**A bidder at a sheriff's sale may retract his bid at any time before the property is knocked down to him, although one of the conditions of the sale *is*, that no person *shall* retract his *or her* bid.**

[*Fisher* vs. *Seltzer*. Pennsylvania Supreme Court. Not yet reported.]

This was an action of assumpsit brought by the sheriff of Lebanon county to recover the deficiency on a *re-sale* of real estate, for which the defendant had previously bid, and which he had refused to take. Conditions of the sale were read in the hearing of the defendant, before the sale commenced, one of which was, that "no person shall retract his or her bid." Another, and the final condition of the sale was, "that if the purchaser should neglect or fail to comply with the above conditions, he shall pay all costs and charges."

When the property was offered, the defendant bid $7,000, but subsequently withdrew his bid. The sheriff refused to permit him to do so, and, after crying the property some minutes, knocked it down to the defendant at $7,000. The defendant refused to take it, and it was afterward sold on an *alias vend. ex.*, for the sum of $1,500. The costs of the second sale were $40. Judgment was rendered for the plaintiff for this amount, and he appealed, claiming to recover the deficiency between the two sales.

LEWIS, J.—Mutuality is so essential to the validity of contracts not under seal, that they can not exist without it. A bid at auction, before the hammer falls, is like an offer before acceptance. In such a case there is no contract, and the bid may be withdrawn without liability or injury to any one. The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes, and retraction. This privilege is of vital importance in sheriffs' sales, where the rule of *caveat emptor* operates with all its vigor. It is necessary, in order that bidders may not be entrapped into liabilities never intended. Without it, prudent persons would be discouraged from attending these sales. It is the policy of the law to promote competition, and thus to procure the highest and best price which can be obtained. The interests of debtors and creditors are thus promoted. By the opposite course, a creditor might occasionally gain an advantage. But an innocent man would suffer un-

justly, and the general result would be disastrous. A bidder at a sheriff's sale has a right to withdraw his bid at any time before the property is struck down to him, and the sheriff has no authority to prescribe conditions which deprive him of that right. When the bid is thus withdrawn before acceptance, there is no contract, and such a bidder can not, in any sense, be regarded as a "purchaser." He is, therefore, not liable for "the costs and charges" of a sale. When there has been no *sale*, there can be no *re-sale*. The judgment ought not to have been in favor of the plaintiff, even "for the costs and charges" of the second sale; but as the defendant does not complain we do not disturb it.

Judgment affirmed.

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PROMISSORY NOTES.—CONSIDERATION.

A note given for money lost at play, is good in the hands of a *bona fide* indorsee, at common law.

[*Haight* vs. *Joyce*; 2 California R., 64.]

This was an action brought by the plaintiff as indorsee on two promissory notes. The defense set up was, that the notes were given for money lost at play. Judgment was for the plaintiff, and the defendant appealed.

MURRAY, J.—The question presented for our consideration in this case is, whether payment of a negotiable note, in the hands of an innocent indorsee, can be avoided on the ground that it was given for money lost or won at play. It is contended by the appellants that gaming contracts are void at common law; and that a note given for such consideration, being void between the original parties, is void in the hands of an innocent holder. The case of *Bryant* vs. *Mead*, decided by this court, is relied upon as authority to sustain the position that these contracts were void by common law. That was a suit between the original parties; and the fact that the money was lost at a public gaming-house, the amount, and all the circumstances were taken into consideration. The correctness of that decision has since been doubted, and if the subject were now open for consideration, I should be inclined to question it. But granting these contracts were void at common law, let us inquire how far this principle affects the present case.

Although want or illegality of consideration may be inquired into in a suit upon a bill or note between the original parties, by the general mercantile law, where these securities have passed into the hands of third persons without notice, the maker is estopped from setting up such defense. This peculiar system of credit is favored by the law; and a rule requiring the indorsee of every bill or note to inquire into the consideration would retard commercial transactions, and, in the language of Lord Kenyon, "shake paper credit to its foundation." Although many contracts were void at common law for illegality of consideration, it is impossible to find a single case in which a note

given for an illegal consideration has been held void in the hands of third persons, except by the operation of statute. In the case of *Valette* vs. *Parker* (6 Wend., 615), the court lay down the rule, that the want or illegality of consideration of a note transferred before due can not be shown in an action by a *bona fide* holder, except where the note is declared void by statute.

From the general tone of these decisions, as well as the policy of the commercial law, I am of opinion that these contracts can only be held void in the hands of third persons when made so by express statute. Any other decision would destroy confidence in commercial transactions, and open a wide door to fraud and perjury.

Judgment affirmed.

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PROMISSORY NOTES.—INDORSER'S LIABILITY.

**There is no difference between the liability of the guarantor and the indorser of a promissory note.**

[*Riggs* vs. *Waldo*; 2 California R., 485.]

This was an action against Waldo as maker, and two other defendants as guarantors of a promissory note. Judgment was rendered against Waldo by default, but in favor of the two other defendants on a demurrer. The plaintiff appealed.

HYDENFELDT, J.—One who puts his name on the back of a promissory note out of the course of regular negotiability, is not an indorser according to strict commercial meaning. He is termed a guarantor, and this is so, whether his inscription is simply in blank, or preceded by the words "I guarantee," etc.

In regard to the character of the guarantor's liability, there has been much conflict of decisions. In New York, and some other states, he is placed upon the same footing as the maker. In others, again, his liability is secondary, and must be fixed by due diligence to enforce the contract against the principal; and in some it is hard to discern what doctrine is intended, as it seems that each decision is made for the particular case, and not for the establishment of a permanent rule.

Judge Story, in his Treatise "on Promissory Notes," says, "The guarantor contracts, upon the dishonor of the note, that he will pay the amount upon a presentment being made to the maker, and notice given him of the dishonor of the note within a reasonable time." And he then goes on to say, that what is reasonable time must be determined by the fact, whether the guarantor has been injured for the want of reasonable notice.

It is with some hesitation that I am constrained to dissent from such a distinguished writer. But his doctrine would equally maintain the ground against any notice whatever, for, it would always be difficult, if not impossible, to determine that the mere want of notice inflicted the injury. The greatest objection to it is, that it is no rule at all. It leaves every case open to uncertainty, forces every contract of the kind into litigation, and each case having to be determined according to its

own particular facts, its decision would scarcely ever be useful in the adjudication of any other case.

The wants of a commercial community demand a rule which is simple and certain; and this can be readily attained by a resort to the principles of common law.

A name written on the back of a note, gave to the writer his title of indorser, and fixed the character of his liability. If the name was written without regular succession, according to commercial usage, a distinction in the description of the latter was instituted, and he was called "guarantor." This distinction, however, was only in name—the act performed by each is precisely the same; and it is a well-settled and safe rule, that the act discloses the intent. When this irregular mode of security was first resorted to, it is hardly within the compass of reason to suppose that the guarantor or the holder imagined that the undertaking was in any respect different from that of an indorsement. And it has only been made so by those minds which rather indulge in nice distinctions and subtile refinements, than lean upon the plain substantial reason which is the foundation of the law.

The contract of an indorser is simply a guarantee or declaration that he will pay, if the maker does not pay upon presentment, if he receives due notice. Now if this legal definition of his liability was written over his signature would it alter his liability? And if not, is the term "guarantee" potent enough in its true signification to alter his condition?

Blackstone says, "Each indorser is a warrantor for the payment of the bill." He there uses the term warrantor, which we have superseded by the term guarantor. There can be no real distinction between the two, for the one is a synonym of the other. If, then, the indorser is the warrantor, the liability of the guarantor must be the same as the liability of the indorser.

It follows from this view, that where one writes his name on the back of a promissory note, either in blank, or accompanied by the use of general terms, his undertaking is attended with all the liability and all the rights of an indorser *stricti juris*.

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### PROMISSORY NOTES.—CUSTOM.

**An indorser who has received due notice of protest for the non-payment of a note held by the bank, will not be discharged because a prior indorser was not thus notified, notwithstanding it was a usage of the bank to give notice of protest to all indorsers of paper not paid at maturity.**

[*Henry* vs. *The State Bank of Indiana*; 3 Indiana R., 216.]

Action against the defendant, Henry, as indorser of a promissory note. Defense *laches* on the part of the bank in not giving notice of protest to one Vinson, defendant's immediate indorser. It was proved that the bank was accustomed to give notice of protest to all indorsers of paper not paid at maturity; that she gave such notice to Vinson in the present case, but that it was misdirected, and did not reach him,

and thereby the defendant lost his remedy against him. Judgment for plaintiff, and appeal by defendant.

PERKINS, J.—It is insisted that the bank by negligence lost her remedy against the defendant below, Henry.

It is not claimed that the bank was guilty of *laches* toward him directly, but indirectly, through negligence toward his immediate indorser. It is insisted that the custom of the bank, as testified to in this case, of notifying all the indorsers upon paper, had become the law of the bank, which the institution was bound to follow in every case; that that custom was not followed in this case—the notice to Vinson not being a legal one, as it was not sent to the post-office nearest his residence, that, consequently, he was discharged, by the negligence of the bank, from liability on the note, and, being the immediate indorser of the defendant, Henry, that discharge operated to his prejudice; from all which the conclusion is drawn, that Henry himself should be discharged from liability to the bank.

The custom of a bank, variant from the general rule of law upon the point, may become the law of the bank as between the institution and its debtors, on the ground that contracts with it are supposed to be made by the parties, with reference to such custom.

For example, if it is the uniform and known practice of a bank to allow four days of grace instead of three, the bank will be bound in a case where there is no express stipulation. (*Marine Bank* vs. *Smith*, 18 Me. R., 99.) But according to the general principles of commercial law, the bank, as the holder of this note, had a right to notify all the indorsers, and hold all of them or any part of them she chose, liable to herself upon it; and had she notified them all, and sued but her immediate indorser, the notice would have inured to the benefit of that indorser as against the prior ones. Or the bank had a right to single out any one indorser, notify and hold him liable to herself, and leave him to notify his prior indorsers, and thus secure their liability over to himself, the indorsers subsequent to the one notified by the bank being of course discharged. The bank was not bound to notify any indorsers she did not attempt to hold liable; and it was the duty of every indorser notified to see to it immediately that the indorsers prior to him were notified, for his own security. The bank thus having by law the right of pursuing either of two courses, we do not think the adoption of one or the other, for any given time, should be regarded as the establishing of a custom precluding her from exercising the remaining one whenever she might choose.

To so hold would, in fact, be abrogating a part of the law itself. The bank, in this case, was acting under a general principle of law, and not adopting a custom aside from the law. (Chitty on Bills, p. 530, 8th edition; *Bromley* vs. *Frazier*, 1 Stra., 441; *Heylyn* vs. *Adamson*, 2 Burr., 669; *Reckford* vs. *Ridge*, 2 Camp., 537. See also *Edwards* vs. *Dick*, 4 Barn. & Ald., 216; Story on Bills, § 381.)

The judgment is affirmed.

CONDITION PRECEDENT.—PERFORMANCE OF CONTRACT.

Where an act, as the payment of money, is to be performed between two specified days, it must be performed before the commencement of the latter day.

[*Richardson* vs. *Ford;* 14 Ill. R., 332.]

This was an action brought by Richardson and others against Ford and others, upon a contract under seal, made on the 9th day of July, 1852, by which the appellees covenanted to deliver to the appellants at Peru, two hundred head of good, fat hogs, from the 1st to the 8th day of November then next; the appellants covenanting to the appellees for all hogs of a certain weight at a certain price on delivery, and to advance from time to time, as appellees might require, $1,600: "one hundred at the date of the contract, and four hundred between that time and the 1st September then next." The appellants averred in their declaration, that at the date of the agreement they paid the one hundred dollars, "and that afterward, to wit, on the 1st day of Sept., they were ready and offered to pay the appellees the further sum of four hundred dollars, which they refused to receive, and that they refused to go on with their contract to deliver the hogs." To this declaration a demurrer was filed, which was sustained by the circuit court, and the plaintiffs appealed.

TREAT, C. J.—The payments of one hundred dollars on the day the contract was executed, and of four hundred dollars between that time and the 1st September, were clearly conditions precedent. They were to be made by the plaintiffs before they could call upon the defendants to perform the contract on their part. The undertakings of the latter were all to be performed after the 1st September. A failure by the plaintiffs to make these payments within the time limited, would authorize the defendants to treat the contract as rescinded. To sustain an action on the contract, the plaintiffs are bound to show the performance of these precedent conditions; this being a necessary part of their right of action. And they have given the contract the same construction. They have averred the payment of one hundred dollars at the date of the contract, and an offer to pay four hundred dollars on the 1st September following. The only question is, whether this tender was made in due time. The covenant was to pay "one hundred dollars now, and four hundred dollars more between now and the 1st September next." It is clear that the offer to pay on the latter day came too late. The time within which the payment was to be made had already expired. The defendants might have maintained an action on that day to recover the money. Where an act is to be done on a particular day, the party has the whole of that day in which to perform it. But where the act is to be done by or before a given day. it must be performed prior to that day. So, if an act is to be done between two certain days, it must be performed before the commencement of the latter day. In computing the time in such a case, both the days named are to be excluded. A grant of land described as

lying between two lots, would not embrace either of the lots. A policy of insurance on goods "to be shipped between February 1st and July 15th," does not cover goods shipped on either of those days. (*Atkins* vs. *Boylston F. and M. Ins. Co.*, 5 Metcalf, 439.) A contract to have a mill "completed by November excludes the whole of that month. (*Rankin* vs. *Woodworth*, 3 Pen. and W., 48.) A direction to receive bids until the 1st day of July," excludes all bids made after the last day of June. (*Webster* vs. *French*, 12 Ill., 302.) The declaration was defective in not showing a performance of the contract by the plaintiffs. If they are entitled to recover back the money advanced upon the contract, it must be done in an action for money had and received.

The judgment is affirmed.

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INFANCY.—AVOIDANCE OF CONTRACTS.

**Where an infant contracted to work for six months, to receive no pay unless he worked out the time—*Held*, that he might avoid the contract on the ground of infancy, and sue in assumpsit for work and labor performed, although he did not work out the full time.**

[*Dallas* vs. *Hollingsworth*; 3 Indiana R., 587.]

This was an action of assumpsit by Hollingsworth against Dallas. It appears that the plaintiff and defendant entered into a contract by which the former was to work six months for the latter, at ten dollars a month. The plaintiff was to work out the time or have no pay. He worked for the defendant under the contract, from the 26th of March, 1850, until the 21st of June of the same year, and then left him without assigning any reason therefor. The plaintiff was a minor when he made the contract, and was still so at the commencement of the suit. The defendant had paid the plaintiff on account of the work three dollars and forty-seven cents. The plaintiff, at the time of the trial in 1850, was twenty years of age, and the wages for the season, of such laborers as he, ranged from ten to thirteen dollars a month.

BLACKFORD, J.—The main question which this case presents is, whether a suit will lie under the circumstances for the value of the plaintiff's labor.

The plaintiff contends, that let the law on the subject as to adults be what it may, he had a right on account of his infancy to rescind the contract when he pleased, and sue for the value of his work.

It is a general rule, certainly, that the contracts of an infant are not binding on him. That he is liable on his contract for necessaries is an exception to this rule. Some of his contracts are said to be by reason of his infancy alone absolutely void. But the far greater part of an infant's contracts are voidable only at the election of the infant. The contract before us, which was for work and labor, is of the latter description, and could be avoided at any time by the plaintiff. He has avoided it by leaving the defendant's service and bringing the suit; and we think the suit is sustainable. The case stands after the avoidance, as if the work had been done at the defendant's request, without

any special contract respecting it. (*Medbury* vs. *Watrous*, 7 Hill, 110; *Whitmarsh* vs. *Hall*, 3 Denio, 375.)

We consider in the case before us, that the plaintiff was entitled to a judgment for the value of his labor, after deducting the small sum paid to him by the defendant; and that, according to the evidence, the defendant can not complain of the amount of the judgment.

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FORECLOSURE.—CANCELLATION OF THE MORTGAGE.

Where a father deeded property to his sons, intending it as a gift subject to his own and his wife's support during their lives, and took from them a note and mortgage as security therefor, but, just previous to his death, delivered up the note to his sons—*Held*, that this delivery of the note and the original intent of the parties was a good defense to an action on the mortgage by the executor.

[*Sherman* vs. *Sherman;* 3 Indiana R., 337.]

This was a bill filed by the administrator of one Benoni Sherman to foreclose a mortgage given by the defendants, as security for a note, to the intestate, their father. It appears that Benoni Sherman conveyed certain real estate to his two sons, taking back from them a note for eight hundred dollars and a mortgage on the property conveyed, as security for the note; that he intended the property as a gift to them, subject to the support of himself and wife, and that he took the note and mortgage as a means of securing that support, and as a check upon the conduct of his sons. About four days before his death, being in good health and not contemplating his decease, he delivered the note and mortgage to his son, with the remark that he wished him to keep them until he (Benoni) and his wife were dead, and that then they would be void and dead also. Benoni's administrator subsequently demanded and obtained possession of the note and mortgage, and instituted this suit for their collection. Foreclosure decreed, and the defendant appealed.

PERKINS, J.—A court of equity will order the delivery up and cancellation of instruments where they are clearly established by the proofs to have become *functus officio* according to the original intent and understanding of both parties, and also where it has been fairly inferable from the acts or conduct of the party entitled to the benefit of the deed or other instruments that he has treated it as released or otherwise dead in point of effect. (2 Story's Eq., p. 19; see also *Wekett* vs. *Raby*, 2 Bro. P. C., 386; *Richard* vs. *Syms*, 2 Eq. Ca. Abr., 617; S. C. Barnard, p. 90; 2 Spence, 912, Note B; *Hower* vs. *Marten*, 2 Mylne & C., 474.)

There are two classes of cases in which equity will decree the delivery up of instruments, which are the evidences of debt: 1. Where they were not intended, originally, to be enforced: 2. Where they were intended, originally, to be enforced, but that intention has been finally abandoned.

The case under consideration falls within both of these classes. In it, we may remark, the mortgage was but a security for the note; and any act that discharged the latter, discharged the former.

The note had been actually surrendered up to one of the makers; and we shall treat it as though it had never been returned to the administrator of the payee, for it was done in ignorance of the rights of the party, and without intending to relinquish any rights he might have, and without the consent of the joint maker. Such a return will not revive an extinguished debt, nor change the liabilities of the parties in this suit. The surrender of a note is, *prima facie*, a satisfaction or relinquishment of the debt evidenced by the note. And in the present case all the facts go to show that the note was surrendered with a view to the relinquishment of what was, indeed, a legal demand, but one never intended to be enforced; and also, with a view to prevent its being collected on the decease of the payees as a part of his estate for the benefit of his heirs.

Of this there can be no doubt; and we think, on the authority of the cases cited, it is the duty of a court of equity to enjoin its collection for such a purpose.

It is true, the defendant, Charles, was not directed immediately to destroy the note; but the unqualified possession was given to him to continue till, on the happening of a future, but certain event, the note should become "void" and "dead" without payment; till, in short, it should "become *functus officio* according to the original intent and understanding of both parties."

Suppose this had been a suit to compel the re-delivery of this note from Charles B. Sherman to Benoni's administrator, would it have been sustained on the fact now appearing in the record? If not, then the present suit should not be. It will be observed that this bill is not in behalf of the widow to secure a support for her. This bill is to collect the note in question for the benefit of all Benoni's heirs, a part of whom he intended should not have any of it; and, if successful, would destroy the claim of the widow to future support, as well as deprive the defendants of their reward for the support they have given.

We think the decree below should be reversed.

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### TRIAL.—MINUTES OF EVIDENCE.

**Where the minutes of evidence of counsel were accidentally taken into the jury-room, but did not influence the jury in coming to a verdict—*Held*, no ground for a new trial.**

[*Ball* vs. *Carley*; 3 Ind. R., 577.]

This was a motion for a new trial. It appears that in an action of assumpsit between the same parties upon the retiring of the jury to consult upon their verdict, one of the jurors produced the minutes of evidence of the defendant's counsel, which, the appellant alleged, influenced the jury in the finding of their verdict, and the question was, whether this was a ground for a new trial. There was a written agreement signed by counsel admitting that the written memorandum did not go to the jury with the knowledge of the parties or their attorneys.

ROACHE, J.—The only question in the cause arises upon the proof. If the charges in the bill were established—if it were true that the minutes of evidence taken by counsel had been surreptitiously introduced into the jury-room, by the procurement of the party, or by the still more reprehensible connivance of a jury-man, and had there been read and used as a basis for arriving at a verdict, or had even exercised an influence upon their finding, it would certainly be good cause for setting aside the verdict and awarding a new trial.

Such gross misconduct would justly subject the guilty parties to punishment which no court should hesitate to inflict. (See *Barlow* vs. *The State*, 2 Blackf., 114, and authorities there cited.) But upon looking into the depositions, we can not conclude that there was any such misconduct in this case. We are satisfied, from the evidence, that the "memoranda" came into the jury-room by an accident; that no improper use was made of them, and that they exercised no influence upon the verdict. The only evidence bearing upon the point materially, is found in the depositions of the bailiff and of two of the jurors, one of whom was the foreman. The evidence of the bailiff goes strongly to support the allegations of the bill relative to the improper use made of the "memoranda." In his statements he is positively contradicted by both the jurors. Smiley, who was the foreman, swears that the jury made up their verdict "from their recollection of what was proved at the trial," and without any reference, as far as he saw, knew, or believed to the "memoranda" of evidence. Brawley, the other juror, sustains him fully, and in addition explained how the paper found its way into the jury-room. He says that when the jury were retiring, he gathered up from the table in the court-room the papers in the cause, and upon drawing them out of his pocket, after arriving in the jury-room, he discovered several sheets of paper containing minutes of evidence, one in the handwriting of Chase, the defendant's attorney, and two in the handwriting of Jones, one of plaintiff's counsel. He swears positively that he took up these papers inadvertently, and upon finding them made the fact known to his brother-jurors, and that they did not in any degree affect the verdict.

We are of opinion, therefore, that no improper means were used to introduce the papers complained of into the jury-room, nor was it used or relied upon as evidence, nor did it, to any extent, influence the minds of the jurors in coming to a conclusion.

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### PRACTICE.—REFERENCE.

Where the record showed that a party was in court by his counsel at the time an order of reference was entered, and made suggestions as to the form of the order—*Held*, that the reference might subsequently be set aside upon the ground that he had never consented to it.

[*Smith* vs. *Pollock*; 2 California R., 92.]

This was an appeal from an order made in the court below referring the cause to a referee, to try and report on all the issues. The record

showed that the appellant was in court by his counsel at the time the order was entered, and made suggestions as to the form of the order. The appellant filed an affidavit stating that he had never consented to such reference, and prayed the court to set the same aside. This motion was refused, and the defendant appealed.

MURRAY, J.—Art. I. sec. 3 of the constitution of this state provides that "the right to trial by jury shall be secured to all, and shall remain inviolate forever; but a jury trial may be waived by the parties in civil causes in the manner to be provided by law." The 182d sec. of the act to regulate proceedings in civil actions provides, that "a reference may be ordered upon the agreement of the parties filed with the court, or entered in the minutes." The same act also gives the court power to refer cases, where the parties do not agree, for certain purposes. It is admitted that the reference under the order in this cause would amount to the finding of a jury. The language of the constitution is explicit; and it is evident that the framers of that instrument intended to give the benefit of the trial by jury in every case. The mere silence of an attorney can not amount to a waiver of a constitutional right. The act concerning references requires the consent to be in writing or entered on the minutes. This waiver must appear affirmatively, and not by implication.

Neither is the appellant concluded by this act of his counsel. The act concerning attorneys and counselors gives an attorney or counsel power to bind his principal by an agreement in writing, filed with the clerk, or entered on the minutes of the court. No such agreement appears in the record of this case.

The order of reference had the direct effect to deprive the appellant of a constitutional right. The waiver of such right must appear in the manner prescribed by law. No such waiver appears directly from the record, and this court can not infer it from the silence of the appellant's counsel.

The order of the court below must be reversed with costs.

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### PLEDGEE'S INTEREST.—LIABILITY ON EXECUTION.

**On execution against the bailee, goods pledged may be taken and sold, subject to the right of redemption in the bailor and general owner.**

[*Saul* vs. *Kruger*. New York Superior Court. Not yet reported.]

This was an action of replevin to recover certain personal property from the defendant, one of the constables of the city of New York, who took the property, under an execution, issued out of a justice's court against the firm of P. W. Byrne & Co., of whom the defendant, Saul, was a member. The property in question was, however, it seems, owned by one Captain Hall, and left by him in the hands of the plaintiff. The goods were replevied, and this suit brought. A verdict was rendered for the defendant, and the plaintiff appealed. The principal question of importance arising in the case was, whether the interest of

a bailee for security, in goods in his possession, may be taken on execution against him.

HOFFMAN, J.—It is true that the rule in the case of mortgages of real estate is, that an execution may not be levied upon the interest of a mortgagee upon judgment against him. But this is only the rule before entry or foreclosure. And it was once held in Connecticut that such interest might be taken even before foreclosure. (*Row* vs. *Couch*, 1 Root's R., 452; and see *Huntington* vs. *Smith*, 6 Conn. R., 235; *Blanchard* vs. *Colbourne*, 16 Mass. R., 345; *Jackson* vs. *Willard*, 4 John. R., 41; *Jackson* vs. *Dubois*, ib., 216; *Collins* vs. *Perry*, 7 John. R., 278.) When there is a forfeiture and possession it is presumed the execution may be levied. But it is decided that personal property in the hands of a mortgagee may be taken upon an execution against the mortgagee after forfeiture. (*Ferguson* vs. *Lee*, 9 Wend., 258.)

The chief distinction between a pledge and a mortgage of chattels is that delivery of possession is essential to the former, and that no forfeiture is worked by failure to perform the condition, but the pledge must be sold by process of law, or upon reasonable notice. (*Cortelyou* vs. *Lansing*, 2 Caines' Cases, 200; *Hart* vs. *Ten Eyck*, 2 John. C. R., 62; *Ward* vs. *Sumner*, 5 Pick., 59.) We see nothing in these distinctions to exempt property pledged from the same liability as property mortgaged.

Upon this subject we refer also to the rule stated by Chief Justice Savage, in *Otis* vs. *Wood* (3 Wend., 500), that where a person is in possession of a chattel, having a right to such possession for a specific time, he has an interest in it which may be sold. When that interest expires, the owner is entitled to his goods. (*Camley* vs. *Hill*, 11 Legal Observer, 334; *Mattison* vs. *Barrows* 1 Comstock, 295.) Where the mortgagee has the immediate right of possession, so that there is nothing but a right of redemption in the mortgagor, the property can not be levied upon under an execution against him. But if he has the right of possession for a definite period, it appears that it may be.

The principle of such cases seems to be, that possession, coupled with an interest, renders the property liable.

Again, with respect to the right of a pledgee, it has been decided that the owner of a saw-mill who had sawed logs, retained a lien upon them although removed by agreement from the premises, so that he could sustain replevin against the sheriff for taking them upon an execution against the owner. (*Wheeler* vs. *McFarland*, 10 Wend., 318.)

So the pledgee may have an action of trover against any one who converts the goods by authority from the general owner. (*Ingersoll* vs. *Van Bokelin*, 7 Cowen, 670.) And in the well-considered case of *Braddock* vs. *Murray* (3 Vermont R., 302,) it was held that the bailee of a chattel, coupled with an interest, might sustain trespass against the bailor and general owner.

These authorities show that a pledgee of goods, with an interest in them as security for a debt or demand, is armed with the whole power and remedies of the law to protect his possession and support his claim. It would be anomalous if a right and interest so guarded should not be amendable to a judgment in favor of his creditor.

It was a rule of the common law, that goods pawned or pledged could not be taken in execution against the pawner. (Cases cited by JEWETT, CH. J., in *Stief* vs. *Hart*, 1 Comst., 28.) This was redressed by the statute of 1830 (2 R. S., 366, § 20,) by which the right and interest of the person making the pledge might be sold on execution against him, and the purchaser would acquire all his title and interest and should have possession on complying with the terms and conditions of the pledge. In *Stief* vs. *Hart* (1 Comst., 20), the supreme court had determined that upon such an execution the sheriff might enter into possession of the property pledged in order to sell it. This was affirmed upon an equal division, four to four, of the judges in the court of appeals. But it was also allowed that when the sale was consummated, the property was to be re-delivered, and could be held until the purchaser redeemed it. If a statute was necessary to authorize a levy upon an execution against a pledger, then either the goods might be taken as against the pledgee or the property was wholly beyond the reach of the common-law process, a conclusion not readily to be admitted.

We do not see any such inconsistency or practical embarrassment from the establishment of the rule now stated as counsel insist upon. The purchaser under a judgment against the pledgee obtains the possession, and the right and interest of the pledgee. The purchaser under an execution against the pledger obtains his right to reclaim the property upon fulfilling the terms of the pledge. There is merely a substitution of persons representing and holding the same rights.

The judgment is affirmed, with costs.

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### PARTNERSHIP GOODS.—LIABILITY ON EXECUTION.

**On an execution against one partner, the partnership goods may be taken and the debtor partner's interest sold, subject to the payment of the partnership debts.**

[*Newhall* vs. *Buckingham*; 14 Illinois R., 405.]

The question in this case was, whether the sheriff might seize partnership goods on an execution against one partner.

TREAT, C. J.—The English courts uniformly hold, that on an execution against one partner, the sheriff may seize the partnership goods and sell the share of the partner against whom the process issued. As respects the property taken, the partnership is dissolved, and the purchaser becomes a tenant in common with the other partner. He, however, acquires the share of the debtor partner, subject to the right of the remaining partner, and through him of the partnership creditors, to have the property applied, so far as it may be necessary, to the payment of the joint debts. But this right is an equitable one, and can not be enforced at law. (*Buckhurst* vs. *Clinkard*, 1 Shower, 173; *Pope* vs. *Haman*, Comberback, 217; *Heyden* vs. *Heyden*, 1 Salkeld, 392; *Parker* vs. *Pistor*, 3 Bos. & P., 288; *Johnson* vs. *Evans*, 7 Man. & G., 240.) The weight of authority in the United States is

decidedly the same way. (*Phillips* vs. *Cook*, 24 Wend., 389; Collyer on Partnership, § 822; Gow on Partnership, § 206; Story on Partnership, § 261; 3 Kent's Com., 65, Notes; 1 Am. Lead Cas., 317, Notes by Hare & Wallace; *Scrugham* vs. *Caster*, 12 Wend., 131; *Washburn* vs. *The Bank of Bellows Falls*, 19 Verm., 278; *Bardwell* vs. *Perry*, *ib.*, 292; *Moore* vs. *Sample*, 3 Ala., 319; *Place* vs. *Sweetzer*, 16 Ohio, 142; *Burgess* vs. *Atkins*, 3 Black., 337; *Shaver* vs. *White*, 6 Munf., 110; *White* vs. *Woodward*, 8 B. Munroe, 484; *Douglass* vs. *Winslow*, 20 Maine, 89; *Tredwell* vs. *Roscoe*, 3 Deveraux, 50; *Schatgill* vs. *Bolton*, 5 McCord, 478; *Gilmore* vs. *The North American Land Co.*, Peter's C. C. R., 460; *U. S.* vs. *Williams*, 4 McLean, 236.)

The cases of *Morrison* vs. *Blodgett* (8 N. H., 238), and *Deal* vs. *Bogue* (20 Penn. R., 228), deny the right of the sheriff to seize partnership goods on an execution against one partner. But these cases are clearly against the current of authorities. They are innovations upon the well-established legal rule; and are the result of attempts by courts of law to administer a principle of equity. They virtually prevent the individual creditors of a partner from subjecting his share in partnership property to the payment of their debts. What remedy have such creditors against the share of their debtor in partnership goods, unless the goods can be seized, and his interest in them sold on execution? In order to sell that interest, the officer must, for the time being, have custody of the property. A levy would be ineffectual, if the property is to remain in the possession and subject to the control of another. From the necessity of the case, the officer must be allowed to reduce it into possession. The authority to sell a chattel, or any interest therein on execution, necessarily includes the power to take possession thereof for that purpose. There are, indeed, inconveniencies growing out of the seizure of partnership property for the individual debts of a partner. They are, however, unavoidable. They are incidents of this kind of title to property. They must be borne, or separate creditors may be without any effectual remedy for the collection of their debts. Their debtor may have no individual estate, and still be entitled to a large surplus in the joint estate after the affairs of the partnership are adjusted. The same inconveniencies may arise in the case of tenants in common of a chattel; and yet the law is firmly settled, that, on an execution against one of them, the sheriff may take exclusive possession of the chattel in order to sell a moiety thereof. (*Melville* vs. *Brown*, 15 Mass., 82; *Reed* vs. *Howard*, 2 Metc., 36; *Waddell* vs. *Cook*, 2 Hill, 47; *Blevius* vs. *Baker*, 11 Ired., 291.)

In equity, a partner has the specific right to have the partnership effects faithfully applied to the payment of the partnership debts. The real interest of a partner in the joint property is a moiety of the surplus that may remain after the joint debts are discharged. And this interest is all that a purchaser acquires at a sale on execution. He succeeds only to the rights of the debtor partner. He takes the property burdened with the payment of the joint debts. The sheriff delivers the property to the purchaser and the other partner as tenants in common, subject to the incumbrance of a partnership account. The account may be taken at the instance of the purchaser or the other partner.

Although there is not a perfect agreement among the decided cases, the better opinion seems to be, that a court of equity may interfere by injunction to restrain a sale by the sheriff, until the partnership account is taken, and the precise interest of the debtor partner ascertained. (1 Story's Eq., § 678; Story on Partnership, § 264; *Place* vs. *Sweetzer*, 16 Ohio R., 132; *Cammack* vs. *Johnson*, 1 Green's C. R., 163.)

Judgment reversed.

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BREACH OF THE PEACE.—CONSTABLE'S AUTHORITY.

**A constable or police officer has no right to arrest, without process, for a breach of the peace, after the disturbance has ceased.**

[*Pow* vs. *Beckner*; 8 Indiana R., 475.]

This was an action of trespass for an assault and battery and false imprisonment, brought by the plaintiff in error against Beckner, a marshal of the town of Lafayette, and six others. Beckner pleaded in justification that he arrested Pow for quarreling and making a disturbance in violation of the ordinances of Lafayette. It was admitted that the arrest was not made until after the disturbances were over, and was made without process. Judgment for defendant, and appeal by plaintiff.

SMITH, J.—We think this plea is insufficient. It sets up as a justification of the trespasses complained of, that the marshal was informed by some unknown person that the plaintiff had been guilty of violating the ordinances recited, by committing a breach of the peace, and relies upon the supposed power of the officer to arrest without process in such cases. The authority conferred upon the marshal by the ordinance is similar to that possessed by constables and other police officers at common law. It is made his duty to suppress all riots and disorders, and apprehend, either with or without process, all disorderly persons or disturbers of the peace; but this should not be construed to mean that he should arrest for a breach of the peace after the disturbance had ceased. The obvious intent of the ordinance from which he derives his power, was to enable him to suppress riots and disorders in actual progress, without waiting to procure process, and to this extent the authority given him is reasonable and proper. But an authority to arrest for such offenses, after they had been committed, without process, and upon vague information communicated to him, would be unnecessary for the preservation of the public peace, and liable to great abuses.

To justify a constable in apprehending without process for an affray, the affray must take place in his view, and be still continuing. After it is over, he has no more power to arrest the offenders than any other person. (*Cooke* vs. *Nethercote*, 6 Carr. & P., 741; *Coupey* vs. *Henley*, 2 Esp., 540; *Fox* vs. *Gaunt*, 3 Barn. & Ad., 798.) The power given to the marshal, who is one of the defendants in this case, is not greater than that possessed by constables, and appears to have been given with the view of placing him on the same footing with that class of officers.

Judgment reversed.

REWARD FOR ARREST.—AGENCY.

M. arrested E. for whose arrest a reward had been offered, but by his negligence allowed him to escape; he then requested P. to aid him in re-arresting E., provided him with a pistol for that purpose, and gave him directions where to watch. P. succeeded in arresting E., carried him to the sheriff, and claimed and received from him the reward—*Held*, that M. might recover the amount of the reward from P., in an action of assumpsit.

[*Pruitt* vs. *Miller*; 8 Indiana R., 16.]

The facts of this case are substantially these: A reward of two hundred dollars was offered, in December, 1850, by the county of *Franklin*, in Indiana, for the apprehension and delivery to the sheriff of that county of Joseph Emsweller, who was charged with the murder of Chauncey Jenks. Russell Miller thereupon went to New Orleans in pursuit of Emsweller, succeeded in arresting and bringing him on the way to Franklin county as far as Harrison, a town near the eastern boundary of the county and between it and Cincinnati, at which place, on Thursday night, Emsweller, through the carelessness of Miller, made his escape. Friday morning, Miller came on to Franklin county, seeking aid to arrest him. Emsweller's wife lived with Mrs. Stuttle, on the farm of the defendant, Pruitt. Miller, with others whom he had procured to aid him, watched Mrs. Stuttle's house Friday night. Emsweller did not appear. On Saturday morning Miller called on Pruitt, related to him the circumstances of his journey to and from New Orleans, his heavy expenses, his arrest of Emsweller, the escape, etc., and solicited his aid in retaking him. He told Pruitt, if he would arrest Emsweller, and let him, Miller, know, he would pay him well for it, and furnished him a pistol for safety. Pruitt agreed to watch for Emsweller at Stuttle's, take him if he should come there, and let Miller know. He said Miller ought to have the reward. In the meantime, Miller continued his search in the vicinity. Emsweller came to Stuttle's Saturday night, and on Sunday morning Pruitt arrested him there, but instead of informing Miller of the fact, he delivered Emsweller to the sheriff, and claimed and received the reward of two hundred dollars. Miller then brought this suit to recover that money from Pruitt.

PERKINS, J.—It is contended, in behalf of Pruitt, that he arrested Emsweller on his own account, and delivered him to the sheriff, and thus became entitled to the reward offered as his own property. But we think it plain enough that Pruitt made the arrest at the request and as the servant of Miller, and is entitled, not to the reward, but to a reasonable compensation for that service. Miller had arrested Emsweller and brought him far on the way to the place where he was to be delivered up; had, somewhat carelessly perhaps, but not intentionally, suffered him to escape, and was following him in eager pursuit; gave Pruitt who was not attempting and so far as appears was not intending to attempt the arrest on his own account, information how and where Emsweller had escaped and where he would be likely to be found; and obtained his promise that he would make the arrest

at the place named, not elsewhere, on a promise of being paid for so doing. Had Pruitt when applied to by Miller declined to act in his behalf, Miller might, and probably would, have watched at Stuttle's and arrested Emsweller himself. But relying on Pruitt's promise, he trusted that point to him, and it would certainly be against all equity, under the circumstances, now to suffer Pruitt to repudiate his promise and claim the arrest as made on his own account.

In the second place, it is claimed, that if Pruitt was the servant or agent of Miller in making the arrest, then before this suit could be instituted, it was necessary that there should be a demand by Miller on Pruitt for an accounting and an allowance, or an offer of an allowance to him, out of the two hundred dollars he had received for his trouble and expenses. It is in general true, that where an agent receives money belonging to his principal in the course of his agency, he is entitled to an accounting before he can be sued for the money, and may retain his expenses, etc. (*English* vs. *Devans*, 5 Black., 558.) But in this case, we think Pruitt did not receive this reward in the course of his agency for Miller, but rather as a wrong-doer. He was not employed to take Emsweller to Brookville, and receive this money on his surrender to the sheriff, but only to arrest and detain him for Miller. If a man is employed simply to find a horse that is lost and bring him to the owner, and he find the horse, but instead of returning him to the owner, take him to the person to whom the owner may have sold him, and receive the price, it would hardly be contended that he received that money in the course of his agency for the owner. It would be otherwise, were he furnished with the horse to sell. And as to the compensation to which Pruitt may be entitled for arresting Emsweller, it could not have been allowed by the jury in this case, had any amount been proved which there was not, because there was no plea or notice of set-off filed.

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### SLANDER.—MITIGATION OF DAMAGES.

**In an action for slander, where the words complained of were spoken under excitement, the fact of that excitement may be taken into consideration by the jury in mitigation of damages.**

[*Brown* vs. *Brooks*; 8 Indiana R., 518.]

This was an action on the case for slander. The only question of law arising in the cause was whether the fact that the words complained of were spoken under excitement might be considered in mitigation of damages.

PERKINS, J.—The allegation of malice in speaking the words is a material one in a declaration for slander. And when the plaintiff has, *prima facie*, established the allegation upon the trial, the defendant has a right, under the general issue, to give in evidence, as mitigation of damages, matters disproving or tending to disprove malice, such as insanity, or that the words were spoken in a sudden heat or passion, or upon a justifiable occasion; or that there was a general belief on the part of the public of the truth of the matter charged.

In answer to such evidence on the part of the defendant, and to prevent the reduction of damages, the plaintiff may produce evidence showing, or tending to show, express malice. Applying these principles to the present case, the defendant below may have shown, as tending to disprove malice, that he spoke the words in a state of excitement, and the plaintiff in reply, as tending to destroy the force of that evidence and show actual malice, may have proved that the defendant persisted in repeating the charges after the excitement had passed off. For though anger may exist without malice, and words therefore may be spoken in the heat of passion without malice, yet malice may coexist with anger, and words be spoken with malice, even in the heat of passion; and whether they are or are not so spoken in any given case is a question for the jury, all the circumstances being considered. It would not necessarily follow that, because words were spoken in the heat of passion, malice was wanting, and damages should be mitigated. Nor would it necessarily follow, because a charge made in the heat of passion was coolly and deliberately repeated afterward, that the charge was maliciously made in the heat of passion, and subject to heavy damages.

These would be questions for the jury. Each repetition of slanderous words lays the foundation for a separate suit, some of the repetitions may be with malice, and some without. Each must stand or fall by itself. In the case before us, therefore, should we consider, as is insisted, that the court told the jury the damages should be mitigated if the words were spoken in excitement, but should not be if they were repeated afterward without excitement, irrespective of the question of malice, the charge was wrong and may have injured the plaintiff in error. But we do not so consider the charge. We think the jury would have understood from what the court said, taken all together, that if the words for the speaking of which the action was brought were spoken under excitement, the fact of that excitement should be considered in mitigation of damages, but if they were spoken not under excitement, then there would be no fact in relation to excitement to take into consideration in mitigation, and this would certainly be true.

We may remark that we think the word "excitement" one of too general signification to be used without qualification in the connection in which it was employed in this case. There are many kinds of excitements, some of which might not even tend to mitigate slander. But we presume the evidence in the cause established that degree of passion that justified the charge. At all events, if it did not, the error was in the complaining party's favor.

Judgment affirmed.

WARRANTY.—MISREPRESENTATIONS.

R. innocently and by mistake told C. that her suitor was rich, and she married him upon the faith of that representation—*Held*, that R. was not estopped by this innocent misrepresentation from bringing suit against C. subsequent to the death of her husband, for a debt due by the husband to him.

[*Coleman* vs. *Rowland*. Pennsylvania Supreme Court. Not yet reported.]

This was an action brought by the executor of John Rowland against his widow, Mrs. Coleman, to recover from her certain personal property which he claimed to appropriate in satisfaction of a debt due by the decedent to himself. The defense set up was, that the executor had estopped himself from setting up the debt to her disadvantage by having falsely represented his brother, the decedent, to be worth a certain sum, and thus inducing her to marry him. Judgment was for the plaintiff, and the defendant appealed.

BLACK, C. J.—The court below instructed the jury that if the plaintiff *fraudulently* declared his brother possessed of property worth $17,000, he could not reduce it below that value, by taking any part in payment of his own debt. The complaint is, that the judge made the case turn on the question of intent. The point before us is therefore narrowed down to this: whether a person who innocently and by mistake tells a woman that her suitor is rich, and she marries him under that impression, may be compelled to make the statement good.

I will not waste words on any attempt to show the difference between the marriage contract and an ordinary bargain for the purchase and sale of lands or goods. Let it be conceded that a woman can have no motive for marrying except the wealth of her suitor; admit it to be proper, delicate, and in accordance with true religious and moral views of the matrimonial relation, that every woman may put the charms of her person into the market, and that, if she gets for them less than she thought, she is injured to the precise extent of the difference. But this being granted, it still does not follow that a third person, as innocent as she is, must lose his own property by way of repairing her loss.

It is true, that when one party to a contract makes a misstatement, which he believes to be true, and on the faith of it the other enters into the agreement, equity will relieve. This is no more than saying, that a contract made in mutual mistake of a material fact may be rescinded. So no man can profit by a mistake of his own, if his neighbor has been misled by it. Where a loss must fall on one of the two parties, it is the more equitable rule, that he should bear it whose error, however innocent, has been the cause of it. To these principles we refer all that class of cases which have decided that a vendee may rescind a contract into which he has been led by a misrepresentation of his vendor, though made without fraud; that a receipt to an agent can not be denied by the receiptor after the principal has settled with, and given credit to, the agent for it; that an owner of land can not take improvements, the erection of which, on his own land, was inno-

cently encouraged by himself, etc. But when one is induced to make a contract or engage in an enterprise, by the statement of another, who has no interest in it, the motive is the very question. A person who gives advice to his friend must speak in good faith, and give breath to no thought which is not true, according to the best of his knowledge; but he is not answerable for a mere error of judgment; he may safely communicate any fact which he believes to be true. Thus, where one person credits another upon the recommendation of a third party, nothing but the willful and fraudulent falsehood of the recommendation can make him who gave it responsible. In a suit founded on such a cause of action, the *scienter* of the defendant must be averred in the declaration, and distinctly proved on the trial. It is equally certain, upon the same general principles of justice and policy, that if a creditor who believes his debtor to be solvent recommends him to another dealer, who trusts him accordingly, and the debtor turns out nevertheless to be insolvent, the first creditor is not thereby estopped from asserting his debt, although by doing so he cuts out the last creditor. I think no rule has ever been seriously propounded in any court of equity which would compel a man to lose his debt for giving to another person such advice as a court of law would pronounce innocent. In no way or manner can a person so related to the subject be held answerable, without proof that he was actually and fraudulently cognizant of the falsehood of his representation.

The jury have found that no *fraudulent* representations were made by the plaintiff before the marriage concerning the property which the deceased was possessed of. This verdict was found after full and, as we think, correct instructions on all the evidence produced. We ought to take it as a true verdict, and if true, the statements of the plaintiff were such as he conscientiously believed. We have conceded (but only for the sake of argument) that a marriage is like a commercial contract, and that a woman may have the same remedies against one who advises her wrongly about her suitor's property, that a dealer has against him who falsely certifies to a customer's solvency; and we only follow out the analogy, when we say, in the present case, that the absence of fraud leaves the plaintiff at liberty to claim his debt.

Judgment affirmed.

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TRESPASS ON THE CASE.—DAMAGES.

Where D.'s house was so injured as to be rendered untenantable by reason of improvements made on the adjoining lot by its owner—*Held*, that he could not recover for damages if—
I. He had knowledge of the approaching danger in time to protect himself from it.
II. If he knew that the defendant was taking measures to guard against the danger, and either concurred in the plan adopted or afterward approved it.
Rights and duties of adjacent land-owners considered.

(*Dunlap* vs. *Walingford*. Pennsylvania Supreme Court. Not yet reported.)

This was an action on the case brought by the plaintiff to recover damages, alleged to have been sustained by him, in consequence of the negligence of the defendants, in excavating the earth too near the plain-

tiff's house, and undermining and destroying his foundation, rendering the entire building, consisting of two small houses, untenantable, and compelling him to take them down and rebuild them.

It appears that the plaintiff erected, in the spring and summer of 1846, two small houses, being, together, 18 by 30 feet, with a partition wall between them on the line of his lot, between Market, Wood, Second, and Front streets, in the city of Pittsburg. The building was on, or within a inch of, the line, at the end of the lot toward Wood street, and at the distance of some eighty or ninety feet from the same. The surface of the ground was descending from Market to Wood streets. The great fire of the 10th April, 1845, had destroyed all the buildings in that part of the city. The plaintiff had sunk his foundation a few feet below the surface, and made a basement story, without any cellar underneath.

The defendants were the owners of the lot fronting on Wood street, and extending back to the end of plaintiff's house, which was on his line. On this lot, with the exception of a strip next to plaintiff's lot, had stood a frame warehouse, which was destroyed by the great fire. The defendants wished to rebuild, and in the winter of 1846–7 made the necessary arrangements for that purpose. After clearing the rubbish out of the old cellar, the workmen commenced excavating the remaining space adjoining the end of plaintiff's lot, for an area, keeping on a level with the old cellar of the former warehouse. They continued until they approached within a certain distance of plaintiff's house, when apprehending danger to the same by proceeding, they carried forward channels, or narrow excavations, under the foundation wall of plaintiff's house, building up stone piers or pillars as they dug out the strips of earth at short intervals, until the whole sub-wall or undermining was completed. This excavation was carried to a depth of some nine or ten or more feet below the foundation wall of plaintiff's house, on account of the descending surface of the earth toward Wood street, which is alleged by defendants to be necessary for purposes connected with their warehouses, and is said to be only of the usual and ordinary depth of cellars, similarly situated, in the city.

It is alleged by the plaintiff, that defendants undertook to underpin, or build, the sub-wall, and that they did it in so careless, unskillful, and negligent a manner as to cause the injury complained of. Defendants allege that the excavation and underpinning of plaintiff's wall was the joint work of plaintiff and themselves, and that both the plan and extension were sanctioned and approved by plaintiff, and that after the work was completed the plaintiff expressed himself fully satisfied therewith, and in token of his entire approbation said he would make a present of some tinware to the chief workman engaged in the work.

Hampton, J., upon the trial, instructed the jury as follows:

Although the amount of damages claimed in this case is not large, yet the principles involved are of vast importance in towns and cities, where men are constantly engaged in building.

The common law, which is said to be the perfection of human reason, has adopted the maxim of the civil law, that every man must so use and enjoy his own, as not to injure or destroy the rights or property of

another. And this maxim is founded on the plainest principles of common justice, without whose observance the very basis, not only of security, but of government itself, would be destroyed, and the whole fabric fall to pieces. In populous towns and cities this salutary principle is more indispensable than in the country, where men, in their ordinary business transactions, are comparatively but seldom brought into contact. And consequently, a rigid adherence to this just and simple rule can not be too strongly or too frequently urged upon our business community, as its careful and conscientious observance would prevent much litigation, trouble, and expense.

The owner of a lot of ground, in a town or city, who wishes to erect a building on the line thereof, which divides it from an unimproved lot of another, is bound to excavate to a proper and reasonable depth, to procure suitable materials, and to use due care and skill in the erection of his building, so that the adjoining owner may, if he wishes to build, by proper care and skill, and the use of ordinary means, excavate not only *up* to his line, but also *deeper* than the foundation of the first building, without any damage thereto. Otherwise the first builder would acquire an undue advantage over his neighbor, and destroy or greatly diminish the value of his property, for which he had paid a full consideration. The wall of the first builder must be of sufficient depth, material, and dimensions, and built with such skill as to stand upon its own foundation, when all the earth to the same depth is removed from the adjacent lot. And if this be not done, he has no right to complain, and can not recover from his neighbor for any injury he may sustain in consequence of such removal.

On the other hand, if the second builder wishes to sink his foundation *below* that of the first, he is bound, in doing so, to use suitable care, caution, skill, and diligence, by the ordinary, proper, and customary means, to prevent any injury or damage to the first building. And if he fail to do so, he will be responsible for such damages as naturally and necessarily result from his default. (*Richart* vs. *Scott*, 7 W., 460.) What constitutes due care, caution, and diligence on the one hand, or negligence on the other, is a question of fact for the jury, and no invariable rule can be laid down on the subject, inasmuch as it depends upon the circumstances of each particular case. The character of the surface and soil, the location of the lots, the prospect and probability of the improvement of that particular neighborhood, together with the character and purposes of the buildings that may, or are likely to be erected, are all questions, with many others, which enter into the inquiry whether or not due care, skill, and diligence have been observed.

The learned judge then quoted and commented upon the following cases: (*Shrieve* vs. *Stokes*, 8 B. Munroe, 453; *Thurston* vs. *Hancock*, 12 Mass., R., 220; *Panton* vs. *Holland*, 17 Johns. R., 92; *Clarke* vs. *Foot*, 8 John. R., 421; *Patridge* vs. *Scott*, 3 Mees. & W., 220; *Actor* vs. *Blundell*, 12 W., 324; *Parker* vs. *Foot*, 19 Vern., 309; *Mahon* vs. *Brown*, 13 W., 261; *Peyton* vs. *The Mayor, &c., of London*, 9 Barn. & C., 725; *Chadwick* vs. *Traider*, 6 Benj. N. C., 1; Com. Dig. Action on the case for nuisance, 6; 2 Rolle's Abr., Trespass, 1; *Wyatt* vs. *Harrison*, 3 Barn. & A., 871; *Lasala* vs. *Holbrook*, 4 Paige, 169;

*Dodd* vs. *Holme*, 1 Adolpus & Ellis, 493.) He then proceeded as follows:

If the first builder may disregard the character of the surface, soil, and probable improvement of the adjacent lots—the uses to which they are likely to be devoted—and the excavations which may be necessary for such improvements, and throw upon subsequent builders all the risk, expense, and difficulties consequent upon such exclusive privilege to the former, such adjacent property would be rendered in a great degree worthless, and all improvements in towns and cities cease. It would be difficult to foresee all the injurious consequences of this doctrine if carried out to its legitimate extent. An unimproved lot in the city of Pittsburg or Allegheny would be of little value to the owner if he were not allowed to dig in it for the purpose of building; and if he may not remove the soil thereof for that or any other proper purpose, lest he should disturb the natural support of his neighbor's lot, he is deprived of the use and enjoyment of his own property, or is limited and restricted therein by the convenience, or even whim or caprice of another. Under the operation of this rule, a person would have it in his power, by purchasing lots at proper points in the different parts of a town or city newly laid out, so to impair the value of the other lots, either in the hands of the proprietor or subsequent purchasers, as necessarily to throw them into his own hands, as the only one who had the legal right to improve them. This proposition is so at variance with every principle of justice and sound morality, as to contain in its very statement its own refutation.

If the owner of a lot erects his building at the line dividing it from one unimproved, he must take the risk of his position, and must use the necessary means to sustain his wall, if his neighbor, building subsequently up to his line, wishes to sink his foundation lower. And this he must do at his own expense.

If the second builder wishes to sink his foundation deeper than that of the first, he should give him reasonable notice of his intention, and permission, if requested, to come on his lot to underpin, shore up, or employ such other means as are best adapted to secure the safety of his wall and building. If this be done, and ordinary care and skill observed in digging and removing the soil from his own lot to such a depth as may be necessary and proper for the purposes of his building, he is not responsible for any injury to his neighbor's house. But if he neglects to give notice, and undertakes to secure the building himself, and in so doing is guilty of negligence or unskillfulness, he will be responsible for such damages as naturally and necessarily flow from his default.

You will apply these principles to the case under consideration.

Did the plaintiff sink his foundation to the proper depth, in view of the character of the surface and soil of his own and the defendant's lot, and did he build his walls of sufficient dimensions and materials, and in a workman-like manner? If he did not, he can not recover.

Had the plaintiff notice or knowledge of the approaching danger in time to take the necessary measures to protect his own wall from injury? If he had, and failed to do so, the defendants were not bound

to underpin the building at their own risk and expense, but might proceed with ordinary care and skill, prudence and diligence, in the excavation of their land to a reasonable and proper depth, and in so doing would not be responsible for any injury to the plaintiff's building arising therefrom.

But if the defendants undertook to underpin, or otherwise secure the plaintiff's building for him, and thus put him off his guard, they were bound to use due and ordinary skill, prudence, and diligence, by the usual and ordinary means, to accomplish that object; and if they were guilty of negligence in so doing, they are responsible for such damages as naturally and necessarily resulted from their default.

If the plaintiff knew of the danger, and joined with the defendants in their endeavors to prevent the threatened injury, and concurred in the plan adopted for that purpose, the defendants are not responsible for any damages the plaintiff may have sustained. Or if, after the work was done, he approved of it, and expressed himself satisfied with it, being fully acquainted with the plan and manner of execution, he can not recover. For, if a man assents to the doing of an act, he can not afterward bring an action and recover damages for it.

[NOTE.—The question arising in this case is one of great importance to all owners of real estate in large towns and cities, and it is the more unfortunate on that account that the cases of this kind which have hitherto arisen, have been determined rather by the circumstances and equities of the individual case, than by any principles of law capable of general application. There is no doubt that a party may recover for damage occasioned by the negligence of his neighbor, in erecting improvements, although upon his own lot, (see cases above cited); but he may also sometimes recover even in the absence of any express negligence, for a violation of the maxim, "*Sic utere tuo ut alienum non lædas.*" It is only in the application of this maxim that any difficulty arises in cases similar to the one above. It is evident that in all such cases both parties must stand upon the same ground; the rights of both must be equal, and equally supported. The maxim, "first come first served," never a legal maxim, is certainly not applicable to a case like the present. And much difficulty has heretofore been found in protecting the one party in the peaceful enjoyment of his property, and the other in his right of making lawful and necessary improvements on his own ground. This will perhaps be best attained by the application of the following principle: A man has a right to demand that his soil be supported in its natural position by the adjoining soil; but he has no right to demand that his artificial improvements be supported by the soil adjoining his own. Although it is true that this distinction has, perhaps, never been specifically laid down, it will be found that it has been more or less distinctly recognized in a number of leading cases. (Compare 1 Comyns Dig. Nuisance, p. 231, A, with p. 233, C. See also 2 Rol., 565.) In the leading case of *Thurston* vs. *Hancock* (12 Mass. R., 226), this distinction is very plainly taken. C. J. Parker, in delivering the opinion of the court says: "A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor,

if he digs too near his line; and *if he disturbs the natural state of the soil* he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and *not for the value of a house put upon or near the line by his neighbor.*" In *Lasala* vs. *Holbrook* (4 Paige, 169), the same distinction was again noticed and approved. (See also Gale & Whately on Easements, p. 216, *et seq.*; Byron's Leg. Maxims, p. 160, *et seq.*; 3 Kent, 437, note *b.*) All the cases quoted by Judge Hampton in the charge above, together with many others of a similar character, will be found entirely consistent with this distinction between natural soil and artificial improvements, and, indeed, most distinctly affirming the latter proposition that one has no right to demand that his artificial improvements be supported by the adjoining soil. The principle that every land-owner has a right to the natural support of his soil is very analogous to the well-settled principle of law, that every proprietor on a stream of water has a right to the natural flow of it. (See *Bealey* vs. *Shaw*, 6 East, 208.) If he be entitled to water for his soil, on the ground that nature has conferred it, why may he not have support for it on the same principle?]

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### CORPORATIONS.—TENANCY IN COMMON.

**Corporations may hold land as tenants in common, though not as joint tenants.**

[*De Witt* vs. *San Francisco*; 2 California R., 289.]

On the 4th of June, 1852, an ordinance was passed by the common council of San Francisco authorizing the purchase of certain real estate for city and county purposes, to be held by the city as tenants in common with the county of San Francisco. This action was brought by the plaintiffs, tax-payers in the city of San Francisco, to prevent the completion of the purchase. An injunction was granted, and a motion to dissolve it refused. This was an appeal from this refusal. Several questions were raised in the discussion of the case, but the only one of any very general interest was, whether corporations could hold land as tenants in common.

WELLS, J.—It is objected that the corporation of the county of San Francisco and the corporation of the city of San Francisco can not hold lands as joint tenants, or tenants in common. It is not pretended that these corporations can hold as joint tenants. Joint tenancy is a technical feudal estate founded, like the laws of *primogeniture*, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons. For the creation of a joint tenancy, four unities are required, namely, unity of *interest*, unity of *title*, unity of *time*, unity of *possession*. (1 Cruise's Digest, by Greenleaf, 355, sec. 11; 2 Crabbe's Real Prop., sec. 2303.) But the distinguishing incident is a right of survivorship. (1 Cruise, 359, sec. 27; 2 Crabbe's Real Prop., sec. 2306.)

Two corporations can not hold as *joint tenants*, because two of the essential unities are wanting, namely, the unity of capacity and of title.

(1 Cruise, 362, sec. 39.) Nor can they hold as joint tenants for another reason: being each perpetual, there can be no survivorship between them; and this, as we have just seen, is the distinguishing incident of this estate. Nor can a corporation hold lands as joint tenant with a natural person, for there is no reciprocity of survivorship between them. (Angel & Ames on Corporations, 150; 1 Kyd on Corp., 72.)

But a tenancy in common requires for its existence but one unity, namely, that of *possession*. (1 Cruise, 390, sec. 2; 2 Crabbe's Real Prop., 627, sec. 2316:) If therefore a grant should be made to two persons, which in its terms should imply a joint tenancy, but such an estate could not vest, for the reason that some of the requisite unities were wanting, the result would be the creation of a tenancy in common. The rule of law is, that a grant shall not fail if there is a capacity to take under it, and if the higher estate can not vest, the next estate which is possible, shall vest. This is an equitable rule, which is made to apply to all grants and devises. The appellants in this case propose to purchase the undivided one half of the property known as the Jenny Lind and Parker House, and the land upon which the same stands, to be used as tenants in common with the city of San Francisco.

But it is said that two corporations can not hold lands as tenants in common; and the case of *The New York and Sharon Canal Company* vs. *The Fulton Bank* (7 Wend., 412) is cited in the opinion delivered by the district judge, and is the only authority produced to sustain this proposition. From an examination of the case, we think that it maintains the opposite doctrine.

The books and cases do not afford any instance in which this right of holding lands as tenants in common, either with each other or with natural persons, is denied to corporations. Not one of the reasons which work a want of capacity to hold as *joint tenants* would prevent their holding as *tenants in common*, for this estate requires but one unity, that of possession.

So far from corporations not being able to hold lands in common, the original condition at common law of the largest class of corporations known to the law, was that of holding all their lands in *common* with each other; and they were never separated until the original position produced inconveniences. (1 Kyd on Corporations, 108.)

Order reversed and injunction dissolved.

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RELEASE.—FAILURE OF CONSIDERATION.

Where D., a creditor of the M. S. I. Co., granted them a release, the instrument setting forth that its object was to prevent the company from becoming insolvent; but notwithstanding the release, the company afterward did become insolvent—*Held*, that the release was not thereby avoided.

[*De Voss* vs. *Johnson*. New York Supreme Court. Not yet reported.]

The defendant in this case was the receiver of the Mutual Safety Insurance Company, and the plaintiffs claim to recover an amount alleged to be due on an insurance granted to them by the company. The defendant

set up a release granted to the company by the plaintiffs, and the plaintiffs replied failure of the consideration of the release. The case turned entirely upon the binding force of this release. The defendant claims that it is a perfect defense to the suit, and the plaintiff claims that it ought to be set aside. The release is as follows:

*Agreement between the Mutual Safety Insurance Company and E. W. De Voss & Co.*

"Whereas, on or about the —— day of June, in the year 1849, a certain proposition was made to the Mutual Safety Insurance Company by various parties, and among others by the above-named in the words following:

"*To the Trustees of the Mutual Safety Insurance Company:*

We, the undersigned, creditors of the Mutual Safety Insurance Company, for the purpose of restoring the solvency of the company and preventing its going into the hands of receivers, agree with the said Mutual Safety Insurance Company, provided the said company will pay us a dividend in cash on our respective claims, that we will release for double the amount of each dividend so paid, it being understood, however, expressly, that after the debts now due, or which may hereafter arise on the existing contracts of the company are discharged, should there be a surplus arising from the present existing assets of the company, we shall receive *pro rata* our share of such surplus to the extent of the balance of our original claims respectively.

"This agreement to be signed by creditors to the amount of two hundred thousand dollars at least; it is understood that the premium notes of the claimants are applicable to dividends on their claims the same as cash.

"New York, June, 1849.

"And whereas the said proposition was, on or about the 24th day of August, 1849, accepted by the Mutual Safety Insurance Company. And whereas, in conformity to the said proposition, and the said acceptance thereof, a dividend of fifty per cent. has been declared by the said company, on the claims represented by the signers to the proposition aforesaid, dated the —— day of June, 1849:

"Now, in consideration of the premises aforesaid, and of the sum of four thousand dollars, now paid to the above-named E. W. De Voss & Co., receipt of which is hereby acknowledged, being fifty per cent. on the claim held by them against the said Mutual Safety Insurance Company, growing out of policy No. 26,422, the said claim amounting to the sum of eight thousand dollars, the above-named E. W. De Voss & Co. surrender and hereby cancel the said policy, and release and discharge the said Mutual Safety Insurance Company of and from all and every claim and demand whatsoever, growing out of the said policy in any way.

"It is, however, expressly agreed, in conformity to the said proposition of the —— day of June, 1849, and the acceptance thereof as aforesaid, that if after payment of the said dividend of fifty per cent. on the claims represented by the signers to the said proposition, and after the payment of expenses and of all the claims on the said company now existing, and which may hereafter arise on existing contracts, there

shall remain any surplus in the hands of the said Mutual Safety Insurance Company, of its present assets and property, the said surplus shall be divided among the signers to the said proposition of the —— day of June, 1849, *pro rata*, according to the respective amounts of their original claims."

This paper was regularly signed and sealed, and the money was paid. The company, however, were not thereby entirely extricated from their difficulties, and on the 5th of October, 1850, the company was dissolved, and Henry W. Johnson, defendant in this suit, was appointed receiver. The plaintiffs then brought this action to recover of the defendant the balance not paid, insisting that the release was executed as part of a plan to prevent the insolvency of the company, and to enable it to continue the business, and that as this plan was unsuccessful, the consideration upon which the instrument was executed failed, and that the claimants ought not to be barred. The referees reported in favor of the plaintiffs, setting aside the release, and the defendants appealed.

CLERKE, J.—I am at a loss to conceive in what respect this differs from any other release, to entitle the plaintiffs to have it set aside, "so that the funds in the hands of the receiver should be distributed in the same way, as if the plaintiffs had not executed the release."

Is fraud pretended? Not at all; it is expressly disavowed. Was there no consideration? The plaintiffs received an immediate payment of fifty per cent. ($4,000) on their claim, with a stipulation that, if after the payment of fifty per cent. of their claims and those of the other creditors who united with them in this release, and after the payment of expenses, and *all* claims in the company then existing, and which might arise on existing interests, there should remain any surplus in the hands of the company, the surplus should be divided among the creditors who executed the release. This was an ample consideration. It *secured* to the plaintiffs one half of their claim, and put at once into their pockets $4,000, instead of leaving them in a state of uncertainty as to what proportion of the demand they should receive, if any, and of waiting for the final settlement of the complicated affairs of an insurance company, pronounced to be insolvent, liable to be dissolved, and whose estate and assets would, therefore, soon, probably, be placed in the hands of a receiver.

Were not the conditions of the agreement in all respects complied with? The $4,000 were at once paid; and, as required, instruments of a similar tenor were executed by other creditors, to the amount of over two hundred thousand dollars, indeed, amounting to over two hundred and fifty thousand dollars, including the plaintiffs' demand—each of them receiving at the time of delivering such instrument fifty per cent. on the amount due to them respectively.

To be sure, it is mentioned in the release that is given for the purpose of restoring the solvency of the company, and preventing its going into the hands of receivers. But this is stated by way of recital, as a motive then operating on the minds of the parties, to perform the act—not as an essential element or condition of the validity of the act. The release did not, indeed, save the company from insolvency, or from

going into the hands of a receiver; but are we to pronounce the instrument void on that account, when nothing appears on the face of it, that if such did happen contrary to the motives or wishes thus incidentally expressed, the release was to be of no effect? If the plaintiffs meant this, they should have said so; and not having said so, it is fairly to be presumed that they meant no such thing. They have lost nothing by the company's failure to resume business; and, as mere creditors, would have gained nothing if they had resumed it.

When releases are limited by courts to the purpose and occasion in which they are made, such purpose and occasion constitute a condition of the ultimate efficacy and validity of the instrument; and this condition is either plainly expressed or so manifestly forms an integral and operative part of it, that it can not be rejected. The release here is in itself unconditional, notwithstanding the incidental expression of the motive, and bears a resemblance to the case, *Pratt* vs. *Crocker* (16 P. R., 270), where a release was given by a defendant in a cause, for the purpose of enabling the releasee to be a witness on the trial; it was a discharge of the liability of the witness to the defendant, although he was not sworn at the trial, nor the release produced.

MITCHELL, J.—In addition to what has been said by Judge Clerke, it may be observed that, before the release was executed, the plaintiffs and others made application to the company to pay this per centage, and that those who joined in the application should then execute releases so as to allow non-concurring creditors to be paid in full, and the applicants to have a claim only on the surplus which should then remain, and that this was done in order to make the company solvent. If a sufficient number joined in this application, so as to enable the company to pay that per centage to them, and to pay all other claims in full, then the company, on receiving those releases, became solvent in fact, and could pay the per centage to the applicants without infringing the law against insolvent companies giving a preference. And a sufficient number did so join. If this were not the meaning of the release, but the claims of those applicants were still to be debts due by the company for the whole amount, or for an equal portion with the non-concurring creditors, then the object of the applicants would be defeated—the company would be insolvent in fact, and no payment could be made to them; and the payments since actually made to them have been made against law, and could be recovered from the applicants. This system of releasing the debts of companies and taking a per centage, and establishing a *new claim* only as to the unpaid part of the debt, on the surplus funds merely of the company, after payment of all other claims, was not new. It was resorted to after one, if not both, of the great fires in this city. It is wise and beneficial to all parties. It enabled the consenting creditor to be immediately placed in funds, and the company to wind up its affairs so far as those creditors are concerned, without the expense and delay of a receivership. It can hardly be doubted that the amount paid to those plaintiffs, some five or six years ago, has been more beneficial to them than it would have been for them to have waited to this day, and then to have received their ratable proportion of the whole assets. Contracts, when fairly made (as

this was), should be honestly carried out; and if a merchant, for the advantage of cash in hand, consents to give their full pay to creditors who choose to wait, he should, after receiving the benefit, allow the other party to receive the benefit which, by agreement (or if it be not one agreement, because the other party was no formal party to it, then the benefit which by his consent), the other party was to have who chose to run the risk of delay and of all its consequences.

The solvency which the agreement was intended to effect was accomplished by the understanding of the agreement above given; it was a then present solvency, such as should authorize the payment to the concurring creditors of their per centage, not a certainty that they would be solvent a year afterward. The court would have sustained the payments made to those creditors, if they had been sued to refund, and it should equally sustain the rest of the agreement which was essential, in order to make those payments valid.

The report of the referees should be set aside; costs to abide the event.

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RAILROAD LAW.—ESTOPPEL.—NUISANCE.

Where the plaintiff allowed the defendants to construct their road over his common of pasture, and to occupy it for railroad purposes for two years without objection—*Held*, that he was estopped in equity from subsequently objecting.

A railroad, as ordinarily conducted, though situated in a city, is not a public nuisance, such as will be abated by a court of equity.

[*Bell* vs. *The Ohio and Pennsylvania R. R. Co.* Pennsylvania District Court. Not yet reported.]

This was a bill filed for an injunction against the Ohio and Pennsylvania R. R. Co., to prevent their erecting a depôt or running their cars on the South Common in Allegheny City, under authority conferred by their charter, and a license from the select and common councils of the city. The grounds on which the relief was asked, are:

I. That the plaintiff's common of pasture is destroyed; and,

II. That the use of the common for the purposes of the railroad are both a public and private nuisance. Some other points were raised in the pleadings, but these are the only ones of any very general interest.

HAMPTON, P. J.—The first question is as to the plaintiff's common of pasture. Is the injury to the plaintiff's right of common in the ground occupied by the railroad of such a nature as to call for the interposition of a chancellor by injunction? Is the injury so great and irremediable at law, as to justify this court in enjoining the defendant from the use of said common ground in the manner and for the purposes heretofore used and intended to be used by them, as charged in the bill, and admitted in the answer? And is the complainant in a position to ask such interference? He who comes into equity must do equity. He must neither do, nor omit to do, any act whereby his adversary may have been led into error, and induced to do the acts complained of. He must on all occasions act and speak consistently with

his alleged rights, and if he fail in this respect, he will afterward be compelled to keep silence when he might wish to speak out.

Prior to the organization of the railroad company, the complainant's right to pasturage on the common ground surrounding the original town of Allegheny is conceded; the question for us to determine is, whether that right is still in him, or whether he has lost it either by operation of law or by his own conduct.

After considering at length the effect and character of the charter granted to the railroad company by the legislature, and the license granted by the councils, the learned judge proceeded as follows:

It is said that the complainant by standing by and looking on, while the defendants entered upon the common, expended large sums of money, and made valuable improvements without objection, is estopped in equity. The evidence in the case shows that the defendants located and constructed their road over the ground in question at great expense, in full view of the complainant, and without objection on his part, and that they used and occupied the ground for a period of more than two years, without remonstrance or complaint by him.

If A constructs a work with the consent of B, either express or implied, equity will not afterward restrain him by injunction, at the instance of B, although the work proves injurious to B, nor from erecting further buildings necessary for the use of, and connected with, the former. (8 Gren. Ch., 116; Eden on Injunctions, 2 vol., 372.)

If a party is cognizant of his right, and does not take those steps to assert it which are open to him, before he has allowed his adversary to incur material expenses, or to enter into engagements difficult to be discharged, he will lose his right to the interposition of equity. (Railway Cases, 66. See, upon the same subject, *Western University of Penn.* vs. *Robinson*, 12 Serg. & R., 34; *Carr* vs. *Wallace*, 7 Watts, 400.)

The complainant can assert no other or greater claim to this common than merely the right to depasture his beasts thereon. In every other respect he stands on the same footing with the *outsiders*, or those who live on the *outside* of the commons. The evidence in this case shows what is known to all, that the complainant's right of pasture is a *common right*, of no material or appreciable value or nature—that no grass or herbage worthy of notice had grown thereon for more than twenty years, nor has it been shown that it was *ever* used for such a purpose by the plaintiff, or that he contemplates or desires to use it as a pasture ground. So that perhaps even the doctrine of the loss of plaintiff's right by *non user* might possibly be applied here, if it were necessary to prevent the injustice that would follow an injunction in this case.

Suppose the defendants, instead of agreeing with the councils on the terms upon which they might occupy the ground in controversy, had made application to the court of common pleas, under the act of incorporation, and three disinterested freeholders had been appointed to determine the question between them and the commoners, what amount of damage would they have awarded to the present complainant for his right of pasturing his beasts on this strip of fifty feet wide,

on the south side of the south common, especially when the fact is taken into consideration that every other owner, or part owner, of an interest in the town of Allegheny had the same right to put any number of animals he pleased on the same strip of ground. It seems to us, it would require a very thorough knowledge of *decimal fractions* to make an accurate calculation of his damages.

It is not surprising, then, that with a claim so utterly valueless, he should have looked on, and made no objections, while respondents were building their road, inferring, no doubt, in common with the councils, who subscribed largely to the construction of this road, that it would be both a public and private benefit and blessing, and that the advantages would be immense in proportion to the contiguity of the depôt.

He saw the operations of the defendants from the time when they commenced grading the ground in question, in 1850, for a period of some two and a half years, for their works were all carried on under his immediate observation from his residence, which is only a few rods off. He saw them expending large sums of money in these operations, and it was his duty then to assert his right, if he had any, and not having done so then, he will be estopped in equity from asserting it now. If this would be the case where the right thus lost by *laches* might be valuable, how much more should the principle apply here, when, as we have seen, the claim is without any value whatever. Under such circumstances, chancery will never interfere. It will not interpose by injunction to prevent the enjoyment of an ancient right of little importance and seldom used. (*Wilson* vs. *Cohen*, Rice Ch., 80.)

Another ground of complaint on the part of the plaintiff is, that the road, cars, engines, freight, etc., as used, received, and discharged, are both a public and private nuisance, disturbing the quiet and peaceful enjoyment of his habitation, and diminishing the value of his property. This, if true, is a very serious inconvenience, indeed. But is it such, under all the circumstances, as to call for the exercise of the extraordinary power of a court of chancery by injunction?

What degree of annoyance will constitute a nuisance must always depend upon the special circumstances of the case. Certain sounds would be considered *nuisances* by some, and *music* by others. As for instance, the chiming of church bells, the blowing of horns or trumpets, the lowing of cattle, the sound of the forge hammer, the whistle of the steam-engine, and the sound of the drum and fife. And this depends more or less on the proximity or distance of the different sounds. It is not every annoyance that is indictable or actionable, and more especially is that the case in towns and cities, in these modern times of progress and improvement. But is a court of chancery called upon to decide those questions of fact which are so difficult and doubtful, when the courts of law are open to the party, where they can be determined by the verdict of a jury? An injunction *may* be granted to restrain a public nuisance at the suit of a private person, who suffers a special injury thereby. (6 John. Ch., 439.) But equity will not interfere in case of a nuisance, except to prevent *irreparable* injury. (4 Hen. & Mun., 474.)

When the thing sought to be prohibited as a nuisance is, in itself, a

nuisance, the court will interpose; but if not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interpose until the matter has been tried at law. (*Gwin* vs. *Milmoth*, 1 Free. Ch., 505.) To justify the interference of a court of equity to restrain a nuisance, the right of the complainant must be clearly established, and it must appear that there is danger of immediate and irreparable injury. (*Caldwell* vs. *Knot*, 10 Yerger, 209.) The court will not interfere, by injunction, to restrain an erection not in itself noxious, though it may, according to circumstance, prove so, until a trial of the right at law, except where an action could not be framed to meet the question, when the court may direct an issue. (*Mohawk Bridge Co.* vs. *The Union and Schenectady Railroad Co.*, 6 Paige Ch. R., 554.) An act tending merely to diminish the value of a man's house, or to shut out a pleasant prospect, was recently held in England not to be a nuisance. (9 Eng. Law & Equity R., 116, 122.) Many other cases might be cited; but these are deemed amply sufficient to justify a refusal to interfere by injunction, on the ground of nuisance, under the circumstances of this case.

It does not appear here that defendants create any more noise or confusion than is usual or customary under similar circumstances, or than is necessary and unavoidable in carrying on the trade and business of their road. To deny to them, therefore, the use of their road, would, in effect, be to exclude all railroads from our towns and cities, after these corporations have chiefly contributed to their construction—to debar the right to steamboats to land at our wharves, to discharge and receive freight and passengers—to stop the passage through our streets of the hundreds of hacks, omnibuses, drays and carts, necessary to convey freight and passengers between the *outer* depots, and drive them round the city limits—to stop all machinery of every description, driven or propelled by steam—to stop all public markets which produce noise and disturb the citizens residing adjacent thereto, and restrain the use of coal, as fuel, because of the intolerable annoyance occasioned by its smoke. It should be borne in mind that we live in an age and a country of progress and improvement, in all the business departments of life. New branches of business are constantly springing up on every hand. The inexhaustible resources and capabilities of the country are being rapidly developed, by the ingenuity, energy, and enterprise of our citizens. The unparalleled increase and improvement in agriculture, commerce, and manufactures demand increased facilities in travel and transportation. These, and many other considerations, require the modification of former rules, and a judicious application of the expansive principles of the common law to the altered condition of the country and the necessities of the public. The common law is said, and with great truth, to be the perfection of human reason. It is the embodied justice and wisdom of each successive age, molded and formed into a system adapted to the habits and wants of the current times.

These remarks are made for the purpose of showing, that what would at one time have been held to be a nuisance, might not, and probably would not, be so considered now. Private interest and com-

fort must often yield to public necessity or convenience. This, we apprehend, must be the case here. If the company had authority to make their road where it is, with its terminus at Federal street, they are entitled to the ordinary and necessary uses and advantages of their position, and would not be responsible for any unavoidable annoyance or disturbance such uses might cause. To permit and encourage them to construct their road at a heavy expense, and then deny them the privilege of using it for the ordinary and necessary purpose of such a work, would be inconsistent with every principle of justice and common sense.

The perpetual injunction is denied, and the bill of complainant dismissed.

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## CITY RAILROADS.—THEIR LEGALITY.

**The authority and obligations of municipal corporations considered in reference to the streets.**

[*Hope & Co.* vs. *The Sixth and Eighth Avenue Railroad Companies.* New York Superior Court. Not yet reported.]

The defendants in this case are the proprietors of two city railroads situated in New York city, and running between the upper part, which is occupied mainly by residences, and the lower or business part. On one part of the route both companies use the same track, running through the same streets. The plaintiffs are wholesale grocers doing business on the corner of College Place and Chambers street. The track of both the companies is laid through these streets, passing by the store of the plaintiffs. This was a motion made by the plaintiffs to prevent the defendants from continuing to run their cars, and to compel them to remove the rails already laid down, for the reason that the resolutions of the common council under which the companies were formed were illegal and void, and because the running of the cars through College Place interfered with the plaintiffs' business, by rendering it impossible for them to leave their wagons in the street, or even to keep them standing there for the purpose of loading and unloading. The case involves the right of the common council to authorize the laying of tracks and running of cars through the streets of the city.

HOFFMAN, J.—Upon an application at special term certain amendments to the complaint were allowed. These amendments were made with a view to raise the question of the entire illegality of the acts of the corporation as to the Sixth and Eighth avenue railroads, and upon the ground that the decision in the Broadway railroad case determines such illegality.

Prior to the late decision in this court and in the supreme court upon the subject, and after the case of *Drake* vs. *The Hudson River Railroad*, I should have considered the following propositions as incontestable:

1. That the establishment of railroads in the city of New York, by the authority having title in the streets, and to the control of them, was an incident to that title and authority, and not in itself an invalid use of the public streets.

2. That the body vested with such title and control was the common council. In my judgment, this power was in the common council without the aid of any statute of the legislature, although there might be a power to restrict it by express enactment. When and to what extent the legislature could restrict it was an open question. But the great principle was, that the power existed without legislative grant, and it must be shown to be abridged, and, at any rate, that the legislature never could empower others to construct roads without the approbation of the corporation.

3. That the corporation of New York held the naked fee of the streets of the city, but held the same as trustees; and were trustees upon the tenure of holding and keeping them as open public streets; and that the parties for whom they were trustees were first and principally the citizens and inhabitants, and next, travelers generally.

4. In executing this trust, the corporation was amenable, like all other trustees, for the faithful, legal, and honest discharge of its duty; and corruption, fraud, or violation of law would not only render its contracts and acts invalid, but would justify the interference of a court, by provisional remedies, to prevent their consummation.

5. That the right to apply for such relief, as the law stood upon several decisions of the supreme court, was vested in any person injured individually, or as inhabitants of the city and tax-payers. This rule has been disputed, perhaps overruled, in our court; and the individuals sustaining injury must unite the attorney-general with them wherever the question is either one of a public nuisance, or regards the violation of its charter by an incorporated company, or, perhaps, where corporate property is sought to be applied illegally to any other than the public purposes to which it has been by law devoted. (12 Legal Observer.)

But every lawyer will understand the pervading influence, upon every point which may arise, of the solution of the question, whether the corporation of New York has an original chartered right to establish railroads in the streets, or derives that right from acts of the legislature. In the former case, they who contest its power must show a restriction; in the latter, the corporation must show where and to what extent it has been vested.

In my judgment, the legislature has no more power to establish a railroad in a street in the city of New York without the assent of the corporation, than to run it through the house of an individual owner without his consent. They may do it in the one case as in the other, upon the ground of public necessity, and upon making proper compensation. But they must, in their legislative capacity, declare the public exigency which demands the appropriation, and must provide the mode of compensation for a surrender of a right in property. Otherwise they invade the right of the corporation of New York in the streets as much as if they enacted that my house should be torn down, without public necessity and adequate remuneration.

But, again, I hold that the corporation of the city possesses the power of establishing railroads, and that it is incumbent upon those contesting its exercise, in any case, to show either that they have vio-

lated their trust, or plainly violated a statute of the state, which it was competent to pass, or have broke in upon a fundamental rule of law controlling the power of the corporation.

It is now my duty to ascertain how far these propositions have been overthrown or modified by the decisions referred to.

1. I do not find it yet decided by either the court of appeals or the general term of this court, that the corporation of New York can not make any grant to others of the right of constructing a railroad in the streets of the city, without a specific act of the legislature, whatever may be the terms or conditions of the permission. I do not mean to say but that this may be logically reasoned out, from some propositions of some learned judges, but I do not find that it has been judicially pronounced, or that it necessarily results from any thing which has been judicially decided.

On the contrary, we find it declared by Justice Edwards, in his able opinion, after a careful review of *Drake* vs. *The Hudson River Railroad Company*, and the other authorities, that this power does vest in the corporation, and we find this sanctioned by Justice Strong, and by Justice Morris. (15 Barbour.)

2. *Next*, the question as to where the fee of the streets resides does not arise in this case, for the complaint states that the title to the lands in the streets named was vested in the mayor, aldermen, etc., in trust, that the same should be appropriated and kept open forever as public streets, for the free and common use of the citizens. I need not, therefore, attempt to support my individual views upon this subject.

3. The decisions in the Broadway railroad case depend upon two great principles.

In the first place, there was a violation of the trust reposed in the corporation. They were acting in a reckless or profligate disregard of the interests and rights of those of whom they were the agents. In the next place, the grant was not a mere license, revocable at the will of the corporation, or upon prescribed and reasonable terms. It was a contract which must remain perpetually in force, unless the company broke the condition. The corporation could not bind themselves by an inviolable compact, the effect of which was to surrender practically and perpetually the management and regulation of the streets. It was a trust which they could not part with.

With this view, Justice Strong, Justice Harris, Justice Duer, and the general term of this court, consisting of Justices Oakley, Bosworth, and Slosson, have concurred. These points are settled by authority, and rest upon incontestable principles.

But if the license to use the streets for a railroad is not an irrevocable contract, if it is not an attempt to divest the corporation of an inalienable control, and to confer vested rights upon others which may not be abridged, then I see no necessity for an enabling statute of the legislature; but I find the power of the corporation is in itself sufficient.

In the case before me, the common council have reserved the power to cause the road, or any part thereof, to be taken up at any time they shall see fit; have provided that the road shall be transferred to them

whenever they demand it, upon payment of the cost and ten per cent. added; and that the parties on being required at any time by the corporation, and to such extent as the common council shall determine, shall take up, at their own expense, said rails, or such part thereof as they shall be required, and upon failure so to do, the same may be done at their expense by the street commissioner.

In words, then, the power to purchase for the use of the city, and thus to extinguish a monopoly in others, the power to remove such portions as may be found injurious to public convenience, and the absolute power to annul the license, is reserved. When the companies accepted the permission thus conferred, they were bound to know that the law was, as it is now pronounced to be, that the corporation could not give them an irrevocable right; and hence that the power to take up the rails was not an unmeaning or contradictory reservation, but a declaration of the legal rights and position of the parties.

I take, then, the first four propositions at the close of the opinion delivered by Justice Bosworth at the general term, in *Davis* vs. *Sharpe and others*, as concentrating the conclusions to which so many judges have arrived. Now I do not understand those propositions as involving more than this: that the grant in question was such a grant of a franchise as the corporation had no power to make, because by its legal import it might be perpetual; because it was a contract which restricted the corporation in the future exercise of its power over the streets; and because it conferred upon the grantees exclusive privileges to a partial use of Broadway, which might be of perpetual duration.

If the observations before made possess the weight I suppose they have, the grant to the Sixth-avenue railroad is not liable to any of these objections; and the same views apply to the Eighth as to the Sixth-avenue railroad.

It is not clear from the case as now made, whether any injury arising from invasion of a right of use has been done to the plaintiffs. However, what is now decided could not operate to prevent a new action, if the plaintiffs are advised to bring one, founded upon such personal violation and damage only.

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### CONSIDERATION.—HUSBAND AND WIFE.

The father of a bastard child, the mother being of full age, in order to avoid a prosecution, proposed to marry her. In consideration of her father's consent to the marriage, he executed a bond, with surety, conditioned that he would live with his daughter, and maintain her and her child, and not desert her, but treat her as an affectionate husband should do—*Held*, that the consideration of the bond, and the bond itself, were legal and valid, and that desertion by the husband rendered the obligors liable.

[*Wyant* vs. *Lesher*. Pennsylvania Supreme Court. Harrisburg, May, 1854. Not yet reported.]

This was an action of debt on a bond brought by the plaintiff in error, who was plaintiff below against John Lesher and Henry Lesher. The bond was executed under the following circumstances. John

Lesher had seduced the daughter of the plaintiff, and, after the birth of her child, refused to marry her. A prosecution was commenced, but was suspended on the arrangement then made, by which it was agreed, that John Lesher should marry the daughter of the plaintiff. But the plaintiff, fearing that it was the intention of the defendant to desert his wife as soon as the marriage should be consummated, required that he should give seeurity that he would treat his wife well, and not desert her. A bond was accordingly executed by John, with his father as surety, in the sum of five hundred dollars to Wyant, the plaintiff, the condition of which was, "That whereas Mary C. Wyant had a child to said John Lesher, which was born on the 2d or 3d of October inst.; and whereas the said Jacob E. Wyant agrees that the said John Lesher may marry his said daughter, Mary C. Wyant, on condition that he treats her as a loving and affectionate husband ought to do, and not to desert her, to which the above-named obligors assent, and by these presents agree, that if the said John Lesher, after marriage, shall or will maltreat, abuse or desert, the said Mary C. Wyant, then, in that event, the said obligors to pay the said Jacob E. Wyant the aforesaid sum of five hundred dollars, for the use and support of the said Mary C. Wyant and her heirs; but should he otherwise live with and treat her as a kind and affectionate husband ought and would do, then the foregoing obligation to be null and void and of no effect." Mary C. Wyant was then of full age.

The declaration alleged bad treatment and desertion, which were proved on the trial. The defendant's counsel requested the court to instruct the jury, that the consideration mentioned in the bond could not be aided by parol proof of a pending prosecution. 2. That if the settlement of the prosecution formed a partial consideration of the bond, yet the other part, being illegal, vitiated the whole. 3. That the bond was against public policy, and therefore illegal and void.

The court below, Kimmel, P. J., directed a verdict for the defendant, and this direction was assigned for error.

The case was argued by W. Reilly, Esq., and James Sill, Esq., for plaintiff in error, and A. K. Cornyn for defendants in error.

The opinion of the court was delivered by

Woodward, J.—Two grounds of defense were assumed on the trial, which the court sustained as a bar to the plaintiff's action, and which I proceed to notice in their order. In the first place, it was objected that the consideration mentioned in the bond was illegal, and against the policy of the law. The seals imported a consideration, and the compromise of a prosecution for bastardy, as was decided in *Mitchell* vs. *Maurer*, 9 W. & S., was an adequate consideration for the bond; but it is argued that the bond must be judged by the consideration set forth in it, and that this being illegal, tainted whatever other consideration may be found growing out of the transaction. Without stopping to inquire how far an illegal consideration can operate to impair an entire contract where there are other good considerations to sustain it, the two considerations mentioned in this bond may be confidently pronounced legal and valid. What are they? First, that Mary had had a child to John Lesher, which, in effect, is *part cohabitation*, a

consideration which has always been held sufficient to support a settlement on an agreement to pay; and, second, the father's agreement that John might marry Mary, which is said to be nothing, because she was of age, and capable of contracting marriage without her father's consent. A father's consent can never be an unimportant fact in a daughter's nuptials. Where she resides in his family, he stands in *loco parentis*, notwithstanding she has attained her majority. He has a right to advise her matrimonial choice. He is bound, not only in morals, but by statute law, to support her and her children, if otherwise unprovided for, and her expectations from his estate may be materially influenced by her marriage with or without his consent. If there be nothing in the filial relation to render the paternal blessing a thing of value, these considerations show that there are possible inconveniences to the father, and advantages to the son-in-law which, on the strictest principles of contract, are sufficient to hold him to such an obligation as the present. In what does the imagined illegality of the consideration of this bond consist? Is it immoral for a seducer to provide for the victim of his passions and the offspring of their guilt? Illegal for a suitor to propitiate parental consent to a daughter's marriage, by a promise that he will live with, and treat her as a kind and affectionate husband ought? It would be a disgrace to our age and generation if the law compelled an affirmative answer. But it does not. Such motives for a promise are legal and reasonable, and afford abundant ground for sustaining it, especially when, as here, though made to the father, it is intended for the benefit of the daughter and her child. A second objection urged against the plaintiff's recovery is, that the bond itself is against public policy, illegal and void. The defendants bound themselves in the sum of $500, that John should treat Mary as a loving and affectionate husband ought to do, and not desert her; and if the said John Lesher, after marriage, shall or will maltreat, abuse or desert, the said Mary C. Wyant, then the said obligors to pay the said Jacob E. Wyant the aforesaid sum of five hundred dollars for the use and support of the said Mary E. Wyant and her heirs. Though equity will not always lend its aid to enforce articles of separation between husband and wife, yet *post-nuptial* contracts between them, for a separate maintenance of the wife, have often been decreed, an example of which is similar in many of its circumstances to the present case, as may be seen in *Seeling* vs. *Crawley*, 2 Vernon, 386 and the general doctrine will be found fully discussed in *Lehr* vs. *Beaver*, 8 W. & S., 104. Here, however, the contract was *ante-nuptial*, and although made between parties competent to contract, is supposed, nevertheless, to be against policy, because looking to a future separation, and tending to encourage domestic feuds and broils. The idea is, that such a contract gives a wife an interest in disobedience, and renders her more independent by misconduct, than by the most strict observance of marriage duties. Mr. Clancy, in his work on "Married Women," p. 422, felicitates himself that *Hoar* vs. *Hoar*, reported in 2 Ridgeway's Parl. Cases, 268, is the sole example of a compact before marriage, of so mischievous tendency, which has found its way into courts of justice.

I have examined that case attentively, and the contract (which re-

lated to personal property of the wife before marriage) was fully enforced against the husband in the House of Lords, on proof of his ill treatment and desertion of the wife. In our own books, I have found no case on the precise point; but I apprehend the principles continually recognized in marriage settlements, articles of separation, and settlements of bastardy cases, justify the contract before us. In the two first-mentioned class of contracts, the object in view is the maintenance of the wife and her children in the event of the husband's inability or unwillingness to provide for them, and in the case of bastardy, the support of the infant, and these are purposes sanctioned by public policy, morals, and law. I see no more tendency in such a contract as this bond, to disturb the harmony of conjugal life, than in a marriage settlement, or in articles entered into after marriage, looking to a future separation. This husband stipulated simply for the performance of his duty, and a faithful discharge of that was the surest way to preserve peace in his family. Among the most imperative of the duties assumed in the marriage contract were the support and maintenance of his wife and child, and for these it was prudent in her father to exact from him a security additional to the marriage vow.

If there were failure here, the bond is forfeit, and the plaintiff should have a verdict; but whether the conditions of the bond have been violated or not, is a question for the jury, to whom the evidence ought to have been submitted.

The judgment is reversed, and a *venire de novo* awarded.

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### AGENT'S DECLARATION.—EVIDENCE.

**The declarations of an agent are not admissible to establish the fact of agency.**
**But where other proper evidence is given, tending to establish the fact of agency, it is not error to admit the declarations of the agent, accompanying acts, though tending to show the capacity in which he acted.**
**Where evidence is competent in one aspect, and incompetent in another, it is the duty of the court to admit it, and control its effect by suitable instructions to the jury.**

[*Marshall* **vs.** *Bobst.* **Pennsylvania Supreme Court; June Term, 1854. Not yet reported.]**

This was an action of assumpsit for work and labor, brought by Samuel Bobst, the defendant in error, against Jacob Marshall. The defendant below owned a farm near the city of Reading, which was occupied by John X. Miller. The plaintiff's claim was for work done on the farm. On the trial, he offered to prove that Miller managed and superintended the garden; that he made contracts with the hands, *and said that Marshall was to pay them;* that Marshall did pay some of them; that Miller told a certain Bieber that plaintiff's contract was for $10 a month; that Miller gave orders on Marshall to some of the hands, and that Marshall paid them, without denying his liability; that Miller purchased grain, *and said Marshall was to pay for all;* that Marshall was out at the farm while Miller was there; that he owned the stock on the farm, which was sold afterward as his property, when Miller left; that when Miller discharged one of the hands, and gave

him an order on Marshall for his pay, the latter said that this was his (Marshall's) business, and requested the hand to remain.

The court admitted the evidence under exception in the same order as above proposed, and the testimony corresponded with the offer. There was a verdict for the plaintiff for $125 79.

The errors assigned were as follows:

1. The court erred in admitting in evidence the acts and declarations of John X. Miller to prove agency.

The following is the testimony objected to:

*David Reiff, testified*—"Miller asked me for corn for planting. I gave it to him. He said when I wanted the money I should present my bill to the old man."

*William Hurlock, testified*—"Miller contracted with me in Philadelphia, and he also contracted with the others. Miller said I should look to Marshall for my money."

2. The court erred in admitting in evidence the declarations of John X. Miller, made to Valentine Bieber, in the absence of both plaintiff and defendant, in regard to the contract with the plaintiff, and stating what that contract was.

*Valentine Bieber, testified*—"Miller once told me the bargain. I think he said plaintiff had the same bargain that I had. He said he would give me what he gave Bobst. He gave him $10 a month."

The case was argued by Samuel S. Young, Esq., for plaintiff in error, who cited 1 Yeates, 502; 2 Wharton, 340; 4 Rawle, 291; 6 Watts, 487.

Henry W. Smith, Esq., for defendant in error, contended that the offer and the testimony must be considered as a whole, and that there was abundant evidence of ratification on the part of Marshall, and also evidence sufficient to establish the fact of the agency. He contended that the order of admitting evidence was discretionary with the court below. (9 Barr, 195; 3 S. & R., 11; 7 Barr, 126; 4 Barr, 310; 3 Harris, 464.)

The opinion of the court was delivered by

Woodward, J.—Agency is often to be made out as an implication from circumstances, and in such cases declarations of the agent tending to prove the agency ought not to be admitted until other evidence has been given which leads to the same conclusion; for although the rule of law is, that whenever the act of an agent is admissible, it is competent to prove what he said about the act while doing it, yet it is also true that his authority to speak can not be proved by his declarations. He may be called as a witness to prove his authority, if by parol, but for this reason his declarations can not be relied on to establish it. Where, however, evidence has been given which tends clearly to establish the relation of principal and agent, and the court sees it would be a fair presumption for the jury to make, it is not error to admit the declarations of the agent in connection with acts, even though they tend to establish the agency. As part of the *res gestæ*, they are competent, but should not be used as establishing the agency; for before one man's words can bind another, the authority to speak should be shown. And when evidence with such double aspect is offered, in

one of which it is competent, and in the other it is not, the proper course is to receive it, and control its effects by suitable instructions given to the jury.

The charge of the court in this case is not brought up, and therefore we presume it was exactly what it ought to have been; and if it was, there was no error in receiving the evidence contained in the bill of exceptions, for it proved that Miller carried on the farm for his father-in-law, the defendant, who paid hands hired by Miller, and thus confirmed his acts in making such contracts as that sued on here. Miller's declarations that Marshall was to pay the hands, were properly admitted in connection with such facts, and we are not to presume that the court omitted to control their effect.

There being no error apparent in the record, the judgment is affirmed.

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MARRIED WOMEN.—SUIT BY AND AGAINST.

Where one married woman deposited money with another married woman, and suit was brought by the depositor and her husband against the depositary and her husband, to recover a balance of the sum deposited, it was held that the joinder of the wives as plaintiff and defendant was improper, and that suit should have been brought by the husband of one against the husband of the other.

[*Williams & Wife* vs. *Coward & Wife*. Pennsylvania Supreme Court, June, 1854. Not yet reported.]

The opinion of the court was delivered by

WOODWARD, J.—A married woman can neither sue nor be sued on her contract made during coverture. If she contract for necessaries, or for goods that go to the use of her husband, the law presumes her to be his agent, and treats the contract as his, and the suit must be against him alone. It is only when an action is brought on her *ante-nuptial contract* that she is to be joined as a co-plaintiff or defendant with her husband (*Nutz* vs. *Rutler*, 1 W., 229), and this, because in case of the husband's death the action would survive. But in an action on a contract between two married women, made after coverture, neither wife should be joined. If any right of action accrue, it belongs to the husband of the one wife, and whatever liability is created attaches to the husband of the other. Though the wives may have created the cause of war, they are to be regarded as the ministers of their lords, and the battle is to be fought by them single-handed.

These rules and principles were all violated in the case before us. Mrs. Coward deposited money with Mrs. Williams to the amount of $600, and drew upon her for various sums, until the balance was reduced to $143 50, which, with $22 interest claimed, amounting to $165,50, are the moneys for which this suit is brought. The plaintiff's counts all charge an assumpsit by Moses Williams *and Elisabeth, his wife*, to Perry Coward *and Anna, his wife*, and the plaintiffs had a verdict and judgment. There is nothing in the common law of the marriage relation, and nothing in the statutory modifications of it, to justify such misjoinders, and the judgment is accordingly reversed, and restitution awarded of the moneys as collected on the execution.

Judgment reversed.

W. L. Marcy

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# LAW MAGAZINE.

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CONDENSED REPORTS OF RECENT CASES.

LIVINGSTON'S
MONTHLY
LAW MAGAZINE.

VOL. II. SEPTEMBER, 1854. No. IX.

## CONDENSED REPORTS OF RECENT CASES.

### EVIDENCE.—IMPEACHMENT OF WITNESS.

In impeaching the credibility of a witness, one is not restricted to an inquiry as to his "truth and veracity," but show his general bad character; but he can not show any particular acts of an immoral character which he may have committed.

[*The State* vs. *Parker*; 7 Louisiana R., 83.]

THE accused was prosecuted for murder. Upon the trial he offered witnesses to prove that the principal witness for the prosecution was a man of infamous character, notoriously guilty of acting falsely and fraudulently, of extorting money by force, and cheating from the unwary and feeble, and of living among low and abandoned women. That he was idle, dissolute, and profligate; had no means of support and no mode of obtaining money other than by such extortions. That although the witnesses could not say that he had formed any character as to lack of truth, and was false in oaths and words, yet, from his vices and general bad character, they would swear that he was unworthy of credit, and that they would not believe him on oath. This testimony was objected to; the objection was sustained and an exception taken. The accused was convicted of manslaughter, and appealed. The principal question of interest in the case was whether evidence of the general bad character of the witness was admissible to impeach his credibility.

PRESTON, J.—The accused did not offer to establish any particular offense or criminal act against the witness, but that he was an infamous character; that he was addicted to crimes which indicated a total disregard of truth, without specifying any particular crime committed by him, that he lived among low and abandoned women, that he was idle, dissolute, and profligate, that he had no means of support but what he obtained by the crimes and vices mentioned, and that, from his vices and general bad character, he was unworthy of credit, and the witnesses would not believe him on oath. These appear to me general descriptions of a bad character, without entering into particular facts or charges. The court limited the testimony as to the general

character of the impeached witness to his character for truth and veracity alone, and they felt bound to such a limitation by the rules of evidence at common law.

There is no doubt that the tendency of many English decisions, and the opinions of some elementary writers, is to establish that limitation. Thus Keseoe and Phillips give the very questions to be asked in impeaching a witness, limiting them to the means of knowing the general character of the witness impeached, and to the inquiry if the witness would believe him on oath; and some judges have limited the questions to a knowledge of the general character of the witness for truth and veracity. We are inclined to the opinion, however, that the weight of authority is in favor of testimony as to the general bad character, without limiting the questions as to character for truth and veracity, or establishing any formal interrogatories. Thus Mr. Archbold, probably the most accurate elementary writer on criminal law, informs us, that the credibility of a witness is compounded, among other things, of his integrity and of his veracity, devoting a paragraph to each quality. If, therefore, his integrity tends to establish his credit, his want of integrity should go to his discredit; and, in fact, this author says the commission of all offenses which import falsity or fraud, whether followed up by conviction or not, affects the credit of the witness; and he expressly says, witnesses may be examined as to the general character of the witness impeached, and does not confine their examination to general character for truth and veracity. (Archbold's Crim. Law, p. 143.)

Conceding, however, such strict limitations well established at common law, we do not feel absolutely bound by them. The act of 1805, to which no doubt the district judge referred as binding him by that common law, is as follows. "The rules of evidence, and all other proceedings whatsoever in the prosecutions of crimes, offenses, and misdemeanors, changing what ought to be changed, shall be according to the common law."

The ancient rules of evidence are therefore subject to change where it is indispensable to truth and justice. We doubt if the rules of evidence in England are precisely the same now as they were in 1805. The whole tendency of modern decisions is to relax the strict rules of evidence with a view to lay every thing before courts and juries, which ought to have an influence upon the cases before them, and to leave to them the objections to the credibility of testimony and witnesses, as much as is possible, consistently with an orderly and speedy administration of justice.

Now, all will agree, that a man, proved by reputable testimony to possess the character described in the bill of exceptions under consideration, would not be entitled to equal credit with a pure and virtuous witness; yet such a man, unless the proof is allowed, would stand as fair before the jury as one of the most spotless character. And this would often occur in fact as well as in theory. For those conversant in criminal trials know by experience that a wretch selected as a witness, either to criminate or acquit by perjury, is always selected on account of his fair face, smooth tongue, and affected sincerity, for the express purpose of more effectually passing off falsehood. The great

art of such a witness is to lie like truth; and he is always selected from the class of men possessing the character described in the bill of exceptions. (*Hume* vs. *Scott*, 3 Marshall's R., 261, 262.)

I do not consider that particular acts of malconduct may be proved, or wish to be understood as holding that the district courts must admit crimination and recrimination further than the real purposes of justice require, and is consistent with the good order of the court and the speedy administration of justice. Much must necessarily be left to the discretion of the courts of original jurisdiction in these respects.

I am of opinion that the court should have admitted evidence that the witness was a man of infamous charaeter, and that he had notoriously the character of acting falsely and fraudulently, of extorting money by force, and cheating from the unwary and feeble, and of living among low and abandoned women; that he was idle, dissolute, and profligate, and supported himself by obtaining money by the means set forth; and that from his vices and general bad character he was unworthy of credit and not to be believed on oath.

Judgment reversed and new trial ordered.

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### GUARANTEE.—LIABILITIES OF BANKS.

M., being largely indebted to the R. C. Bank, assigned a bond and mortgage of his to the American Trust Company, and applied the proceeds to the payment of his debt, the bank at the same time guaranteeing the final collection of the amount due on the bond and mortgage—*Held*, that the guarantee was good, and the bank would be liable on it, in case the bond and morigage were not paid off.

[*Talman* vs. *The Rochester City Bank*. New York Supreme Court. Not yet reported.]

Action on a guarantee given under the following circumstances:

One Mumford was largely indebted to the Rochester City Bank, and the bank was desirous of obtaining payment. Mumford, in order to procure the means of payment, arranged with the bank to convert a certain bond and mortgage in his possession into money, and to apply the money so received to the payment of his debt. In pursuance of this arrangement he assigned the first six installments of the bond and mortgage, amounting to $14,250, to the American Life Insurance and Trust Company, the bank at the same time guaranteeing to the Trust Company the final collection of those installments and the interest to become due thereon. Mumford then received the money from the Trust Company and applied it to the payment of his debt to the bank. The mortgaged premises were subsequently sold on foreclosure, realizing only $5,150. The mortgagor was insolvent and had removed from the state. Nothing could be collected from him. The bank being called upon to fulfill its guarantee, refused to do so on the ground that it had no legal capacity to make such a guarantee, and that it is therefore not liable upon it.

MITCHELL, J.—The defendants concede that if the bond and mortgage had been assigned in good faith by Mumford to the Rochester

City Bank, as security for the debt which he owed to the bank, the bank might (with the consent of Mumford) have assigned the bond and mortgage to another, and guaranteed the payment of the bond and mortgage. But they say that the distinction is manifest between the right of the bank to guarantee choses in action belonging to it, and its right to guarantee those belonging to another. The concession is right, and a bank may certainly assign or convey any property held by it, and may enter into the common covenants of guarantee or warranty on making such assignment or conveyance. This right is a matter of substance and not of form; as a formal contrivance, complying in all outward respects with the requirements of the rule, would be a nullity, if it was in fact a mere contrivance, and the substance of the transaction were contrary to the rule; so, if the case before the court is in substance within the rule, and only needs a formality to bring it in all respects within it, the omission of the form should be disregarded, and the substance alone looked to; for it is not a question whether the bank has used the requisite forms or not, but whether it had any power or capacity to do the thing which it has done, in any possible form; whether the bank had any powers, functions, or franchises to guaranty in such a case, not whether it had used all the requisite forms, which would clearly show that it had such right. This is not like the case when that which partakes of the character of form is made necessary by statute; then the seeming form becomes essential and matter of substance by the effect of the statute—as when a bank is forbidden to issue circulating notes unless payable on demand or at its place of business. If the bank has the power or capacity to give its guaranty under the circumstances of this case, there is no statute against this form of doing it.

If Mumford had assigned the bond and mortgage to the bank, and the bank had assigned them to the company, and guaranteed the payment, it is conceded that the bank would have been liable. The only difference is, that the one transfer from Mumford to the bank that would have been necessary in that case was omitted, and Mumford, to simplify the transaction, assigned directly to the company. This was a mere matter of form in conveyancing, and neither the one form nor the other can be considered in any degree as an attempt to enlarge the franchises of the bank. The measure of a franchise is never determined by immaterial forms. The question always is, what power or capacity has been given, not whether the power is exercised in a particular form. In substance the bank had an interest in the bond and mortgage—the arrangement made between it and Mumford, that he should assign the bond and mortgage for their benefit, or assign them and apply the proceeds to pay his debt to them, gave them such an interest in this bond and mortgage that to some extent the bond and mortgage were the property of the bank. It was agreed to be theirs when it was agreed that the proceeds should be theirs; and when this agreement was carried out, and became an executed contract, it made the bond and mortgage to have been theirs, by relation, during the process of completing the arrangement, as much as if there had been an express contract, of a sufficient consideration, to assign the bond and

mortgage directly to the bank, that the bank might assign to the company.

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EVIDENCE BY ENTRIES IN DAY BOOK.—LIABILITY OF HUSBAND FOR WIFE'S NECESSARIES.

A day book copied from a blotter, in which charges are first made, is not a book of original entries.

Where a woman leaves her husband voluntarily, it must be shown, in order to make him liable for necessaries furnished to her, that she could not stay with safety. Personal violence, either inflicted or threatened, will be sufficient cause for such separation.

Necessaries of dress furnished to a discarded wife must correspond with the pecuniary circumstances of the husband, and be such articles as the wife, if prudent, would expect, and the husband should furnish, if the parties lived harmoniously together.

[*Breinig* vs. *Meitzler*. Pennsylvania Supreme Court, 1854. Pittsburg Legal Journal.]

The opinion of the court was delivered by

Black, C. J.—This was an action of assumpsit for goods sold and delivered to the wife of the defendant below. She was living apart from her husband. To justify a recovery, it was necessary for the plaintiff to show, first, that the goods were delivered; second, that they were necessaries; and third, that the wife had separated from her husband for good cause. These facts were all found by the jury; but the plaintiff in error alleges that they were found upon illegal evidence, and in consequence of wrong instructions.

I. To establish the sale and delivery, the plaintiff's shop book was produced, and by himself sworn to as a book of *original* entries. But some of the charges were made by a clerk; and, when he was called, he testified that they were first entered in a blotter, of which the book offered on the trial was but a copy. When this fact came out, the book should have been rejected. Mere memoranda made on a slate or on loose slips of paper are not entries, and a day book made from such memoranda is the original. But a counter book or blotter is a permanent record of the business done in the shop. In the present instance it was kept and presented, and appears to be still in the possession of the plaintiff. There is no authoritative case on record which goes the length of deciding that such a book can be superseded as evidence by another which is transcribed from it. The plaintiff, it is true, swore that the entries in the day book were original. This is often done by parties and witnesses who do not quite understand the meaning of their words, and the facts subsequently elicited show them to be mistaken. When a person authenticates his shop book by swearing, in general terms, that it is original, and it afterward appears, either from his own testimony, or that of another witness called for the same purpose, that it is a mere transcript, it becomes inadmissible, because a witness' conclusion, which may be the result of a mistaken judgment, has no force against a contrary statement of particular facts by himself or by another witness equally credible.

Taking all the evidence concerning this book together, it was not, in our opinion, sufficient to establish it as a book of original entries.

If it had been duly proved, the fact that the purchases were not made by the husband himself, in his own person, but by his wife, for whose contracts he was not liable, would not be a reason for rejecting it. Nor was it necessary to show the defendant's liability for his wife's contracts before the book was read. The sale of the goods to the wife was one fact in the cause, of which the book was evidence. The obligation of the defendant to supply her with necessaries, or pay for them, if supplied by the plaintiff, was another fact to be established by other proof. As these two things can not be done at the same time, one must necessarily precede the other. It was proper to begin with the sales, though if a different order had been followed, we could not reverse for that reason.

II. The goods purchased consisted almost entirely of clothing, and do not seem to be at all extravagant. But what would be extravagant in one man's wife, might be very economical in another. The best way to determine what articles of dress a discarded wife may supply herself with, at the expense of her husband, is to ascertain what a prudent woman would expect, and a good husband be willing to furnish, if the parties were living harmoniously together. This would depend on a variety of circumstances, and on the value of the husband's estate among others. The short, as well as the fair way of dealing with such a question, is to call a witness who knows the circumstances, style of living, and social position of the husband and his family. In the present case nothing was offered but a deed, which showed the defendant to be the owner of land conveyed to him for the consideration of $16,000. Though this was far from being satisfactory, we can not say that it was altogether irrelevant. It was legal evidence; but standing alone, it was not of much value.

III. We take it for granted, as the counsel and court below did, that this is not a case in which the wife was turned away from her husband's house, but that her departure from his roof was an act of her own. Was the cause of her leaving such, that he is bound by her contract for necessaries? If she did not go by his command, it must be proved that she could not stay with safety. Mere want of sympathy, disagreeable manners, ebullitions of ill temper, habitual disregard of her feelings, refusal to protect her from the insults of others, all these—though nearly as brutal as blows—are not to be taken as just cause for separation. If they were, this would be a clear case. But personal violence, whether actually inflicted or only threatened, is sufficient. To that effect, the judge instructed the jury, and left it to them to say whether there was a threat or not. No language was proved which clearly or plainly implied an intention to do her bodily injury. But the defendant used words capable of being so understood. A witness testified that in a dispute at the breakfast table, which he provoked by insisting that she ought to eat a particular piece of bread, he said a thunder-storm *would* rise and strike one of them; and some hours afterward, when he was not excited, he said there must be an alteration—a thunder-storm *would have* to rise and strike one of them. According to another witness, he said that in *six weeks* thunder and lightning *should* rise and strike the one who was in fault. This is

obscure, certainly. It may have been all meaningless, and therefore innocent. But the jury were the only judges competent to give it a construction. The court could not have decided, as matter of law, that the words meant nothing, or that they did not mean what the plaintiff alleged. It was right, therefore, to admit the evidence, and equally right to let the jury give it the weight to which they thought it entitled.

There is another error assigned, which is not touched by any thing yet said. The plaintiff's clerk having been called to prove the book, he was asked, on cross-examination, if he did not know that the defendand's wife was separated from her husband, and the court refused to let the question be answered. Neither the object of the question nor the ground of objection is set out on the record. We conjecture that it was overruled because it would have been a premature and irregular introduction of the defense. In this aspect, it was properly dealt with. At a subsequent stage of the trial, the fact of the separation was proved without objection, and its notoriety was shown by a newspaper advertisement. If more was desired (though more could scarcely be necessary), we do not doubt that the court would have permitted the clerk to be called back at the proper time, and a knowledge of the separation brought directly home to the plaintiff. But no such offer was made, either because the fact was not considered important, or else because it was known that the clerk's testimony would not prove it.

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

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### MARINE INSURANCE.—RE-INSURANCE BY A COMPANY.

**Where one insurance company had insured a vessel for five calendar months, with use of the globe, and the vessel was re-insured by another company for a single voyage, which could be easily ended long before the expiration of the five months, it was held that the first company named had an insurable interest in the vessel.**

[*The Philadelphia Mutual Insurance Co.* vs. *The Washington Mutual Insurance Co.* Pennsylvania Supreme Court, July, 1854. Legal Journal.]

The opinion of the court was delivered by

WOODWARD, J.—The only questions on this record are questions of evidence, the first and most material of which relates to the policy of insurance issued by the defendants on the 15th of August, 1848, to William Cummings, on the brig Delaware, for three thousand dollars.

Having given in evidence the plaintiffs' contract of re-insurance, on this vessel, for $1,500, the defendants offered their own original insurance for the purpose of establishing in themselves an insurable interest, the objection which was, that the re-insurance was not co-extensive with the principal insurance, one being a time policy, the other for a specific voyage. Had the fact been, that the re-insurance was *larger* than the original risk, there would have been force in the objection, for then the re-insurance would have been beyond any insurable interest possessed by the defendants. But the fact was the other way. Both policies were issued on the 15th dav of August,

1848. The Washington company were the original insurers, and their risk was three thousand dollars on the brig, "lost or not lost, at and from June 6th, 1848, at noon, for five calendar months, with use of the globe (Tampico and ports in Texas at all seasons excepted); and if at sea at the expiration of the time, the risk to continue at same rate of premium." The re-insurance of the Philadelphia company was for fifteen hundred dollars on the brig "at and from Rio de Janeiro to Havana, and at and from thence to Philadelphia," a voyage which, according to the proofs, takes about forty days from Rio to Havana; and as this vessel sailed eighteen days from Havana to Philadelphia, she was at sea, on her voyage to Havana at the date of these policies, having sailed from Rio on the 15th of July, 1848. It is apparent, from these facts, that while the defendants, in virtue of their insurance, were bound for *any* voyage she might make or commence within five months from the date indicated, the plaintiffs were bound, in virtue of their re-insurance, only for the *one* voyage, partly performed when they assumed the risk, and capable of being finished far short of the five months, and thus their risk was *less*, and included *within* that of the defendants. Now it is distinctly admitted, by the learned counsel of plaintiffs, that if the defendants' policy had been for the particular voyage specified, they would have had such an interest as would have entitled them to purchase a re-insurance; but we have not been shown how, when a less interest would have qualified a greater interest, it disqualified them to re-insure. If an insurable interest can spring from a prior insurance, which, since the judgment in the celebrated case of *Lucenn* vs. *Crawford*, before the house of lords (2 Bos. & Pull, 302), I believe has not been doubted, why not from a time policy as well as any other? In respect to the right of deviation and warranty of sea-worthiness, and perhaps in other legal consequences, time policies differ from voyage policies; *but for the single purpose of creating an insurable interest*, I can find no authority for a distinction. If a distinction were to be made, I should think it would be in favor rather than against the time policy; for he who insures a ship for a period of time that is to cover a variety of undefined voyages, comes much nearer to the position of an owner; has a far deeper state in her welfare than he who insures her simply for one specified voyage which she is to perform within that time. This is too obvious to need illustration. If, then, a time policy, as well as any other, can create an insurable interest, why are not the plaintiffs bound by their contract of re-insurance? Because, say the counsel, every re-insurance necessarily contains an assertion, that the *specified risk* had been previously taken by the first insurer. This expression, *specified risk*, is not in the definition of re-insurance as given by Armand, Phillips, or Marshall According to Armand, re-insurance is a contract by which, in consideration of a certain premium, the original insurer throws upon another the risk (or, according to Marshall, part of it) for which he has made himself responsible to the original assured, to whom, however, he alone remains liable on the original insurance. The other writers define the contract to the same effect. *The risk, or part of it*, implies the same subject-matter of insurance in both policies; and hence, in *Merry* vs

*Prince* (2 Mass. R., 176), an unsuccessful attempt was made to apply a re-insurance of a policy on *vessel and cargo* to other policies on the *cargo* only. And these expressions also imply the same perils in kind, but not in quantum or duration. Thus, if the insurance be against perils of the sea, the re-insurance must be against perils of the sea, but while it may not be against *more*, it may be against *less* perils of the sea than the original insurance. The reason of this required identity in the subject-matter and the kind of perils is, that the first insurance has no insurable interest except in the thing, and against the kind of perils in respect of which he has insured. This is plainly developed by Phillips on Insurance, page 56, where he says, "An underwriter, by subscribing a policy, acquires no interest in the subject insured, yet he acquires an insurable interest, and having rendered himself directly liable to loss from certain perils, may stipulate to be indemnified against these perils. His interest, however, exists only in relation to the perils against which he has insured in the original policy." Yet re-insurance is not an indorsement or re-adoption of the first policy, for Armand adds to his definition of the contract, "that it is totally distinct from, and unconnected with, the primitive insurance."

Neither the rate nor the amount of premiums, the amount insured, nor the duration of the policies are similar, and the liabilities are to different parties—the re-insurers being never liable to the first assured, save, perhaps, in the exceptional case of the first insurer's insolvency.

The proposition, then, that re-insurance is a retaking of the *specified risk*, is not sustainable in the sense contended for, and if it were, it would deprive commerce, in a great degree, of the benefits of such contracts.

Before any party has a right to an insurance, he must have an interest to protect, and as the interest of a first underwriter springs from his contract, and must be measured by the liability assumed, he can have no insurable interest beyond that. But because the greater contains the less, the whole the parts, he has an insurable interest in every portion of his risk, which, by re-insurance, he throws on another.

This seems to be the sum of the whole matter, and hence it follows, that the policy of the defendants was properly admitted in evidence, to establish their insurable interest, both when the re-insurance was made, and when the loss occurred; and having shown such an interest, the plaintiffs were bound to indemnify to the extent of the terms of their own contract.

Without the pleadings in the case, it is impossible for us to say whether the verdict and judgment could ever be evidence against Forsythe, the master of the brig, and therefore we can not presume against his competency as a witness. For aught that appears on the paper books, he was competent.

There is not a shadow of ground for the objection to Riche. Though the president of the company, he was not a stockholder nor party to the record. Having no necessary interest in the event, he was competent, and his credibility was for the jury to decide on.

The errors have not been sustained, and the judgment is affirmed.

SHERIFF'S SALE.—FRAUD IN PURCHASER AT THE SALE.

Where a purchaser at sheriff's sale was guilty of actual fraud, in representing that he intended to purchase the property for the benefit of the family of the defendant in the execution, and by falsely stating that the property would be sold subject to certain incumbrances, in order to deter other persons from bidding, it was held in ejectment by those claiming under the original owner, that the plaintiff could recover without tendering or refunding the purchase money, and that the verdict should not be conditional.

[*McCaskey* vs. *Graff*. Pennsylvania Supreme Court, 1854. Pittsburg Legal Journal.]

This was an action of ejectment brought by David Graff, assignee of John M. Downey, the defendant in error, against William McCaskey and Adam Ellet, who were nominally defendants. The defendant in interest was Robert A. Evans, who purchased the property at sheriff's sale. The land in dispute was originally the property of John M. Downey. It was levied on as such, advertised for sale by the sheriff, and finally sold to R. A. Evans, at public vendue.

The plaintiff below, on the trial, showed the original title of Downey, and rested. The defendants gave in evidence the judgment, execution, and sheriff's deed, and rested. The plaintiff then offered as rebutting evidence the declarations and conduct of R. A. Evans before and at the time of the sale, to prove that he practiced actual fraud to obtain the property The declarations were, that he intended to purchase the property for the family; that he stated at one time that he and his brother Walter had agreed to buy the property for the old lady and her daughters; that two or three persons who had heard these statements from him, and by hearsay from others, declined bidding at the sale for that reason; and that R. A. Evans falsely represented to another person at the sale, that the property was selling subject to certain legacies. The plaintiffs also gave in evidence, under exception, the statements of Walter Evans, made before the sale, that Robert intended buying for the family. The defendants afterward offered Walter as a witness, and he was rejected.

The defendants asked the court to instruct the jury, that if the plaintiff was entitled to recover at all, their verdict should be conditional, subject to the reimbursement of the purchase money paid.

The court, Long, P. J., charged, that if there was actual fraud on the part of the defendant, their verdict should be for the plaintiff, without any condition. The jury found for the plaintiff absolutely.

The case was argued by Thos. E. and Emlen Franklin, for plaintiff in error, and by T. Stevens, for defendants.

The opinion of the court was delivered by

Black, C. J.—It is not denied that the title by which the plaintiff below claims the land was originally good. But the defendant asserts that it passed to him by a sheriff's sale; and so it did, if his purchase was an honest one. This was the matter of fact contested before the jury.

The plaintiff offered one Barefoot as a witness, to whom the defendant objected, on the ground of interest. It was not asserted that he

had a direct interest in the record, or that the judgment in this case could be used as evidence for or against him in any future suit to which he might become a party. But it was shown that he was a creditor of Jane Downey, and that Jane was the surety of John Downey for a debt which John would be able to pay if his assignee recovered in this case; otherwise, Jane would be compelled to pay the debt, and her property would be so far exhausted that the witness' debt would probably not be realized. If his character did not put him above the suspicion of being influenced by a mercenary motive in giving his testimony, the relation he bore to the subject was a fair argument to the jury against his credibility. But it was entirely too remote an interest to exclude him.

Robert Evans was the purchaser at a sheriff's sale, and seems to have defended the cause as the real party. The defendants on record were probably his tenants. Certainly they hold from him in some way. It is charged that he got the property knocked off to him at an under price, by falsely giving out that he was buying it for the family of the defendant in the execution, and by fraudently pretending that the purchaser would take it charged with certain liens which he knew the sale would divest. There is some evidence from his own mouth that this trick was practiced (if practiced at all) by him and his brother Walter together, and for their joint benefit. Under these circumstances, it was not error to admit evidence of a statement made by Walter, which prevented bidders from going to the sale, or his declarations afterward concerning the purchase, its purpose, and object. The words of a co-conspirator, as well as his acts, can always be proved when uttered in furtherance of the common design. His subsequent admissions were rightly received for another reason, namely, because if he and Robert bought the property together (as Robert had said), he was party in interest.

Walter was himself offered as a witness in favor of his brother. The bill of exceptions contains but this: "Walter G. Evans objected to by plaintiff, Mr. Stevens; disallowed on account of interest." The presumption is, that the court were right. We make every intendment in favor of a judgment. It was the business of the court to find and decide the fact of interest or no interest, and we can not suppose they did so on insufficient evidence, when the bill of exceptions does not show it. This alone would decide that the judgment could not be reversed on that ground. But from what I have said before, our opinion will be readily inferred that the witness had such an interest as would render him incompetent. The defendant has probably lost nothing by leaving his bill imperfect.

But the great point in this cause, which really goes to the root of it, is raised by that part of the charge in which the jury were instructed to find an unconditional verdict for the plaintiff, if they believed there was actual fraud in the defendant's purchase. The defendant thinks he has a right to hold the land until he is reimbursed what it cost him, no matter how fraudulent his conduct was.

In the case of a purchase, honest in itself, but forbidden by a rule of policy, the legal fraud can not be taken advantage of without a ten-

der of the purchase money. Thus, an attorney who buys a title on which he has been consulted, without the consent of his client, may hold it until he is reimbursed what he paid for it. (3 W. & S., 486.) The same rule applies to all sales which are unexceptionable, except for the fiduciary relation borne by the purchaser to the other claimant. It is also true, that where a party goes into chancery to be relieved against a hard bargain, which has been extorted from his folly, his weakness, or necessities, but which he made with his eyes open, and without being influenced by any positive deception of the other party, the relief will not be given until he who seeks it surrenders all the advantage he has derived from the agreement. He must do equity before he can ask it. Thus, one in remainder sold an estate which was to fall in upon the death of a tenant in tail turned of fifty, and not likely to marry, for a sum not greater than a single year's purchase. Lord Hardwick declared it a catching bargain against a necessitous and improvident heir, and set it aside, but decreed the plaintiff to pay back the sum he had received. (2 Atk., 133.) Where £1000 had been assigned to an attorney for fees, by a weak and intemperate woman, there being no proof of deception, the attorney was allowed his just claim, and no more. (2 Atk., 296.)

A defendant in an execution, driven to the wall by the oppressive rigor of his creditor, and seeing his property about to be sold at an enormous sacrifice, consented to give a bond and mortgage for his own debt, and that of his insolvent son besides. It was decreed that the bond and mortgage should stand for the amount of the execution only. (2 Cowen, 138.) The assignment of a sailor's share of prize money at a great under-value, was set aside upon paying the sum actually received by the assignor. (2 Tes. Sr., 516.) A deed was ordered to be canceled on account of the grantor's mental imbecility, but the master was directed to take an account between the parties, and allow certain advances made by the grantee. (11 Wheat., 103.) In none of these cases was there any actual fraud. They were all hard bargains—hard, not because they were produced by deception, but on account of the gross disparity between the things given and the price paid. The last mentioned might seem at first blush to lie outside the rule; but the weakness of the grantor does not seem to have been imposed upon; and though the court speaks of the grantee's conduct as improper, it is not pronounced to be fraudulent. The contracts were all sound in law. It required the intervention of a chancellor to dissolve them, and he could do it only upon terms which would place all parties in their original condition.

But we thought it was settled in Pennsylvania, if not in every other civilized state, that a title procured by means of an actual fraud, or a plain and positive deception, was tainted through and through, destitute of all validity, and utterly void in law as well in equity. Certainly it was so decided very often here and elsewhere; and though we have examined all the cases cited on the argument from books within our reach, we have found none in which the proposition is denied by the court. *Gilbert* vs. *Hoffman* (2 W., 66) ruled the very point now before us in a case precisely like this. *Jackson* vs. *Somer-*

*ville* (1 Harris, 359) decides the principle with equal clearness. In *Riddle* vs. *Murphy* (7 S. & R., 230), the court, speaking of one who had purchased at a sheriff's sale under a fraudulent judgment, to which he was himself a party, said, "In his character of purchaser, he could not claim to be reimbursed, for if the sale was fraudulent, it was a nullity."

To say that a void title can stand as security for purchase money, advances, or any thing else, is a contradiction in terms. It falls like an empty sack, because it has nothing to support it, and can not support itself. The proposition that one who is detected in a cheat by which he has acquired no title, shall nevertheless be placed on the footing of one who has a good title, unless the money he expended in the perpetration of the fraud be paid to him by the injured party, shocks our sense of right as much as it violates the analogies of the law. I am content, however, to leave the justice of the rule to the ample vindication of it given by Chief Justice Kent, in *Sands* vs. *Codwise* (4 Johns. Rep., 597).

We are of opinion, that if the plaintiff was entitled to recover at all, it was on the ground of fraud—not fraud by construction of law, but actual fraud—and therefore he was not bound to tender the purchase money before trial, nor take a conditional verdict by which he would be compelled to pay it afterward.

There being no error in the charge, nor in the ruling of evidence in or out, the verdict is, of course, conclusive on the facts, and the judgment must be affirmed.

Judgment affirmed.

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LIMITATIONS.—SET-OFF.

Where there were mutual dealings between two parties for thirty years, the defendant was not permitted to set off a single bill under seal, drawn by the plaintiff and guaranteed to by defendant which was due and payable more than twenty years before suit brought.

[*Rickert's Executors* vs. *Geistwite*. Pennsylvania Supreme Court. June Term, 1854. From the Pittsburg Legal Journal.]

This was an action of assumpsit on a book account for work and labor done, brought in 1849 by Henry Geistwite against the executors of John Rickert. The plaintiff's book contained items commencing April 20, 1820, and ending April 21, 1845. All the items in the same year were dated of the same day, but on this head there was no bill of exceptions. The defendants, under the plea of *set-off*, gave in evidence a running account from 1834 to 1845, and also a single bill under seal, dated May 29, 1822, for $73 78c., payable to Antes & Foster at sixty days. On the back of this note there was a guaranty by John Rickert, dated January 4, 1827. The court charged the jury to disallow the single bill, and that no part of the entries in the plaintiff's book could be allowed unless the work was done at or about the time the entries were made. These parts of the charge, after a verdict for the plaintiff, were assigned for error.

Lewis, J.—There is no bill of exception to the admission in evidence

of the plaintiff's book of original entries, nor does it appear by the record that the court was at any time requested to withdraw it from the jury. Besides, if we look into the evidence, we can not avoid seeing that the plaintiff's claim for work and labor did not depend altogether upon his book. Under such circumstances, we are unable to perceive any error in the direction, that "no part of the entries can be allowed by the jury, unless they are convinced that the work was done at or about the time the entries were made." The instruction was more in favor of the plaintiff in error than against him.

It is contended here that the statute of limitations did not apply to the payment made by the defendant below, as surety or guarantor of the single bill of the 29th May, 1822. If we concede that he was entitled to subrogation, it would not better his case, because the single bill itself was due more than twenty years before the suit was brought, and there was no evidence to repel the presumption of payment. As the defendant below was not entitled to the set-off, it is not material to inquire into the reasons of the court for excluding it. It is plain that, in any aspect of the case, the instruction did no harm.

Judgment affirmed.

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☞ During the hot vacation months the editor has found it difficult to prepare or procure suitable matter, and for want of something better for the present month, he inserts the forms for the authentication of deeds, etc.

## FORMS FOR THE AUTHENTICATION OF DEEDS.

In many of the states two witnesses are required to the execution of deeds, while some require only one, and others none at all. The *safer* course will be to have every instrument witnessed by at least two persons. In most of the states a scroll or device has the same effect as a seal of wafer or wax; but, as in some states a scroll is not regarded, the officer before whom papers are executed should affix a seal, unless familiar with the laws of the locality where the papers are to be used.

It is a settled rule of law, that not only the capacity of persons to convey or devise real estate, and the right to inherit, but also the forms and solemnities required to pass the title, must be in conformity with the local laws of the country in which the land is situated. [1 Pick., 86; 7 Cranch, 195; 9 Wheaton, 2; 10 Wheaton, 192; Story on Conflict of Laws, 364; 4 Kent Com., 440.] It is therefore of the utmost importance that acknowledging officers should make their certificates in legal form.

The following forms, which are used by the editor, are such as are required by the laws of the several states:

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## FORMS OF ACKNOWLEDGMENT AND PROOF FOR EVERY STATE.

**[Prepared by John Livingston, commissioner, resident in New York, to take acknowledgments, depositions, etc., for all the states.]**

### ALABAMA.

*By an Unmarried Man.*

State of New York:

City and County of New York, to wit: I, J. L., commissioner of the state of Alabama, to take and certify depositions, to receive the acknowledgments, and take the proof of conveyances of property lying within the state of Alabama, duly appointed and commissioned by the governor of the state of Alabama, for the state of New York, and resident in the city of New York, hereby certify that John

Doe, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day, that being informed of the contents of the instrument, he executed the same voluntarily on the day the same bears date.

Given under my hand and seal of office this first day of January, A. D. 1854.

Signed J. L.

[Seal.] Commissioner of the state of Alabama, in New York.

*By Husband and Wife.*

When the conveyance is by husband and wife, the certificate must state that "A. B., the grantor, and C. D., his wife, personally appeared, and being known to me severally acknowledged before me on this day, that being informed of the contents of the instrument, they executed the same voluntarily on the day the same bears date."

*Proof by a Subscribing Witness.*

State of New York:

City and County of New York: I, J. L., commissioner of the state of Alabama, to take and certify depositions, to receive the acknowledgments and take the proof of conveyances of property lying within the state of Alabama, duly appointed and commissioned by the governor of the state of Alabama for the state of New York, and resident in the city of New York, hereby certify that Richard Roe, whose name is signed to the foregoing conveyance known to me, appeared before me this day, and being sworn, stated that John Doe, the grantor in the conveyance, voluntarily executed the same in his presence and in the presence of the other subscribing witness on the day the same bears date, that he attested the same in the presence of the grantor and the other witness, and that such other witness subscribed his name as a witness in his presence.

Given under my hand and seal of office this —— day of ——, A. D. 185–.

Signed J. L.,

Commissioner of the state of Alabama

[Seal.] for the state of New York.

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## ARKANSAS.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Arkansas, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared before me A. B., grantor in and to the annexed and fore-

going deed of conveyance, to me personally known to be such, who stated and acknowledged that he had executed the same for the consideration and purposes therein mentioned and set forth. And at the same time and place also voluntarily appeared before me C. D., the wife of the said A. B., to me personally known to be such, and in the absence of her said husband declared that she had of her own free will executed the said deed for the purposes therein contained and set forth without compulsion or undue influence of her said husband.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Arkansas, in New York.

*Proof by a Subscribing Witness.*

State of New York:

City and County of New York, ss.: Personally appeared before me E. F., one of the subscribing witnesses to the annexed and foregoing deed of conveyance, to me personally known, and being thereto by me duly sworn, stated on oath that he saw A. B., the grantor to said deed, subscribe the same as his act and deed (or that said grantor, A. B., acknowledged in his presence that he had subscribed and executed said deed), for the purposes and consideration therein mentioned, and that he the said E. F., had subscribed the same as a witness at the request of the said grantor.

In witness whereof, I have hereunto set my hand and official seal, this first day of January, A. D. 1854.

J. L.,

[Seal.] Commissioner of Arkansas, in New York.

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## CALIFORNIA.

*By an Unmarried Man.*

State of New York:

City and County of New York, ss.: On this fourth day of July, A. D. 1854, personally appeared before me J. L., a commissioner duly appointed by the governor of California for the state of New York, A. B. (satisfactorily proved to me, by the oath of C. D., a competent and credible witness for that purpose, by me duly sworn), or (known to me) to be the person named in, and who executed, the foregoing instrument; and he, the said A. B., acknowledged that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

J. L.,

[Seal.] Commissioner for California, in New York.

*By Husband and Wife.*

When the acknowledgment is that of a married woman, it must express that she was made acquainted with the contents of the instrument, and acknowledged, on examination apart from, and without the hearing

of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same.

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## CONNECTICUT.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Connecticut, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me personally known to be the individuals named in, and who executed the foregoing instrument, and severally acknowledged the same to be their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Connecticut, in New York.

In this state the wife does not sign with the husband unless a tenant in common, or otherwise individually interested in the estate; her dower extending only to one third of the estate of which her husband *dies* seized.

*Proof by Subscribing Witness.*

This can only be adduced in a court of justice, when the validity of the deed is denied. A commissioner has no authority to take such proof.

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## DELAWARE.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this fourth day of July, in the year of our Lord 1854, personally came before the subscriber, a commissioner duly appointed by the governor of the state of Delaware for the state of New York, A. B., and E. B., his wife, parties to this indenture, known to me personally (or proved on the oath of ———) to be such, and severally acknowledged said indenture to be their act and deed respectively, and that the said E. B., being at the same time privately examined by me, apart from her husband, acknowledged that she executed the said indenture willingly, without compulsion, or threats, or fear of her husband's displeasure.

Witness my hand and the seal of my office, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Delaware, in New York.

## FLORIDA.

*By an Unmarried Man.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Florida, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., to me known to be the person who executed the foregoing deed, by him sealed and subscribed, and acknowledged the execution thereof to be his free act and deed, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Florida, in New York.

*Relinquishment of Dower.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Florida, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared C. D., wife of the said A. B., separately and apart from her said husband, who being privately examined by me, whether her foregoing relinquishment or renunciation of dower was made freely and voluntarily, and without any constraint, compulsion, apprehension, or fear of or from her said husband, answers and says, that she did and does acknowledge the same to have been freely and voluntarily made, and without any compulsion, constraint, apprehension, or fear of or from her said husband.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Florida, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Florida, to take the acknowledgment of deeds, etc., to be used or recorded therein, per-

sonally appeared L. M., whose name appears as subscribing witness to the foregoing deed, and who being duly sworn, etc., deposes and says, that A. B., party, grantor, etc., duly signed, sealed, and delivered the foregoing deed as his act and deed, in the presence of him the said L. M., and of one O. P., who then and there duly signed and attested the same in the presence of him the said A. B., as subscribing witnesses, etc.

In witness whereof, I have hereunto set my hand, and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Florida, in New York.

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## GEORGIA.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Georgia, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me personally known to be the individuals named in, and who executed the foregoing conveyance, and severally acknowledged that they executed the foregoing deed (or conveyance or other instruments as the case may be) for the purpose therein named and mentioned, and the said M., on private examination, acknowledged and agreed that she did, of her own free will and accord, subscribe, seal, and deliver the said deed, with an intention thereby to renounce, give up, and forever quit claim her right of dower, and thirds, and all her other interest of, in, and to, the lands or tenements therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Georgia, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Georgia, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared before me, A. B., who being sworn, deposeth and saith that he is a subscribing witness to the foregoing deed, and that he saw B. C., the other subscribing witness, sign as such, and that he saw C. D., the grantor, sign and seal the said deed of his own free

will, and for the purposes therein contained and mentioned, on the day and year therein named.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Georgia, in New York.

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## ILLINOIS.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Illinois, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., and M. B., wife of the said A. B., whose signatures appear to the foregoing deed, and who are personally known to me to be the real persons who subscribed and executed the same, and acknowledged the same to be their free act and deed. And M. B., wife of said A. B., and whose signature appears to said deed, having been by me made acquainted with the contents thereof, and examined separate and apart from her said husband, acknowledged that she executed the same, and relinquished her right of dower in the premises therein conveyed, voluntarily, freely, and without compulsion of her said husband.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Illinois, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Illinois, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared C. D., personally known to me to be the person whose name is subscribed to the foregoing deed as a witness, and being duly sworn, testified that A. B., whose name appears in the foregoing deed as grantor, is the real person who executed the same, and that the said C. D. subscribed said deed as a witness to the execution thereof, in the presence and at the request of the said A. B.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Illinois, in New York.

## INDIANA.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Indiana, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., and C. D., his wife, the grantors in the foregoing deed hereto annexed, and acknowledged the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Indiana, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this fourth day of July, A. D. 1854, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Indiana, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared F. G. and O. B., the subscribing witnesses to the execution of the within deed, both of lawful age, who being by me duly sworn, upon their oaths depose and say that they saw the within-named grantors, D. G. and R. H., sign and seal the within deed, that these deponents at the same time signed their names as witnesses of the execution of said deed, at the request and in the presence of said grantors, which grantors were at the time over the age of twenty-one years, and of sound mind and memory, and laboring under no disability so far as deponents know.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Indiana, in New York

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## IOWA

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Iowa, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., and C. D., his wife, personally known to me to be

the identical persons whose names are affixed to the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Iowa, in New York.

This is the form for a single grantor, or for husband and wife. No examination of wife is necessary.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: I, J. L., commissioner etc., etc., do hereby certify that on this first day of January, in the year one thousand eight hundred and fifty-four, it was satisfactorily proved before me, by the oath of A. B., well known to me to be a credible and disinterested witness, that C. D., now absent (state reason of absence), was (or is) personally known to him to be the identical person whose name is affixed to the foregoing deed as grantor, and that the same was executed by the said C. D., whose name is thereunto subscribed, as a party, in the presence of said A. B., at the date therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Iowa, in New York.

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## KENTUCKY.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: I John Livingston, a commissioner for the state of Kentucky, duly appointed and commissioned by the governor thereof, for the state of New York, and authorized to take the acknowledgments of deeds and other writings, do certify that this instrument of writing from C. D., and his wife, E. F., was this day produced to me in my office in the city aforesaid, by the parties, which instrument was acknowledged by the said C. D. to be his act and deed: and the contents and effect of the instrument being explained to the said E. F. by me, separately and apart from her husband, she thereupon declared that she did freely and voluntarily execute and deliver the same to be her act and deed, and consented that the same might be recorded.

Given under my hand and seal of office, this first day of January, 1854.

J. L.,

[Seal.] Commissioner for Kentucky, in New York.

*By an Unmarried Man.*

State of New York:

City and County of New York, ss.: I, J. L., commissioner for the state of Kentucky, duly appointed and commissioned by the governor thereof, for the state of New York, and authorized to take the acknowledgment of deeds and other writings, do certify that this deed from C. D. to G. H. was on this day produced to me in my office in the city aforesaid, by the said grantor, and by him then and there acknowledged before me to be his act and deed, for the purpose therein mentioned.

Given under my hand and seal of office, this first day of January, A. D. 1854.

J. L.,

[Seal.] Commissioner for Kentucky, in New York.

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## LOUISIANA.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Louisiana, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., and C. D., wife of the said A. B., to me known to be the individuals named in, and who executed the annexed conveyance, and acknowledged to me that they did sign, seal, and deliver the same as their free act and deed, on the day and year therein mentioned, and for the consideration, uses, and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Louisiana, in New York.

The laws of Louisiana do not prescribe any particular form for certificates of proof by subscribing witnesses. The forms under New York are sufficient.

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## MAINE.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Maine, to take

the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me personally known to be the individuals named in, and who executed the foregoing conveyance, and acknowledged that they did sign and seal the same as their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Maine, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: On the fourth day of December, A. D. 1854, at request of A. B., the grantee of foregoing deed, I caused G. H., the grantor, being a resident of said county, to be legally summoned to appear before me on the twentieth day of December, A. D. 1854 (being at least seven days from the time of said summons), to hear the testimony of C. D. and E. F., the subscribing witnesses to said deed. Said summons contained the date of said deed, the names of the parties thereto of all the subscribing witnesses; and on said twenty-fourth day of December, A. D. 1854, said witnesses appeared and testified, and the said G. H. was (or was not) present; and by the testimony of said witnesses it was satisfactorily proved to me that the above deed was duly executed by said G. H. the grantor.

In witness whereof, I have hereunto set my hand and fixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Maine, in New York.

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## MARYLAND.

*By an Unmarried Man.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Maryland, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., he being known or being satisfactorily proven by oral testimony under oath received by us, to be the person who is named and described as, and professing to be, the party of the first part to the foregoing deed or indenture, and doth acknowledge the said indenture or instrument of writing to be his act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Maryland, in New York.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Maryland to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, they being known to me (or, "they being satisfactorily proven by oral testimony, under oath, received by me," *as the case may be*) to be the persons who are named and described as, and professing to be, the parties to the foregoing deed or indenture, and do severally acknowledge the said indenture or instrument of writing to be their respective act and deed; the said M. L. having signed and sealed said indenture before me, out of the presence and hearing of her husband; and the said M. L. being by me examined, out of the presence and hearing of her said husband, "whether she doth execute and acknowledge the same freely and voluntarily, and without being induced to do so by fear or threats of, or ill usage by, her husband, or by fear of his displeasure," declareth and saith that she doth.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Maryland, in New York.

## MASSACHUSETTS

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Massachusetts, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me known to be the individuals named in and who executed the foregoing conveyance, and acknowledged the above instrument to be their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Massachusetts, in New York.

## MICHIGAN.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this

first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Michigan to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me personally known to be the individuals named in and who executed the foregoing conveyance, and acknowledged that they had severally executed the within instrument for the uses and purposes therein mentioned; and the said M., on a private examination, separate and apart from her husband, acknowledged that she executed the within instrument freely and without any fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Michigan, in New York.

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## MISSISSIPPI.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Mississippi, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me personally known to be the individuals named in, and who executed the foregoing conveyance, and severally acknowledged the same to be their voluntary act and deed for the uses and purposes therein mentioned. And the said M. did moreover, on a private examination made by me, apart from her husband, acknowledge that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her said husband.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Mississippi in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Mississippi, to take the acknowledgment of deeds, etc., to be used or recorded

therein, personally appeared E. F., one of the subscribing witnesses to the annexed deed, who being first duly sworn, deposeth and saith that he saw the above-named A. B., whose name is subscribed thereto, sign, seal, and deliver the same to the within-named C. D., that he, this deponent, subscribed his name as a witness thereto in the presence of the said A. B., and that he saw the other subscribing witness, L. M., sign the same in the presence of the said A. B., and in the presence of each other on the day and year therein named.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Mississippi, in New York

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## MISSOURI.

### *By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Missouri, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me personally known to be the individuals named in, and who executed the foregoing conveyance, and acknowledged that they executed the same for the purposes therein mentioned; and the said M. being by me examined apart from her husband, and made fully acquainted with the contents of the foregoing deed, acknowledged that she executed the same and relinquished her dower in the real estate therein mentioned, freely and without compulsion or undue influence of her said husband.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Missouri, in New York.

### *Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Missouri, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared E. F., who is personally known to me to be the person whose name is subscribed to the foregoing instrument as a witness thereto, and upon his oath proved that A. B., whose name is subscribed thereto as a party, is the very person who executed the same, and that

said A. B. executed the said instrument in presence of the deponent E. F., and that E. F. subscribed his name thereunto as a witness thereof: declaring on his oath that (here state briefly facts which constitute proof, as, "he was acquainted with A. B., and saw him sign, etc.")

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Missouri, in New York

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## NEW HAMPSHIRE.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty four, before me, the undersigned, J. L., a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of New Hampshire, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., and C. D., his wife, who are personally to me known to be the parties described in and who executed the foregoing deed, and acknowledge that they did sign and seal the same as their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for New Hampshire, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of New Hampshire, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. H., with whom I am personally acquainted, and being by me duly sworn, said that he was a resident of the town of ——, in said county, that he saw the said A. B. execute the within conveyance; that he, the said G. H., subscribed his name thereto as a witness, and that he knew the said A. B. to be the person described in, and who executed the said conveyance.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for New Hampshire, in New York.

## NEW JERSEY.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of New Jersey, to take the acknowledgment of deeds, etc., to be recorded or used therein, personally appeared A. B., and C. D. his wife, whom I am satisfied are the grantors mentioned in the within indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they had signed, sealed, and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; and the said C. D. being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed, and delivered the same as her voluntary act and deed, freely without any fear, threats, or compulsion of her husband.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for New Jersey, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of New Jersey, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., of full age, who being duly sworn according to law, on his oath deposes and says, that he saw E. F. and C. D., the grantors named in the annexed conveyance, sign, seal, and deliver the same as their voluntary act and deed, and that he the said A. B. subscribed his name to the same as an attesting witness.

Taken, sworn, and subscribed before me, on this first day of January, A. D. 1854.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for New Jersey, in New York.

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## NEW YORK.

*By Husband and Wife.*

State of Pennsylvania:

City and County of Philadelphia, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty-four

before me, the undersigned, John Smith, a commissioner, resident in the city of Philadelphia, duly commissioned and qualified by the executive authority and under the laws of the state of Philadelphia, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., and C. B. his wife, personally to me known to be the individuals described in and who executed the within conveyance (or other instrument), and acknowledged that they executed the same; and C. B., the wife of A. B., on a private examination apart from her husband, acknowledged that she signed, sealed, and delivered such conveyance freely, and without any fear or compulsion of her husband.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

JOHN SMITH,

[Seal.] Commissioner for New York, in Philadelphia.

*Grantor Identified by Witness.*

State of Pennsylvania:

City and County of Philadelphia, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty-four, before me, the undersigned, John Smith, a commissioner, resident in the city of Philadelphia, duly commissioned and qualified by the executive authority and under the laws of the state of New York, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B. before me, and acknowledged that he executed the within conveyance, and at the same time G. H., residing in the city of Philadelphia, in said county, to me well known, came before me, and being duly sworn, said that he knew the person making the said acknowledgment to be the individual described in and who executed the said conveyance, which is to me satisfactory evidence.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

JOHN SMITH,

[Seal.] Commissioner for New York, in Philadelphia.

*Proof by Subscribing Witness.*

State of Pennsylvania:

City and County of Philadelphia, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty-four, before me, the undersigned, John Smith, a commissioner, resident in the city of Philadelphia, duly commissioned and qualified by the executive authority and under the laws of the state of New York, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. H., with whom I am personally acquainted, came before me, and being by me duly sworn, said that he was a resident of the town of ———, in said county, that he saw the said A. B. execute the within conveyance, that he the said G. H. subscribed his name thereto as a

witness, and that he knew the said A. B. to be the person described in and who executed the said conveyance.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

JOHN SMITH,

[Seal.] Commissioner for New York, in Philadelphia.

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## NORTH CAROLINA.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of North Carolina, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and his wife M., who severally acknowledged the execution of the foregoing deed for the purpose therein expressed; and thereupon the said M. was by me privately examined separate and apart from her said husband touching her execution thereof, and she declares that she voluntarily assents to the same, and that she did execute the same freely, voluntarily, and without compulsion or restraint upon the part of her said husband, or any other person whatsoever.

Therefore, let the said deed with this certificate be registered.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for North Carolina, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on the first day of January, in the year of our Lord eighteen hundred and fifty-three, the signing, sealing, and delivery of the foregoing deed was proved before me by the oath of A. B., a subscribing witness thereto.

J. L.,

[Seal.] Commissioner for North Carolina, in New York.

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## OHIO.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Ohio, to take the acknowledgment of deeds, etc., to be used or recorded

therein, personally appeared J. P., and O. P., his wife, above named, and acknowledged the signing and sealing of the foregoing conveyance to be their voluntary act and deed; and the said O. P., wife of the said J. P., being at the same time examined by me, separate and apart from her husband, and the contents of said deed made known to her by me, she then declared that she did voluntarily sign, seal, and acknowledge the same, and she is still satisfied therewith.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Ohio, in New York.

No form prescribed by law for certificates of proof by subscribing witness. Those under New York are good for Ohio.

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## PENNSYLVANIA.

*By an Unmarried Man.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of July, A. D. one thousand eight hundred and fifty-four, before me, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Pennsylvania, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared the above-named A. B., personally known to me, and in due form of law acknowledged the above indenture to be his act and deed, and desired that the same might be recorded as such.

In testimony whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Pennsylvania, in New York.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Pennsylvania, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me personally known to be the individuals named in, and who executed the foregoing conveyance, and acknowledged the above conveyance to be their act and deed, and desired the same might be recorded as such. And the said M., being of full age, on a private examination, separate and apart from her husband, the full contents of said deed being first made known to her, declared that she did, voluntarily and of her own free will and accord, and without any coercion or compulsion of her said hus-

band, seal, and as her own free act and deed deliver the sai convey ance.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Pennsylvania, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Before me, the subscriber, a commissioner, duly appointed by the executive of the state of Pennsylvania for the state of New York, personally appeared A. B., one of the subscribing witnesses to the execution of the above indenture, who being duly sworn according to law, doth depose and say that he did see K. L., the grantor above named, sign and seal, and as his act and deed deliver the above indenture, deed, or conveyance, for the uses and purposes therein mentioned, and that he did also see M. N. subscribe his name thereunto as the other witness of such sealing and delivery, and that the name of this deponent thereunto set and subscribed as a witness is of this deponent's own proper handwriting. A. B.

Sworn and subscribed the fourth day of July, A. D. 1854, before me.

Witness my hand and official seal.

J. L.,

[Seal.] Commissioner for Pennsylvania, in New York.

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## RHODE ISLAND.

*By Husband and Wife*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Rhode Island, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared John Doe, the signed and sealer of the above written instrument, and acknowledged the same to be his free voluntary act and deed, and afterward, on the same day, came Jane Doe, wife of the said John Doe, and was by me examined privily and apart from her said husband, when the said above written instrument, by her subscribed, was shown and explained to her by me, when she declared to me that the same was her free voluntary act and deed, and that she did not wish to retract the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Rhode Island, in New York.

The laws of Rhode Island do not prescribe a particular form for the certificate of proof by a subscribing witness. The forms under New York are good for Rhode Island.

## SOUTH CAROLINA.

### *By an Unmarried Man.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of South Carolina, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., who is personally to me known to be the same person described in, and who executed the foregoing deed, and he acknowledged that he did execute said conveyance for the purposes expressed therein.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for South Carolina, in New York

### *By Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of South Carolina, to take the acknowledgement of deeds, etc., to be used or recorded therein, personally appeared M. L., the wife of the within-named G. W. L., and having been privately and separately examined by me, she did declare that she did freely, voluntarily, and without any compulsion, dread or fear, of any person whomsoever, renounce, release, and forever relinquish unto the within-named J. J., his heirs and assigns, all her interest and estate, and also all her right and claim of dower, of, in, or to all and singular the premises within mentioned and released.

[Wife signs.] M. L. [Seal.]

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for South Carolina, in New York.

### *Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this fourth day of July, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of South Carolina, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. H., with whom I am personally acquainted, and being by me duly sworn, said that he was a res-

ident of the town of ———, in said district, that he saw the said A. B. execute the within conveyance, that he, the said G. H., subscribed his name thereto as a witness, and that he knew the said A. B. to be the person described in, and who executed the said conveyance.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for South Carolina, in New York

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## TENNESSEE.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Tennessee, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared G. W. L., and M. L., his wife, to me known to be the individuals named in, and who executed the annexed conveyance, and acknowledged to me that they did severally sign, seal, and deliver the same as their free act and deed, on the day and year therein mentioned, and for the consideration, uses, and purposes therein expressed. And the said M. L., on a private examination separate and apart from her husband, acknowledged that she executed the within instrument freely and without any fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Tennessee, in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Tennessee, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared before me A. B., C. D., and E. F., subscribing witnesses to the within deed, who, being first sworn, depose and say, that they are acquainted with G. H., the grantor, named in the annexed deed, and that he acknowledged the same in their presence to be his act and deed upon the day therein named (or state the time proven by the witnesses), and that they saw him sign, seal, and execute the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Tennessee, in New York.

## TEXAS.

*By an Unmarried Man.*

State of New York:

City and County of New York: I, J. L., commissioner in said state, appointed by the governor of the state of Texas, to administer oaths and affirmations, and to take depositions, affidavits, and the acknowledgment and proof of deeds, etc., to be used or recorded in the said state of Texas, and duly commissioned and sworn, and dwelling in the city of New York, do hereby certify, that A. B. this day personally came before me and acknowledged that he signed, sealed, and delivered the annexed (or foregoing) instrument of writing as his voluntary act and deed for the consideration and purposes therein expressed.

In testimony whereof, I, J. L., commissioner as aforesaid, have hereunto set my hand and affixed my official seal as such commissioner, the first day of January, A. D. 1854.

J. L.,

[Seal.] Commissioner in the state of New York, appointed by the governor of the state of Texas.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Before me, J. L., duly commissioned and qualified under and by virtue of the laws of the state of Texas, a commissioner resident in said state of New York, to take the "acknowledgments and proofs of the execution" of deeds, etc., to lands lying in said state of Texas, personally appeared A. B., and C. B., the wife of said A. B., parties to a certain deed or writing bearing date on the first day of January, A. D. 1854, and hereto annexed, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said C. B., acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it: to certify which I hereto sign my name and affix my official seal, this first day of January, A. D. 1854.

J. L.,

[Seal.] Commissioner for Texas in New York.

*Proof by Subscribing Witness.*

State of New York:

City and County of New York, ss.: I, J. L., commissioner in said state, appointed by the governor of the state of Texas, to administer oaths and affirmations, and to take depositions, affidavits, and the acknowledgment and proof of deeds, etc,, to be used and recorded in the said state of Texas, and duly commissioned and sworn, and dwelling in the city of New York, do hereby certify, that this day C. D. personally appeared before me, and being duly sworn, saith that John Doe, whose signature appears to the annexed instrument of writing, acknowledged the same to be his act and deed for the consideration

and purposes therein expressed, and that he, with E. F. (the other witness), subscribed their names as witnesses thereto at the request of said John Doe.

In testimony whereof, I, J. L., commissioner as aforesaid, have hereunto set my hand and affixed my official seal as such commissioner, the first day of January, A. D. 1854.

J. L.,

[Seal.] Commissioner for Texas, in New York.

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## VERMONT.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Vermont, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared M. L., and J. C. L., wife of the said M. L., and severally acknowledged the foregoing instrument, by them respectively signed and sealed, to be their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Vermont, in New York.

*Proof by Subscribing Witness.*

The form of the certificate is not prescribed by law. That under New York is good.

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## VIRGINIA.

The code of Virginia prescribes the forms of acknowledgment of husband and wife to deeds and other writings. A deed or other writing may be admitted to record as to any party, except a *femme covert*, upon acknowledgment before a Virginia commissioner, or any justice or notary public within the United States.

By an unmarried man, when the acknowledgment is made before a justice or notary public.

State of New York:

City and County of New York, to wit: I ———, a justice of the peace (or notary public) for the county aforesaid, in the state of New York, do certify that E. F., whose name is signed to the writing hereto annexed, bearing date on the ——— day of ———, has acknowledged the same before me, in my county aforesaid.

Given under my hand, this ——— day of ———.

Upon acknowledgment before a commissioner for the state, the certificate must be as follows:

State of New York:

City and County of New York, to wit: I, J. L., a commissioner, appointed by the governor of the state of Virginia for the said state of New York, certify that E. F., whose name is signed to the writing hereto annexed, bearing date on the first day of January, A. D. 1854, has acknowledged the same before me in my state aforesaid.

Given under my hand this first day of January, A. D. 1854.

J. L.,

[Seal.] Commissioner for Vermont, in New York.

When the acknowledgment is made before any county or corporation court in the state, or the clerk of any court out of the state, the clerk must certify that the writing was acknowledged by the party signing, or proved by *two* witnesses before himself or before the court of which he is clerk.

*By a Married Woman.*

State of New York:

City and County of New York, to wit: I, J. L., a commissioner, appointed by the governor of the state of Virginia for the said state of New York, do certify that E. F., the wife of A. F., whose names are signed to the writing hereto annexed, bearing date on the first day of January, personally appeared before me in the county and state aforesad, and being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said E. F., acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand and official seal, this first day of January, A. D. 1854.

J. L.,

Commissioner for Virginia, in New York.

*Proof by Subscribing Witness.*

There is no particular form in use for the certificate of the proof of identity of a party by a witness, or of the proof of the writing by the subscribing witness, and the officer can adopt a form to suit the case, making it full and explicit. The form given under New York is good.

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## WISCONSIN.

*By Husband and Wife.*

State of New York:

City and County of New York, ss.: Be it remembered, that on this first day of January, in the year one thousand eight hundred and fifty-four, before me, the undersigned, J. L., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the state of Wisconsin, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared A. B., and C. B., his wife, to me known to be

the persons who executed the foregoing deed, and acknowledged the execution thereof, by them sealed and subscribed, to be their free act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

J. L.,

[Seal.] Commissioner for Wisconsin, in New York.

*Proof by Subscribing Witness.*

No particular form of certificate is prescribed by law. The form given under New York is good.

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## THE RIGHTS OF MARRIED WOMEN IN EVERY STATE.

ALABAMA.—All the property which a woman has at the time of her marriage, and all that she acquires thereafter, is esteemed in law as her separate estate, notwithstanding her coverture, and the husband acquires no right to the property by marriage. The property vests in the husband as trustee of the wife, the husband controlling the property, without liability to account to the wife for the proceeds. The property can not be taken by legal process for the husband's debts. The husband and wife are jointly liable and suable at law for all necessary family supplies.

*Dower.*—The widow (if no provision is made for her by will) is entitled to one third part of the real estate of which her husband died seized, and to which she has not relinquished the right of dower; and to one half of the personal property if there be no children, or if there be but one child; if there be more than one child, and less than five, she is entitled to a child's part; if there be five children or more, she is entitled to one fifth part in absolute right. She shall be endowed of one half of her husband's estate when he dies leaving no lineal descendants, unless the estate is insolvent.

The widow may dissent from or waive provision in a will, and claim her dower, at any time within one year after the probate of the will. The widow may retain the dwelling-house, plantation, etc., free of rent, until her dower is assigned her.

ARKANSAS.—Any married woman may in her own right become possessed of any property, provided the same does not come from the husband after marriage.

The slaves and their natural increase, owned by any married woman before marriage or acquired by her after marriage, are her separate property, exempt from any liability for the debts or contracts of the husband.

In order to secure her rights, the wife must cause a schedule of her

separate property to be filed in the recorder's office of the county in which she lives, unless the instrument by virtue of which the property was transferred to her expressly set forth that the property was designed for the wife alone, exempt from all the liabilities of the husband, in which case it shall be deemed to belong exclusively to the wife, and shall not be liable for the husband's debts.

*Dower.*—A widow is endowed with a life estate in one third of all the lands of which the husband was seized at any time during the marriage, unless she relinquished her right in legal form, and of a like interest of one third in all the slaves of which he dies possessed, and of one third of all the personal estate, absolutely in her own right, unless the husband leave no children, in which case her dower shall be one half the slaves and personal estate.

CALIFORNIA.—All property, both real and personal, of the wife, owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, is her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise, or descent, is his separate property.

All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, is common property.

A full and complete inventory of the separate property of the wife must be made out and signed by the wife, acknowledged or proved in the manner required by law for the acknowledgment or proof of a conveyance of land, and recorded in the office of the recorder of the county in which the parties reside.

If there be included in the inventory any real estate lying in other counties, the inventory must also be recorded in such counties.

The filing of the inventory in the recorder's office is sufficient notice of the title of the wife; and all property belonging to her, included in the inventory, is exempt from seizure or execution for the debts of her husband.

The husband has the management and control of the separate property of the wife during the continuance of the marriage; but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband, before a justice of the supreme court, judge of the district court, county judge, or notary public; or if executed out of the state, then so acknowledged before some judge of a court of record, or before a commissioner appointed under the authority of this state to take acknowledgment of deeds.

The husband has the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate. The rents and profits of the separate property of either husband or wife are deemed common property.

Upon the dissolution of the community by the death of either hus-

band or wife, one half of the common property goes to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, the whole goes to the survivor, subject to such payment.

In case of the dissolution of the marriage, by the decree of any court of competent jurisdiction, the common property is equally divided between the parties, and the court granting the decree makes such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require.

The separate property of the husband is not liable for the debts of the wife contracted before the marriage, but the separate property of wife continues liable for all such debts.

In every marriage contracted in the state, the rights of husband and wife are governed by the statute, unless there is a marriage contract, containing stipulations contrary thereto.

In 1852, an act was passed authorizing married women to transact business in their own name.

*Dower.*—No estate shall be allowed to the husband as tenant by courtesy upon the decease of his wife, nor any estate in dower be allowed to the wife upon the decease of her husband.

CONNECTICUT.—The interest of a married man in the real estate of his wife, belonging to her at the time of the marriage, or which she may have acquired afterward by devise or inheritance, can not be taken on execution against him during her life, or the lives of children, the issue of such marriage.

If the wife acquires real estate by her personal services, or personal property should accrue to her when abandoned by her husband or during a separation from him caused by his abuse or habitual intemperance, it is her sole and separate estate.

When the real estate of a married woman is sold and the avails invested in her name or for her benefit, the same is construed in equity to be her separate estate, and is not liable for the debts of her husband.

All personal estate which accrues during coverture, to any married man, in right of his wife, by virtue of bequest to her, or distribution to her, as heir at law, and all property derived from the sale or investment thereof, vests in him in trust for the use of his wife; and at his decease, if undisposed of, vests in the wife, or her devisees, legatees, or heirs at law.

The husband is entitled to the rents and profits of the estate, but such rents and profits can not be taken for his debts, except those contracted for the support of his wife and her children after such estate has vested in him.

No sale or transfer of such estate by the husband is valid, unless by consent of the wife, or if she be dead, the consent of those in whom the estate is vested, and they must join with the husband in its conveyance.

The husband can be called to account by a court of probate, which can remove him, and appoint a trustee in his place.

A married woman has the separate use and benefit of an insurance on the life of any person expressed to be for her benefit, independent of her husband, his creditors or representatives, provided the annual premium shall not exceed one hundred and fifty dollars, unless paid from the private property of the wife.

If a married woman earn wages by her own labor, payment of the same may be made to her and be valid in law as though made to her husband, and no debt for the wages of any married woman thus earned is liable to be taken by virtue of any process against her husband.

Payment to a married woman of any money deposited by her, the earnings of her own labor, either before or after marriage, is valid, and her receipt has the same effect as that of her husband, not to affect the right of the husband's creditors to levy.

The widow has right of dower in one third part of the real estate of her husband, of which he died possessed, during her natural life. If there be no children or legal representatives of them, then one moiety of the personal estate is set out to the wife forever, and one third of the real estate for the term of her life—*i. e.*, where there is no will. If there be children, she takes but one third personal, and that for her own use and disposal forever.

DELAWARE.—This state has no special legislation for the protection of the property of married women; and the rights of the wife remain as at the common law.

FLORIDA.—The separate estate of a married woman, a citizen of the state, or who has married a citizen, whether acquired before or after marriage, continues her separate and independent property, beyond the control of her husband, and not liable for her husband's debts.

The husband and wife must join in any conveyance of the estate of the wife, and her real property can only be conveyed by a joint deed.

The property of the wife only is liable for the debts contracted by her prior to the marriage.

If a married woman die possessed of property, the husband inherits as a child would inherit; and if she die without children, the surviving husband is entitled to administration and to all her property.

An inventory of all the property of which the wife is possessed at the time of marriage, or of which she becomes possessed at any time after marriage, must be filed in the circuit court, or in the county clerk's office, within six months after marriage, or after the property is acquired, in order to protect the same from liability for the husband's debts; but a neglect to file such inventory confers no rights upon the husband.

A widow is entitled to a life estate in one third of the husband's real estate. The widow takes one half of the personal estate absolutely, if there be no child or only one; if more than one child, she takes one third absolutely, except slaves, in which she takes a life estate. A widow may elect to take dower, or a child's part; if she choose the latter, she has a fee simple; if the former, she has only a life estate in the real property.

GEORGIA.—*Dower.*—The wife must make application for her dower within seven years from the time of her husband's death.

All conveyances of lands and tenements made by the husband alone during coverture shall convey the entire premises (except such lands as the husband is seized of by his intermarriage with his wife); provided that nothing shall deprive the widow of her right to dower in all lands of which her husband may have died seized and possessed.

ILLINOIS.—*Dower.*—A widow, unless divorced from her husband for her own fault, is endowed with one third part of the lands in which her husband had an estate of inheritance at any time during marriage, unless she shall have relinquished the same in the form prescribed by law.

IOWA.—*Dower.*—One third of all the legal or equitable interest of the husband in any estate, unless the wife relinquish her rights thereto, is set apart upon the death of the husband as dower, if the wife survive him; but such dower is a life estate only.

The widower has the like interest in the real estate owned by the wife during the coverture. Estate by courtesy is not known in the law.

Continuous cohabitation as husband and wife is presumptive evidence of marriage for the purpose of securing the right of dower.

The personal property of the wife does not vest in the husband immediately upon marriage, but if left in his control, it will, in favor of third persons acting in good faith, without knowledge of the real ownership, be presumed that it has been transferred to him. To avoid this, the wife must place upon record, in the recorder's office, a notice stating the value of her separate property, and that she has a claim therefor upon the husband's estate.

The wife is not liable for the separate debts of the husband, or the husband for those of the wife; but the separate debts of the wife are those only contracted in relation to her separate property, or those purporting to bind herself only.

The expenses of the family, the education of the children, and such like obligations, are chargeable upon the property of both husband and wife, or either of them.

INDIANA.—No real or personal estate acquired by the wife, either before or after marriage, is liable for the debts of her husband; but is her own separate property, as if she were unmarried; and is liable for all her debts contracted before marriage.

Tenancies by courtesy and in dower are abolished. At the husband's death, one third of his estate descends to the wife in fee simple, free from all demands of creditors, except when the estate exceeds $10,000 in value, when she has one fourth, and when it exceeds $20,000 she has one fifth, free from creditors. If she marry again, holding such real estate, she can not, either with or without the consent of her husband, alienate the same, but at her death it descends to the children of the husband from whom it was derived. If the husband's estate does not exceed $300 in value, it goes to the widow without administration.

The widow is entitled to one half the personal property of the husband, if there be but one child, and one third if there be more than one.

KENTUCKY.—The slaves of a married woman and their natural increase, her real estate and chattels real owned before, or acquired after marriage, are not liable for the debts of her husband, but are liable for any debts contracted by husband and wife jointly, for necessaries furnished any member of the family.

The husband's estate is not liable for debts contracted by the wife before marriage, to a greater amount than was received by the husband from the wife upon the marriage.

An alien wife of a citizen may take and hold property as if a citizen.

A married woman who comes into the state without her husband, he never having resided within the limits, so long as he remains absent, has all the rights to make contracts, sue and be sued, of a *femme sole*.

LOUISIANA.—The debts of both husband and wife, contracted before marriage, are chargeable only on their separate and individual property.

The property which the husband or the wife owns before marriage, or that comes to either by gift, bequest, or inheritance, after marriage, remains the distinct and individual property of the party to whom it belongs. As to all other property they are partners, unless they have otherwise stipulated in their marriage contract.

The wife, even when she is separate in estate from her husband, can not alienate, grant, mortgage, or acquire, either by gratuitous or encumbered title, unless her husband concurs in the act, or yields his consent in writing.

The wife may make her last will without the authority of her husband.

The surviving husband or wife has the usufruct of the portion coming to his or her children, unless the husband or wife first dying prevent it by will.

MAINE.—If any woman at the time of her marriage be seized in her own right of any property, real or personal, whether by direct bequest, demise, gift, or purchase in her own name, she can hold the same exempt from the debts or contracts of her husband; provided it appears that, if the property was purchased after marriage, the husband did not furnish the purchase money, and that the husband did not, directly or indirectly, convey the property to the wife without adequate consideration, and in order to defraud his creditors.

The statute provisions do not affect any marriage settlement or rights of property acquired by virtue of any life insurance.

Any woman may release to her husband the right of control over her separate property, and the husband may receive and dispose of the income so long as it is appropriated to their mutual comfort and support.

Any married woman legally seized of property in her own right, can commence and prosecute a suit as if she were unmarried, but her person is not subject to arrest. In case of the decease of any married

woman intestate holding property in her own right, such property descends to her heirs; or she may devise or bequeath any property belonging to her.

By a late enactment, a married woman holding property in her own right, as above stated, can lease, sell, or otherwise dispose of such property, real or personal, and can execute all necessary papers in her own name as if she were unmarried; and no action can be maintained by the husband for any property held or disposed of by her.

In 1852 the following provisions were added to the law regarding the rights of married women:

Hereafter when any man shall marry, his property shall be exempt from any and all liabilities for the debts or contracts of his wife made or contracted before marriage; but an action to recover the same may be maintained against such husband and wife, and the property of the wife held in her own right, if any, alone may be attached or sold on execution, to satisfy all such liabilities as if she were unmarried.

In any such action the wife may defend alone or jointly with her husband; but neither husband nor wife can be arrested.

Married women under the age of twenty-one years enjoy the privileges and are subject to the liabilities above named as though they were of full age.

MARYLAND.—This state has no special legislation for the protection of the property of married women; and the rights of the wife remain as at the common law.

MASSACHUSETTS.—A married woman may receive any property or estate by bequest or deed, to be held by her without the intervention of a trustee, and free from the control of the husband. The grant conveying the property must, within ninety days, be recorded in the registry of deeds for the county in which the husband resides, or if he be a non-resident of the state, in the county in which the grantor resides. If this registry be not made, the property is liable for the debts of the husband.

No property held by a married woman is protected by law when employed in trade or commerce, but only when invested in real estate or in public stocks, in personal securities, or in furniture in the actual use and occupation of the woman.

A policy of insurance upon the life of any person for the benefit of a married woman inures to her use and that of her children, free from all liability for the debts of her husband.

A married woman may devise her separate property with the assent of the husband indorsed in writing on the will; and she may revoke the will without the husband's assent; but if all the devises are to the husband, his assent is unnecessary.

Every woman is entitled to her dower at common law, unless her right is lawfully barred.

The right to dower may be barred by the wife joining her husband in a deed and voluntarily relinquishing her interest, or joining the husband in a subsequent deed releasing her claim. Or it may be barred

by a jointure, at least of a freehold estate in lands for life of the wife, to take effect immediately on decease of the husband; or by a provision in the will of the husband, in lieu of dower at her election, to be made within six months after probate of the will.

MICHIGAN.—All property acquired by any female before marriage, or to which she may be entitled afterward, continues her separate property, and is not liable for her husband's debts, but is liable for her own debts contracted before marriage. She can not give, grant, or sell without the consent of her husband, except by order of court; but she may devise and bequeath her property as if she were unmarried.

*Dower.*—The wife is entitled to dower in all lands of which her husband was seized of an estate of inheritance during coverture.

MISSISSIPPI.—A married woman may become seized or possessed of property, real or personal, by direct bequest, gift, or purchase, or distribution in her own name, and as of her own property, provided the same does not come from her husband after marriage.

The slaves owned before marriage and their natural increase continue her separate property, exempt from any liability for the debts or contracts of her husband; also those she may acquire by conveyance, gift, inheritance, distribution, or otherwise after marriage, and their natural increase.

*Dower* includes a life estate in one third part of all the real estate of which the husband dies seized, together with one third of all the estates conveyed to him to which the widow did not relinquish her right in the manner provided by law.

MISSOURI.—Property owned by a woman before marriage, or in any way acquired subsequent to her marriage, and the use and profits thereof, are exempt from debts and liabilities of her husband contracted before marriage or before the wife came into possession of such property. Such property is absolutely exempt from the husband's security debts, whenever contracted, and also from fines or costs imposed on the husband in any criminal case.

*Dower.*—The wife is endowed of one third of all the lands of which her husband, or any one to his use, was seized, of an estate of inheritance, at any time during the marriage; also of leashold estate for the term of twenty years or more.

The widow is also entitled to have and keep as her absolute property, all her implements of industry, and all the beds, bedding, wearing apparel, provisions, etc., requisite for the family; also kitchen furniture to the value of twenty dollars, and any other personal property to the value of two hundred dollars. In addition, she is entitled as follows:

If the husband leaves descendants—to a child's share of the personal estate, absolutely; or, at her option, to one third of the slaves for her life, and one third of the other personal property absolutely subject to her husband's debts.

If the husband leaves no descendants—to all the real and personal estate which came to the husband in right of the marriage,

remaining undisposed of absolutely, and to one half of the real and personal estate belonging to the husband at the time of his death subject to the husband's debts.

3d. If the husband leaves descendants, but not by his last marriage, his widow may, in lieu of dower, take the real estate and personal property in possession of the husband which came to him in right of his wife, by means of the marriage—subject to the husband's debts.

NEW HAMPSHIRE.—A married woman entitled to hold property in her own right and to her separate use, may sue and be sued in her own name, and may dispose of her property by will or otherwise as if she were unmarried; should she die intestate, the husband is excluded, and her estate is divided in the same manner as if she were unmarried.

A married woman of full age may join with her husband in any conveyance of real estate, and though not of age may join in release of dower.

A married woman may dispose of her property by will, provided the will does not affect any rights acquired by the husband from the marriage contract.

*Dower*..—The widow of every person deceased shall be entitled to her dower in the real estate of which her husband was seized during coverture.

The widow of every person deceased testate, leaving lineal descendants, is entitled, in addition to her dower, to one third part of all the estate remaining after the payment of the debts and expenses of administration, if no provision is made for her by the will of the deceased, or if she shall waive such provision.

If the deceased is intestate, and leaves no such lineal descendants, the widow is entitled to one half of all the estate remaining after the payment of the debts and expenses of administration in addition to her dower. If the widow in either of the above cases elect, she shall be entitled, including her dower to a portion of the estate remaining after payment of debts and expenses of administration, not exceeding that which the husband received from her or in her right during coverture.

NEW JERSEY.—A wife, in her own name, or in that of a third person, with the assent of her husband, as trustee, may for her own use cause the life of her husband to be insured for her sole use for any definite period, or for the term of his natural life. And, in case of her surviving her husband, the insurance shall be payable to her for her use, free from the claims of her husband's representatives or creditors; but this exemption does not apply when the amount of premium annually paid exceeds one hundred dollars. In case of the death of the wife during the life of the husband, the amount of the insurance may be made payable to the children, if of age, or to their guardian if under age.

The widow, alien or citizen, is endowed with an estate for life of one third of the real property of which the husband was seized at any time during the marriage, and to which she has not relinquished her right in the manner prescribed by law.

NEW YORK.—The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, are not subject to the disposal of her husband, nor liable for his debts, and continues her sole and separate property, as if she were a single woman.

Any married woman may take, by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and the same is subject to the disposal of her husband, or liable for his debts.

Any person who holds, as trustee for any married woman, any real or personal estate, or other property, under any deed of conveyance or otherwise, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court, that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman, by deed or otherwise, all or any portion of such property, or the rents, issues, or profits thereof for her sole and separate use and benefit.

All contracts made between persons in contemplation of marriage remain in full force after such marriage takes place.

Any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, may insure, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable, by the terms of the insurance, is payable to her, to and for her own use, free from the claims of the representatives of her husband or of any of his creditors; but such exemption does not apply where the amount of premium annually paid exceeds three hundred dollars.

In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable, after her death, to her children, for their use, and to their guardian if under age.

Every married woman, being a resident of this state, who receives a patent for her own invention, pursuant to the laws of the United States, may hold and enjoy the same, and all the proceeds, benefits, and profits of such invention, to her own separate use, free and independent of her husband and his creditors, and may transfer and dispose thereof, and in every respect perform all acts in relation thereto, in the same manner as if she were unmarried; but this act does not authorize such married woman to contract any pecuniary obligations to be discharged at any future time.

When any deposit is made in any savings bank or institution, by any woman, being or hereafter becoming married, in her own name, it is lawful for the trustees or officers of the bank or institution to pay the depositor such sum or sums as may be due, and the receipt or acquittance of the depositor shall be a sufficient legal discharge to the corporation

*Dower.*—A widow is endowed with the third part of all the lands whereof her husband was seized, of an estate of inheritance, at any time during the marriage.

North Carolina.—Whenever a marriage takes place, all the lands or real estate owned by the wife at the time of the marriage, and all lands or real estate which she subsequently acquires, by will, devise, inheritance, or otherwise, can not be sold or leased by the husband for the term of his own life, or any less term of years, except with the consent of his wife, to be ascertained and effectuated by privy examination according to the rules now required by law for the sale of lands by deed belonging to married women. And no interest of the husband whatever, in such lands or real estate, can be sold to satisfy any execution obtained against him, and all such sales are declared to be null and void both at law and in equity.

*Dower.*—The widow is endowed of one third part of all the lands, tenements, and hereditaments of which her husband died seized and possessed.

The dower of a widow is not subject to the payment of debts due from the estate or her husband, during the term of her life.

Ohio.—The interest of any married man in the real estate of his wife, belonging to her at the time of their intermarriage, or which may have come to her by devise, gift, or inheritance during coverture, or which may have been purchased with her sole and separate money or other property, or, during her coverture, have been deeded to her, or to any trustee for her, is not be liable to be taken, by any process of law or chancery, for the payment of his debts during the life of the wife, or the life or lives of the heir or heirs of her body.

All conveyances and incumbrances of the husband's interest in the real estate of the wife above mentioned are void during the life of the wife, and during the life or lives of the heirs of her body, unless an instrument of such conveyance or incumbrance is executed, attested, and acknowledged, according to the laws of the state, for the conveyance or incumbrance of the estate of the wife, in lands, tenements, and hereditaments, situate within this state.

No interest of a husband in any chose in action, demand, legacy, or bequest of his wife is liable to be taken, by any process of law or chancery, for the payment of his debts, unless the husband has reduced the same to possession, so as, by the rules of law, to have become the owner in his marital rights.

All articles of furniture and household goods which a wife brings with her at marriage, or which come to her by bequest, gift, or which after marriage are purchased with her separate money or other property, are exempt from liability for the debts of the husband during the life of the wife, or of any heir of her body.

*Dower.*—A widow is endowed of one third part all the lands, tenements, and real estate of which her husband was seized at any time during the coverture, and of all equitable interest in real estate of which he may die possessed.

PENNSYLVANIA.—Every species and description of property which may be owned by a woman, may be owned by her as well after marriage as before; and all that a woman acquires in any manner after marriage remains her own separate property and is not liable for the debts of the husband; and this property can not be encumbered or sold by the husband without her consent having been obtained and an acknowledgment made by her before one of the judges of the court of common pleas, that the same was given freely without coercion on the part of the husband.

The property of the wife is liable for debts contracted by herself or her agent, and to satisfy judgments obtained against the husband for wrongs done by the wife; in these cases execution must be first had against the separate property of the wife.

A married woman may dispose of her separate property by will executed in presence of two witnesses neither of whom is her husband.

In all cases where judgments are obtained on debts contracted for articles necessary to the support of the family, execution shall first issue against the estate of the husband; if not satisfied, an *alias* execution may issue against the estate of the wife. In this case it must be proved either that the wife contracted the debt, or that the debt was contracted for articles necessary for the maintenance of the family.

RHODE ISLAND.—The real estate, chattels real, household furniture, plate, jewels, stock, or shares in the capital stock of any incorporated company of this state, or debts secured by mortgage on property within this state, which are the property of any woman before marriage, or which may become her property after marriage, are so far secured to her sole and separate use, that the same, and the rents, profits, and income thereof, are not liable to be attached or in any way taken for the debts of her husband, either before or after his death.

Any policy of insurance on the life of any person, expressed to be for the benefit of a married woman, whether effected by herself or by her husband, or by any other person in her behalf, inures to her separate use and benefit, and that of her children, if any, independently of her husband, of his creditors and representatives, and also, independently of any other person effecting the same in her behalf, his creditors and representatives. A trustee or trustees may be appointed, by any court authorized to appoint trustees, to hold and manage the interest of any married woman in any such policy, or its proceeds. These provisions do not apply to any policy upon which the amount of annual premium exceeds the sum of $300.

*Dower.*—The widow of any person shall be endowed of one full and equal third part of all the lands, tenements, and hereditaments whereof her husband, or any other to his use, was seized of an estate of inheritance at any time during the intermarriage, and to which she has not during the coverture released her right by deed.

SOUTH CAROLINA.—The common law in regard to the rights of married women prevails in this state, except that marriage settlement

deeds must be recorded in the office of the secretary of state, and register of mesne conveyance, within three months after their execution.

TENNESSEE.—When any married woman is possessed of property, real or personal, acquired before or after marriage, the husband's interest in the wife's estate can not be disposed of by virtue of any judgment or decree against him; this exemption of the husband's interest does not exist after the death of the wife. The husband can not dispose of such an interest during the wife's life, unless she join in the conveyance in the manner prescribed by law.

When a husband dies without children, the widow inherits in fee simple all the real estate remaining after payment of his debts.

Married women may dispose of their separate property by will.

*Dower.*—A widow is entitled to dower of one third of the real estate of which the husband dies seized and possessed.

TEXAS.—All property, real and personal, owned or claimed by married women, or which may be owned or claimed at the time of marriage by any woman, or which she may acquire by gift, devise, or descent, must be registered.

A schedule must be made out, particularly describing the same, and acknowledged by her that the property described therein is her separate property, and recorded in the county or counties where it really lies, and if there be personal property, then also in the county where she resides.

Property so recorded can not be recovered by the creditors of the husband.

She has a community with the husband in all property acquired during coverture, except that acquired by devise, gift, or descent. The community property may be sold by the husband alone, and is liable for his debts.

VERMONT.—The wife may effect an insurance upon the life of her husband, and if she survive him, the insurance becoming due must be paid to her for her own use, and is not liable for the debts of the husband, unless the premium annually paid exceed $300.

In case the wife die before the husband, the insurance may be made payable to her children for their use, or to their guardian.

Married women may devise real estate, or any interest therein descendible to their heirs.

The rents, issues, and profits of the real estate of any married woman, and the interest of the husband in any real estate which belonged to the wife before marriage, or which she may have acquired by gift, devise, or otherwise, after marriage, are exempt from liability for any separate debts of the husband during the coverture; and no conveyance of such property is valid unless it be by joint deed of husband and wife.

*Dower.*—The widow is entitled during her life to one third of the estate of which her husband died seized, and to the same portion of

any equity of redemption of lands mortgaged by the husband which he may hold under the mortgagee.

The widow may be barred of her dower when a jointure shall have been settled upon her, or some pecuniary provision shall have been made for her before her marriage with or without her consent; or after her marriage with her consent, to have effect after the death of the husband, and expressed to be in lieu and discharge of her dower; or, when the husband provides by will for his widow, and it appears to the probate court that the provision was intended in lieu of dower.

When the husband dies leaving no children or children's representatives, the widow is entitled to one half the estate.

The widow may waive all the above provisions and notify the probate court within eight months after the will is proved or letters of administration are granted, in writing, that she intends to take her dower instead.

VIRGINIA.—A widow is endowed of one third part of all the real estate whereof her husband, or any other to his use, was at any time during coverture seized of any estate of inheritance, unless her right of dower has been lawfully barred or relinquished.

In addition to dower she is entitled to one third of the personal estate after the payment of debts and charges, taking, in slaves, an estate for life only; if the marriage be without issue, she is entitled, absolutely, to the slaves and other personal property so remaining, which were derived from her, and were preserved in kind; and if the marriage be without issue, and the deceased husband was without issue by any former marriage, she is entitled to one half of the residue, qualified in respect to slaves as before.

If provision be made for her in her husband's will, she may renounce it at any time within one year from the probate, and entitle herself to her legal rights.

WISCONSIN.—The widow is entitled to dower of any property in which her husband was seized of an estate of inheritance at any time during marriage, unless she is lawfully barred.

The real estate, and the rents, issues, and profits thereof, of any married woman, are not subject to the disposal of her husband, but are her sole and separate property, as if she were single.

The real and personal property of any unmarried female, and which she may own at the time of her marriage, and the rents, issues, and profits thereof, are not subject to the disposal of her husband nor liable for his debts, and are to continue her sole and separate property.

A married woman may receive by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits, in the same manner and with like effect as if she were unmarried, and the same is not subject to the disposal of her husband nor liable for his debts.

Any policy of insurance upon the life of any person expressed to be

for the benefit of a married woman, whether the same be effected by herself, her husband, or any other person in her behalf, inures to her sole and separate use and that of her children. In case of the death of the wife, any court having authority may appoint guardians to the minor children, who have power to manage the interests of the children in the policy and its proceeds.

When lands are exchanged, it is deemed that the widow elects to have dower in the lands received, unless within one year from the death of her husband she commence proceedings to recover her dower, and in case of lands mortgaged for the purchase money, the widow is not entitled to dower out of the lands against the mortgagee, but against all other persons.

Engd by H S Sadd

# LIVINGSTON'S
## MONTHLY
# LAW MAGAZINE.

CONTENTS OF No. X., VOL. II., OCTOBER, 1854.

# LIVINGSTON'S
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VOL. II. OCTOBER, 1854. No. X.


## CONDENSED REPORTS OF RECENT CASES.

### IN THE SUPERIOR COURT OF CHANCERY OF MISSISSIPPI, JACKSON, JUNE SESSIONS, 1854.

[*James L. Calcote* vs. *Frederick Stanton and Henry S. Buckner.* Reported for the Law Magazine, by Hon. L. M. Day.]

1. CHOSES IN ACTION. ASSIGNMENT.—The fact that a claim is disputed will not forbid its transfer or assignment; nor will public policy avoid such a sale because it may become necessary in the assignee to set aside the fraud of the debtor in order to effectuate his purchase.
2. CHAMPERTY. MAINTENANCE.—The doctrine of champerty and maintenance is now only applied to the purchase of controverted titles, productive of naked litigation, among persons claiming the same thing by different titles, and is only enforced (if at all) in cases where there is an adverse right claimed under an independent title, not in privity with the assignor or seller, and not under a disputed right claimed in privity, or under a trust for the assignor or seller.
3. ESTOPPEL.—Where B. and S. were the sole and only surviving members of three distinct firms, but each composed of the same individual members, and B. in the state of Louisiana, in his inventory and schedules filed in the bankrupt court, represented that the firms of S., B. & Co., and M. B. H. & Co., in the state of Mississippi, were each largely indebted to B., S. & Co., in the state of Louisiana, and S. *also* made the *same* representations in his schedules and inventory in bankruptcy, in the state of Mississippi, and which indebtedness of said firms of S., B. & Co. and M. B. H. & Co. to B., S. & Co., were sold as assets for the benefit of the creditors of the firm of B., S. & Co., by the order and decree of the bankrupt court in the state of Louisiana to C.: *Held*, B. & S. upon principles of justice are *estopped* from denying the existence, amount, and validity of said indebtedness, both as to C. and his assignee.
4. PARTNERSHIPS. BANKRUPTCY. CREDITORS.—Where the same parties composed three distinct firms, at different places and under different names, and which were entirely separate and distinct from each other, and kept their business books and accounts accordingly, upon the bankruptcy of all the firms: *Held*—that the social creditors of one firm in a court of equity can enforce payment of stated accounts or balances due it from the other firms.
5. RULE IN EQUITY AS TO PARTNERSHIPS.—In equity all contracts and dealings between such firms of a *moral and legal* nature are deemed obligatory though void at law, and in all such cases equity looks behind the form of transactions to their substance and treats the *different firms* for the purposes of substantial justice exactly as if they were composed of strangers, or were in fact corporate companies.
6. EQUITY. JURISDICTION. ASSIGNMENT.—(1.) Whenever a remedy is more full and complete in equity than at law, or from the subject-matter of a suit, or the circumstances surrounding it, more full and perfect relief can be had in equity than at law, *equity will take jurisdiction.*

   (2.) Where an equitable interest in a *chose in action* is vested in the holder by assignment, his rights will be enforced in equity if there is *no* legal remedy, or the remedy at law is a doubtful or a difficult one.

   (3.) Courts of equity are not ousted of an original jurisdiction because the same has been assumed by courts of law, or has been conferred upon the latter by statute.
7. CHANCERY. PLEADING.—(1.) It is a proper mode of pleading in equity to anticipate and avoid the defenses which the defendant is supposed to set up.

   (2.) Complainant may anticipate and avoid the defense of a *discharge and certificate in bankruptcy*, by showing the same were obtained by *fraud, or in violation* of the bankrupt act.
8. CERTIFICATE OF BANKRUPTCY. FRAUD.—Bankruptcy is pleadable in bar to all actions and in all courts, and this bar may be avoided whenever it is interposed by showing *fraud* in the procurement of the discharge or a violation of any of the provisions of the bankrupt act.

9. Fraudulent Discharge in Bankruptcy. Jurisdiction.—Where discharge and certificate in bankruptcy are obtained by fraud, or in violation of bankrupt act, it is *not* necessary to institute proceedings in bankrupt court to annul the same, for when so obtained they are absolutely *void*, and will be treated as *nullities* in all courts whatsoever, whenever it is shown they were obtained by fraud.

10. Bankrupt Law of 1841. Fraud. Proof of Claim.—A creditor of any class, whether he *has or has not proved his claim* against the bankrupt, whether he has or has not participated in the bankrupt proceedings, is not barred from suit or recovery on his claim when he can show that the discharge was fraudulently obtained, and that the bar is a nullity; *Provided*, He was ignorant of the fraud and there were no circumstances which would justly put him upon inquiry, and he has not delayed action too long after coming to a *knowledge* of the fraud.

11. 5th Section. No Bar in case of Fraud.—The 5th section, act of 1841, did not intend that the proving of claims by creditors should affect an absolute abandonment of all claims against the future acquisitions of the bankrupt, but simply a waiver of all rights of such creditors in law or equity inconsistent with the bankrupt proceedings, in case the bankrupt should obtain a discharge which was not "impeachable for some fraud or willful concealment of his property."

12. Law of 1841. Effect on Creditors.—The bankrupt law of 1841 was a legislative confiscation of existing rights for the benefit of the debtor, with the privilege to the creditor to avoid the same for fraud on the part of the bankrupt when it became known to him.

13. Statute of Limitations. Law and Equity.—Courts of law are bound by the statute of limitations, and equity also regards it, except in cases of fraud and pure trust; yet courts of equity are not within the statute, and never permit a plea thereof when *conscience* would be violated.

14. Fraud. Concealment. Equity. Limitations.—In cases where the party by fraud has kept concealed the rights of complainant, and has thereby delayed him in the assertion of those rights, lapse of time ought not, on principles of justice, be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to *grant ample and decisive relief.*

The case was brought to a hearing upon the demurrer of defendants to the complainant's bill. The chancellor of the state, Charles Scott, having formerly been of counsel in a branch of the case in the bankrupt court, was incompetent to sit in it; whereupon, in pursuance of a statute of Mississippi, in such case made and provided, by the unanimous consent of the counsel of both parties, the Hon. D. C. Glenn, the attorney-general of the state, was selected to preside therein. The facts of the case fully appear in the opinion of the court.

The following opinion of the court was delivered by Attorney-General Glenn, Special Chancellor.

This case has been argued and submitted on the demurrer of the defendants to the complainant's bill.

The facts charged in the bill are substantially as follows:

The defendants, together with M. B. Hamer, who died in April, 1842, had been during the years 1841 and 1842, and for several years prior thereto, partners in trade, doing business in the city of New Orleans, under the style of Buckner, Stanton & Co., Buckner being the resident and sole managing partner; and in the city of Natchez, under the style of Stanton, Buckner & Co., said Stanton being the resident and sole managing partner; and in Yazoo City, under the style of M. B. Hamer & Co., Hamer being the resident and sole managing partner. Although composed of the same individual members, the three firms were entirely separate and distinct from each other, and kept their business books and accounts accordingly. The firms in 1841, and for several years before that time, were insolvent, and so were the individual members, and so continued until Buckner and Stanton were declared bankrupts. On the 21st July, 1842, Stanton, as an individual and as a member of the three firms, filed his petition in bankruptcy in the United States bankrupt court in Mississippi, and on the 8th November, 1842, was declared a bankrupt, and on the 21st February, 1843, received his discharge. On the 18th July, 1842, Buckner, as an individual and as a member of the three firms, filed his petition in bankruptcy in the United States bankrupt court in Louisiana, and on

the 5th September, 1842, was decreed a bankrupt, and on the 5th December, 1842, received his discharge. These applications, and the proceedings under them, were made by the defendants in concert with each other, with an agreement to continue in business when they received their discharge.

Joseph Sill was appointed assignee in the case of Buckner.

In the inventory of assetts annexed to the petition of Buckner were the two claims or stated accounts which it was alleged were due to Buckner, Stanton & Co. One of said claims was due to it from the firm of Stanton, Buckner & Co., and amounted to $254,987 21. The other of said claims was due to it from M. B. Hamer & Co. for $392,463 92. In the schedule of debts annexed to the petition of Stanton, these two claims were set forth and alleged to be due from Stanton, Buckner & Co., and M. B. Hamer & Co. to Buckner, Stanton & Co. These two claims were vested in Joseph Sill, assignee of Buckner, and were by him, in pursuance of an order of the district court of Louisiana, sold on the 21st June, 1844, to S. W. Oakey, who became the owner of them.

Sill, the assignee, is dead, and no other assignee has since been appointed in his place.

After Oakey became the owner of said claims, he filed his petition in the district court of the United States in Mississippi, claiming to be entitled as a creditor of the firm of M. B. Hamer & Co. and Stanton, Buckner & Co., to a *pro rata* division of the property in the hands of the assignee, and such proceedings were accordingly had, that on the 19th May, 1845, Oakey was decreed and adjudged to be a creditor of said firms for the sums aforesaid, and received a dividend accordingly. On the 22d March, 1854, Oakey, for value received, by writing under seal, transferred to the complainant all his right, title, and interest in the claims so purchased by him of Sill.

The bill further states that when Stanton filed his petition in bankruptcy, the firm of Stanton, Buckner & Co. was indebted to Montgomery & Boyd in the sum of $1,315 51, which debt was proved and allowed in the district court, and a *pro rata* dividend of $77 67 received thereon. This debt was also, on the 25th March, 1854, transferred and assigned by Montgomery & Boyd to complainant.

The bill further charges that the several decrees by which the defendants were discharged in bankruptcy were obtained by fraud, and are therefore void, and various acts of fraudulent preferences and concealments and secretions are specifically set forth and enumerated in the bill, all of which fraudulent acts, it is alleged, were kept concealed by the defendants, and only came to the knowledge of Oakey and Montgomery & Boyd and the complainant within eighteen months before the filing of the bill, who up to that time remained in entire ignorance of the same.

The bill prays for a decree for the amounts of the several claims, now amounting, principal and interest, to upward of a million of dollars. It also prays that the decrees of discharge in bankruptcy so obtained by fraud, may be declared to be void and of no validity against the claims of complainant.

Thus situated, this case has been argued at great length, and with very great ability, by counsel on either side. As briefly as possible I will state the opinion of the court on the most material points involved.

(I.) It is insisted that the assignment of the claims of Oakey and Montgomery & Boyd was champertous, that it savored of maintenance, was contrary to public policy, and therefore void.

In order to determine the force of such a defense in this case, it will be proper to inquire what champerty and maintenance meant at common law. In treating of them, Blackstone places them in the list of crimes, and says they are punishable by fine and imprisonment. He defines maintenance to be "an officious intermeddling in a suit which no way concerns one, by maintaining or assisting either party with money, or otherwise, to prosecute or defend it." "Champerty, *campi partitio*, is a species of maintenance, and punishable in the same manner; being a bargain with a plaintiff or defendant, *campum partire*, to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." (Com., 4, 135.)

There is no statute in this state in regard to either of these offenses, and if they exist at all here in their original signification (which I seriously doubt), they must exist as at common law, and in order to avoid this assignment the offense must be complete.

If, then, we bear in mind this definition of these offenses, it must become manifest that the transfer of the claims in the bills mentioned is not void. A and B are the holders of claims against C, and for a valuable consideration assign them to D. There is here no bargain that D shall aid A and B in maintaining a suit thereon with money or otherwise, or that D shall carry on their suit for them, and to divide the matter sued for between them. The assignor parts with his whole interest in the claim for a valuable consideration, and D becomes the absolute owner of it. He may dispose of it as he thinks proper. He may never sue on it. He may compromise or settle it. The assignor, by the assignment, totally divests himself of all right or interest in the thing assigned, and thereafter, as to all third parties, becomes an entire stranger to the claim. Can it then be said that such facts make a case of champerty and maintenance as at common law? Clearly not. It is useless to examine at any extent what is said of these offenses at common law. The reasons given in connection with them certainly do not apply at the present day, and it will be seen that they were not originally directed at the sale or assignment of choses in action, but that the rigorous rule as to such, arose from considerations which have long ceased to have any weight.

But it is argued that the assignment here was of a mere right to sue. So it might be said of every assignment of a chose in action, and such is the case in nearly every assignment in a commercial community. The assignment of a note or a bill of exchange is an assignment of a right to sue if necessary. Such are termed choses in action; that is, things or rights of things resting or existing in action as distinguished from property actually existing and capable of a material transfer or seizin.

But it is insisted that here there was assigned a mere right to litigate. But in one sense, upon every assignment of every thing, there passes also, *ipso facto*, a right to sue; because the right to have, recover, and enjoy the thing is the very essence of the thing itself. If you purchase a promissory note, you purchase at the same time the right to sue on it or litigate it if the maker refuses to pay it; and if the assignment in this instance is void, so would be the transfer of every disputed claim, and of all rights which rest or exist in action, and which may be contested.

The question here is perhaps more fairly presented when we inquire, not whether Calcote had the right to purchase the claim, but had Oakey the right to sell the chose in action? To deny such a right because the debtor disputes the claim, would be a novel doctrine, and would call for a retrograde movement in the courts. But looking at it from a different point of view, counsel have very ingeniously urged that this was a purchase of a mere right to vacate the discharge of Buckner & Stanton for fraud. Now, it may be, that Calcote must invalidate this discharge before he can recover and effectuate his purchase. Yet does this make him a purchaser of a mere right to litigate a fraud? I think not. Suppose he should prove fraud and invalidate the discharge. Does he recover the fruits of the fraud or damages for the fraud? Not at all. He recovers his debt, which is the foundation of his action. Suppose the parties do not avail themselves of their discharge, and the court possesses jurisdiction, and the claim is a good one, the assignee obtains his decree on his debt or claim. It would be quite as correct to say a man purchased the right to litigate any other defense which might be set up against a chose in action. An assignee purchases the right to enforce his claim, and to recover it unless there is a just and legal reason for not so doing, and to recover it over all unjust, illegal, and unconscientious defenses. His right to the claim clothes him as with an incident thereto, with a right to avoid all such defenses. It is illogical to say that he has purchased a naked right to litigate a fraud, because he has become the owner of a claim against which a fraudulent defense may be urged.

It is well settled, that at common law, no possibility, right, title, or thing in action could be transferred to a third person. For it was said a different rule would authorize the transfer of a lawsuit to a mere stranger. That such is not now the law, or the spirit of the law, is matter of legal history which needs no authority. The assignability or negotiability of choses in action is the basis of half the litigation in this country, and if the transfer of a lawsuit is champertous, our courts are full of it. But the reason of the rule against the transfer of choses in action ceasing, the rule itself has ceased. At an early day, courts of equity, and many eminent law judges, disregarded this rule. "Accordingly," says Judge Story, "they give effect to assignments of trusts and possibilities of trusts, and contingent interests and expectancies, whether they are in real or in personal estate, as well as to assignment of choses in action." And in § 1040, b. n. 4, he has enumerated cases showing the great extent to which courts of equity will go to protect and enforce assignments.

I am not unmindful of the rule laid down by the same writer in § 1040 g., which he has sustained by a reference to the case of *Prosser* vs. *Edmonds*, 1 Younge & Coll., 481, 499. He says, "An assignment of a bare right to file a bill for a fraud committed on the assignor will be held void, as contrary to public policy and savoring of maintenance. * * * Indeed, it has been laid down as a general rule, that when an equitable interest is assigned, in order to give the assignee a *locus standi in judicio* in a court of equity, the party assigning such right must have some substantial possession and some capability of enjoyment, and not a mere naked right to overset a legal instrument or to maintain a suit.

Admitting this to be correct, and that we can understand it, apply it in this case practically. Oakey and Montgomery & Boyd had a just claim against Buckner & Stanton. They assign it to Calcote. Calcote sues on it. Buckner & Stanton reply, that Oakey and Montgomery & Boyd had not a substantial possession or capacity to enjoy the claims when assigned by them. Why? Because they were discharged in bankruptcy. But Calcote alleges that this discharge was fradulent. Buckner & Stanton admit it. If so, the discharge is utterly null and void; and if a nullity, Oakey and Montgomery & Boyd had a substantial possession, etc., which gave them a right to assign, and their assignee a *locus standi in judicio*. Now, when only assignor, assignee, and debtor are concerned, is it pertinent to talk of champerty and maintenance? When the easy and unrestricted transfer of every species of property is the policy of our law, and especially of choses in action, can it be said to be against public policy to permit an assignee to avoid a fraud and recover his debt? If Oakey and Montgomery & Boyd have not or had not the *status* delineated in § 1040, the fraud of Buckner & Stanton ousted them; the act is null and void. Can Buckner & Stanton then plead the advantage of their own fraud? There does not seem to me to be any reason in this.

The same writer presents us with various instances where the assignment of a disputed claim or chose in action is held good in equity. (2 Eq., § 1050, n. 5, 1051, 1057.)

If there were controverted rights as to the ownership of this claim at the time the assignment was made, there might be some ground for the rule insisted on. It is the purchase of controverted titles productive of naked litigation among persons claiming the same thing by different title, which alone now calls for the assertion of the doctrines of champerty or maintenance. The true distinction will be found to be (and so Judge Story asserts it), that the doctrines of maintenance and champerty, and the buying pretended titles, apply only to cases where there is an adverse right claimed under an independent title not in privity with the assignor or seller, and not under a disputed right claimed in privity and under a trust for the assignor or seller. So in this state, in one of the few cases which recognize the doctrine of champerty at all (11 Smedes & M., 431), it is said that a party out of possession of real estate, which is held adversely by another under a title, though it be imperfect, can not sell so as to pass a good title to his vendor.

I can not avoid remarking, that the section from Story relied on, is taken almost literally from the body of Lord Abinger's decision in *Prosser* vs. *Edmonds*. General principles laid down in a case are only valuable in connection with the facts to which they are applied, and without the facts to mark the true meaning and extent of the principles they may mislead us. I have no report of the facts of the case, and only a part of the opinion before me. In n. 1 to § 1050, Judge Story speaks of it as a case where "there was a mere naked right to set aside a conveyance for fraud," and in 69 Com. L. R., Lord Campbell says of it, "In that case there had been a sale of rights, *which were a subject of contest*."

Thus understood, the doctrine has not only authority, but reason to support it.

This, however, is clearly no such case. Here there is no adverse right asserted to these debts or demands, under an independent title, not in privity with the assignors or sellers, Oakey and Montgomery & Boyd. But the defense, when literally stated, is, that the assignors had an undisputed right to these claims; that they were prevented from collecting them by fraud; that they have assigned them, and that the assignee, in order to collect them, must set aside a fraud; that it was champertous in him to purchase the claim, and it would be against public policy to allow him to expose or vacate, or disregard the fraud. Thus stated, the fraud charged in the bill, and confessed by the demurrer to have been perpetrated by these defendants, is relied on as their strongest ground of defense. See generally *Morresdale* vs. *Birchall*, 2 Black., 820; *Masters* vs. *Miller*, 4 T. R., 203; 2 Story Eq., 1039, 1040; *Baker* vs. *Whiting*, 3 Sumner, 475, 481–4; 3 Cowen's Rep., 623; 1 Swanston, 56, 57.

(II.) It is further insisted that the claim sold by the assignee in Louisiana against Stanton, Buckner & Co. and M. B. Hamer & Co., and purchased by Oakey, and by him transferred to complainant, is no claim. The argument is this: that the same persons constituted each and all the firms; that they could not owe or sue themselves, and therefore there was no such debt or claim in existence to sell or transfer.

I will examine the position of the parties in this case before disposing of the main question.

The bill states: "*the three firms were entirely separate and distinct from each other, and kept their business and accounts accordingly; each, however, constituted of the same individual members.*"

Upon his bankruptcy and the bankruptcy of his firm of Buckner & Stanton in Louisiana, Buckner rendered in his schedule of assets on oath. Among these assets, as so much property of the firm, he returned the stated accounts due from Stanton & Buckner and M. B. Hamer & Co. to Buckner & Stanton. As such they passed with his other assets to Sill, his assignee, and were sold for the benefit of creditors. Under such circumstances, Oakey was induced to become the purchaser, and has since assigned to the complainant.

Upon his bankruptcy, and the bankruptcy of his firms of Stanton & Buckner and M. B. Hamer & Co., in Mississippi, Stanton rendered in

a schedule of debts and liabilities on oath. Among these debts, as liabilities against the firms, and the respective persons composing them, entitled to a *pro rata* share of dividends, he rendered in the claims or stated accounts due from Stanton & Buckner and M. B. Hamer & Co. to Buckner & Stanton, which were sold by Sill and purchased by Oakey, and transferred to complainant.

With these facts admitted, can Buckner & Stanton, or either of them, be now permitted to say that there is no such claim in existence? that it is mere fiction, and the possession of it vests no substantial rights in any one? If such a point was contested between Buckner & Stanton, the position might be tolerated, but not where third parties, and those creditors of both, are concerned. By the course pursued by both, each has effected a practical result which they must not now be allowed to gainsay. Buckner & Stanton have received the benefits of the proceeds of the sale of this claim in Louisiana, and it has been divided among their creditors there; and by it Stanton & Buckner have lessened the dividend of their creditors in Mississippi, to the extent of the *pro rata* allowance made here on these claims. In thus acting, they gave notice to the world, and placed it on record, that these accounts were actual and substantive claims, liable to be sold as other assets, and entitled to be paid as other debts. If the claims are mere fictions, as is argued by the conduct of those on whose behalf the argument is offered, they have been made and have become practical realities in the hands of third persons. By their own act the claims were made debts, by their action they were sold as *bona fide* debts, and by their acts Oakey was induced to part with his money therefor, and are thus estopped from denying their existence.

I grant that technical estoppels are not favored in law; but an estoppel here is not formal or technical, but is the enforcement of a rule of great propriety. All persons are responsible for effects growing out of their own voluntary action. If one then, by his conduct or representations, induces another to act, he can not, upon principles of reason and fairness, be allowed to deny the results of his own proceedings. This rule does not rest simply on authority, but on the highest principles of justice which govern the transactions of men. But see 33 Eng. Com. L. R., 116, 117; 19 Wendell, 557; 21 Wendell, 172; 5 Leigh, 1; 5 Howard, 698, and others.

Then, Buckner, one of the defendants, has returned this claim, on oath, as an existing debt, and Stanton, the other defendant, having acknowledged it to be such, and Oakey, upon such representations, having parted with his money for the same, upon principle, Buckner & Stanton can not now be heard to dispute the existence of the claim in the hands of Oakey, or, which is the same thing, in the hands of his assignee, Calcote, the complainant.

Moreover, as between these parties, I regard *the existence* of these claims as "*res adjudicata*" by the order and judgment of the United States circuit court. When Oakey presented his claim in Mississippi against the assets of Stanton, Buckner & Co. and M. B. Hamer & Co., it was resisted on the ground now assumed. Mr. Justice Daniel of the supreme court overruled them, and ordered its *pro rata* allowance

with the claims of other creditors, and this judgment still stands. On this, if on no other ground, I should regard this question as no longer an open one between these parties.

In this connection I might stop here, as the foregoing is conclusive with me; but were this not so, I should be compelled to rule the matter against the defendants.

I admit the principle that where two firms deal with each other, where some or all of the partners in one firm are partners with other persons in the other firm, by the technical rules of the common law in such cases, no suit can be maintained at law in regard to any transactions or debts between two firms; for in such suit all the partners must join and be joined, and no person can maintain a suit against himself, or against himself and others. The objection is, at law, a complete bar to the action. This is the strict rule of the common law, which will recognize no different capacities in an individual, and will not tolerate a conflict in his positive and relative rights and duties. But such distinctions are recognized and acted on under other systems, where real justice is not cramped by arbitrary rules The laws governing partnerships, Judge Story says, are almost identical in equity with the civil law, where conflicting rights of a person, growing out of his individual and his social relations, as to third parties, are asserted and enforced. In equity, all contracts and dealings between such firms of a moral and legal nature are deemed obligatory, though void at law. Courts of equity, in all such cases, look behind the form of transactions to their substance, and treat the different firms for the purposes of substantial justice exactly as if they were composed of strangers, or were in fact corporate companies.

I may as well ask here, with Mr. J. Daniel, "Is this the case of an individual partner attempting to prove his separate claim against the social effects, in opposition to the social creditors?" It is not. It is the claim of Buckner & Stanton against the effects of the bankrupt firms of Stanton & Buckner and M. B. Hamer & Co. True. But a higher claim even still—it is the claim of the social creditors of the bankrupt firm of Buckner & Stanton of New Orleans, against the social assets of the bankrupt firms of Stanton & Buckner and M. B. Hamer & Co. *Ex contractu* a debt of a moral and a legal nature existed between these houses; though composed individually of the same persons, socially as corporations or artificial actors in the community, they were distinct and separate. It is unnecessary to say how far this rule could go in a contest among themselves. I only consider it as affecting the rights of third persons or creditors. Suppose the Mississippi firms had abstracted two thirds of the means of the New Orleans firm, can it be said that the creditors of the latter can not avail themselves of the indebtedness upon its books, which represents amounts thus withdrawn by the former to satisfy the claim, and this by suit thereon? Not at law, but in equity, which disregards form, and looks to the substantial justice of the case.

This is a partnership debt of the Mississippi houses payable out of the social assets of the firms, and in case of a surplus of assets to pay the separate debts of each partner entitled to such surplus, as the sep-

arate creditor would, in case of a surplus of social assets, be entitled to the separate share of the partner separately indebted to him. This is the rule of the 14th section of the bankrupt law, and is but the rule in equity which is derived from the civil law, and I suppose of every code which owes its distinctive features to that enlightened system. It certainly is the law of Louisiana, where this account was created, sold, and transferred. (3 L. Ann. R., 322.) Mr. J. Slidell, at present chief justice of that state, speaks so appositely on the point, that I will quote him. He says: "The partnership once formed and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compose it. It is a civil *person*, which has its peculiar rights and attributes. *Une personne fictive et morale separée des associes. Fictæ cujusdam personnæ vicem obtinet.* See the authorities cited in Troplong on Part., § 68, etc. Hence, therefore, the partners are not the owners of the partnership property. The ideal being thus recognized by a fiction of law is the owner; it has a right to control and administer the property to enable it to fulfill its legal duties and obligations, and the respective parties who associated themselves for the purpose of participating in the profits which may accrue are not the owners of the property itself, but of the residuum which may be left from the entire partnership property, after the obligations of the partnership are discharged."

If, then, we disregard the technical intricacy of this transaction, and look at its real and substantial nature, we can have no doubt. We need only to bear in mind the distinction between the social and individual relations of these parties, and the matter is plain and simple, and on behalf of creditors this claim should, on principles of justice, be sustained. This case is clearly embraced in the principles laid down by Cary in his work on Part., where he says: "Where there are minor partnerships and distinct dealings between the different houses, and all the firms become bankrupt, a debt due from one firm to the other may be proven in the same way as though the dealings had been between strangers, *and* where the same parties carried on two distinct trades, at different places and under different names, the concerns were kept totally distinct, and regular accounts were opened between the houses, and in general both concerns were conducted as if the proprietors of each concern had been different and distinct; on a joint commission against one firm it was held, that the other firm could prove against the joint estate of the bankrupt firm." P. 240.

So in this case, the New Orleans firm being bankrupt, the indebtedness of the Mississippi firms to it is assets in the hands of the social creditors, and can be enforced by Oakey, or his assignee, as the purchaser of such indebtedness, regardless of the individual identity of the partners composing the firms; such, unquestionably, is the rule in equity, and reason and justice would seem to uphold it. (See generally 1 Story Eq., § 679; 6 Taunton, 597; 2 Bos. & P., 120; 3 How. (Mis.) R., 355; Collyer on Part., § 880, 1001, 1002, *et seq.*; Story on Part., § 376, p. 341, n. 2; 2 Bell's Com., 619, 620; Pr. Dec. of Mr. J. Daniel, S C U. S.; *Wilson* vs *McEhoy*, 3 Smedes & M., 241, and cases therewith cited.)

(III.) Has the court of chancery jurisdiction in this case?

Before examining the question it is well to remark that the mere fact that a party has a remedy at law will not deprive this court of jurisdiction, for it is a rule without an exception, that whenever a remedy is more full and complete in equity than it is at law, courts of equity will exercise jurisdiction.

If, then, from the subject-matter of this suit, and the circumstances surrounding it, more ample and complete relief can be rendered here than at law, this court will afford it.

If I am right in the view of the nature of the claim assigned by Oakey to complainant, it is at once evident that there was never a remedy existing at law, but whether in the hands of Buckner & Stanton, or their assignee, or of Oakey, the purchaser, or his assignee, a court of equity had and has the sole and exclusive jurisdiction over it.

But in another point of view the question of jurisdiction is a clear one. Joseph Sill, the assignee in bankruptcy, is dead, and no other has ever been appointed, and if living, the 8th section of the bankrupt law forbids any suit by or against him, after the lapse of two years. Then, if the suit could ever have been prosecuted in his name (which I doubt), that right is gone, and gone by *no laches* of complainant or his assignor. There is then no one *in esse* in whose name this suit could be prosecuted at law. If the party, therefore, had no original right to relief in equity, the special facts of the case would entitle him to it. The law on this subject was greatly discussed in our state upon the assignment of the Planter's Bank to the United States Bank, and as it exists in Mississippi, will be found in the case of *Bacon et al.* vs. *Cohea*, 12 Smedes & M. R. The former assigned to the latter a large amount of bills receivable. After assignment, and before suit brought, the charter of the Planter's Bank was forfeited. Afterward suits were commenced in equity by the assignees of the United States Bank insisting that an equitable interest was vested in them by the assignment, that their legal remedy was gone, and asking naked money decrees with execution. The bills were filed asking no account, averring no trust or accident, and charging no fraud. Indeed, but for the averment that the transfer had vested in the assignees an equitable interest in the choses in action, the bills were simply declarations at law. The cases were severely contested in all the courts, yet the court of appeals asserted the jurisdiction of equity, there being no party in whose name the right could be enforced at law. It was strongly urged that suit could be brought at law in the name of the statutory trustee of the extinct bank, for the use of complainants; but this was overruled, it being answered that their powers were limited by the terms of the law under which they were appointed. So here it may be said that the powers of the assignee, under the bankrupt law, are limited in express terms to two years, and afterward his assignee possess but an equitable interest. I will here remark, that I can not agree that this assignee had no power to sell or assign this claim. The "speedy settlement" intended by the law would seem clearly to indicate that he could sell in a case like this, and the power becomes manifest, when he is required by the law "to collect the assets and

reduce the same to *money*, as soon as the rights of creditors would admit," and when, in the 8th section, he is limited to *two years*, within which to bring any suit at law or in equity.

It was also argued in the case last cited that an equity was a mere incident to a legal right, and the incident was involved in the destruction of the principal. The answer was: "This argument is not well founded in its application to mere rights or intangible things, such as *choses in action*. Such rights are often equitable merely. Even the payee of a lost note, not negotiable, had not, according to the English decisions, a remedy at law; his remedy was exclusively in equity."

Again, the court say: "The transfer of a note by mere delivery, which is not payable to bearer, vests an equity or beneficial interest in the holder. If, by any casualty, he should be deprived of his remedy at law, the nature of his right entitles him to redress in a court of equity. His equity is not destroyed because his payee may happen to die. His is precisely such a right as a court of equity may take cognizance of, because he has taken but an imperfect conveyance of the thing transferred," quoting 2 Wheaton, 375, where C. J. Marshall, in a similar case, said a court of equity was the proper and only court in which such a right can be asserted.

The natural and inevitable deductions from the principles in this case, and the reasoning in 2 Wheaton, amply support the jurisdiction of equity in a case in the condition of the one at bar. I agree with the senior counsel in his position as to the manner of charging fraud, so as to give a court of equity jurisdiction. But I will here say that the charges of fraud in the bill have no controlling weight with the court in settling its jurisdiction. It is exercised because the claim of Oakey, in its inception and in all its stages, has been one purely of equitable cognizance, and if suit could ever have been maintained at law on either claim, in the name of the assignee, he is both "*functus officio*," and physically dead, and complainant's is precisely such a right as courts of equity may take cognizance of, because he has taken an imperfect conveyance of the thing transferred.

I might assign other reasons for the conclusion arrived at; such as the rule that the assignee of a chose in action, unless negotiable, obtains but an equitable interest which equity alone enforces; that originally, at common law, assignments of choses in action were void, as contended by counsel for defendants, and equity exercised exclusive jurisdiction in the premises, which is not taken away because statutes have conferred the like on law courts, or because they have seen proper to assume it. (See generally, 1 How. Miss., 562, 3; 1 Story Eq. P., § 91, 96; *Bacon* vs. *Cohea*, 12 Smedes & M., 516; 2 Story Eq., § 1057; 4 Mason R., 16; 3 Paige R., 466; 2 Paige R., 289; 5 Paige R., 539; 1 Story Eq., § 80; 1 Cushman, 90; 4 Cowen, 717.)

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I can not perceive the force of the remark that this proceeding is to impeach the judgment of a court of exclusive jurisdiction, or to enjoin a degree of the district court of the United States. Much was here said, the application of which I can not see. I admit the rule, that parties and privies can only impeach a judgment in the court where

it was rendered. General rules are of little use unless the case admits of a practical application. I do not understand this bill to impeach any judgment or to enjoin any decree. It sets out a defense to the claim, which the parties may interpose, and says this defense is founded on a certificate of discharge as bankrupt, which is fraudulent, null, and void. This is admitted to be true. It is properly said by counsel of complainants that where, as here, the pleadings in chancery are simply by bill and answer, it is regular in complainant to set out in his bill the pretenses of defendants, as here, the pretense of a fraudulent discharge. (Story Eq. Pl., § 31, 677, 678.)

Counsel say they do not rely on their discharge; that they do not plead their discharge; that they plead and rely on the bankrupt law. If so, it may be naturally inquired, how they can rely on the law, unless they show a discharge under it; for if they have or plead no discharge, the law is no protection to them; the law only protects, and can only be relied on by those who hold a discharge under it, and a valid discharge at that, and if they admit their discharge null and void, neither it, nor the law which provides for it, will avail them.

But is it correct to say a judgment is impeached or enjoined when a party alleges there is no such judgment—that it is a fraud, a nullity? This certificate of discharge, or, if you please, this judgment of discharge, does not of itself and in itself bar and defeat this action. The party entitled to it must plead it. If the party does not do so, of course it is not in question. But complainant apprehends he will plead it, as he must do to avail himself of it, and proceeds to avoid it as any other defense. Can he not then impeach it for fraud? The bankrupt law itself gives him a right (if not for other reasons debarred) to "impeach it for fraud." Does the fact that the fraud grows out of a judicial proceeding (or rather a quasi judicial proceeding) take away this right? Mere terms sometimes mislead, and the mode of putting a point changes its nature practically. Is it not a universal principle that fraud vitiates every thing into which it enters. In *Niles* vs. *Anderson*, 3 How. Miss., C. J. Starkey says, p. 386: "Any act however solemn, even though it be a judgment of a court of competent jurisdiction, may be set aside if procured by fraud," and the cases cited by Clayton Counsel, p. 376, abundantly make good the remark. Contracts, solemn assurances, judgments of courts, and even the statutes of the land, have been impeached for fraud.

To say that a judgment is a nullity can not well be said technically to impeach it, for it denies that it ever had a legal existence. But is this right of impeaching a discharge for fraud confined to the court where it was obtained? This would scarce be reasonable, when the bankrupt law says the discharge "may be pleaded in any court of judicature whatever." It also says that the discharge shall be a bar "in all courts of justice, unless impeached for some fraud," etc. Then, if it may be pleaded in any court whatever, and is a bar, unless impeached, is it not manifest that it may be impeached "everywhere?"

Chancellor Desaussure, in 3 Des., 269, 270, speaking of a fraudulent insolvent discharge, says, "that in case there was any fraud or concealment in obtaining this discharge, this court is not bound to give

effect to the discharge obtained in any other court. That it is essential to the jurisdiction of this court to detect fraud, and prevent its having its intended effect, and even formal judgments at law can not resist its all-searching power, and when the frauds on which they have been obtained are exposed, such judgments are decreed to be nullities. * * * If the discharge was obtained by fraud or concealment it was a mere nullity, like every other judgment or sentence of a court obtained by fraud or surreptitiously."

These views are fully sustained by C. J. Ruffin, of North Carolina. in 8 Iredell, L. R., N. C., 142. Among other things, he says: "The remedy of the creditor is not an application to the court of bankruptcy, upon the ground of fraud newly discovered; but it is by replying the fraud of the bankrupt to his plea of the certificate, so as thereby to avoid the bar. As the certificate may be pleaded in all courts, it follows that it may be impleaded in any court in which it may be set up as a bar."

These positions meet my unqualified assent, and the mere forms of pleading or technical rule can not avail to avoid substantial right. (See generally, 3 Des. R., 269, 270; 8 Ire. L. N. C. R., 180–183; 1 Denio, 75; 1 Cushing, 564; 8 Metcalf, 75; 9 Metcalf, 434–8; 2 Story R., 349; 1 Bar. Ch. R., 352; 18 Ohio R., 412, 413; 9 Georgia, 9, 14.)

(IV.) It is next insisted that Oakey and Montgomery & Boyd, the assignors of complainant, by coming in and proving their claims under the proceedings in bankruptcy, notwithstanding the alleged fraud therein, waived all right of action against these defendants, and that the certificate of discharge was final and conclusive upon said assignors, they being parties to said bankrupt proceedings.

The decision of the point thus presented will require an examination of the provisions of the bankrupt act of 1841, to which the court is so earnestly and so properly invited by the counsel. With the proceedings in cases of involuntary bankruptcy, we have here nothing to do. It is the true extent and meaning of the law touching voluntary bankrupts which we must look to. It is now generally conceded, though at one time doubted by some, that Congress possesses the power to discharge insolvents from their debts at their own instance; yet, as remarked by Chief Justice Ruffin, it was a new principle in the law of bankruptcy. Previously creditors possessed the power to compel their debtors, under certain circumstances, *to go* into bankruptcy; it was a privilege of creditors, and though the act of 1841 may secure some rights to the creditors in cases of voluntary bankruptcies, yet it would seem to have been done *ex gratia*, and it must be fairly admitted the provision was made for the benefit of debtors. I might say that the history of the law so proves, but I will only remark that the nature of the provision itself demonstrates it; for it was a principle unknown to bankrupt laws, and it was a privilege the debtor could, at his own option exercise, and by which he could compel his creditors *to come* into bankruptcy with him.

Counsel have said to me that the bankrupt law was designed to establish a system, and I agree with them. And to my mind, on examining its entire provisions, there is one main feature, prominent and

paramount over all others in the act. By it we may judge the true meaning of minor provisions, for they must all be held and construed to subserve this great object; and any interpretation which tends to defeat or impair this main principle of the law can not be countenanced.

Then let us sum the law. The great purpose of the act was, that where a man made a full, fair, and honest surrender of all his property of every kind and nature, he should be forever discharged from all his debts and liabilities except such as were specially saved, and this, too, without regard to the proportion of his debts to his assets. Though they paid but one cent in a hundred, he was clothed forever with a legislative exemption from his existing contracts. And his certificate of discharge was made in all courts of justice a full and complete bar to the recovery of all his debts, contracts, and engagements, pleadable to all suits in "any court of judicature whatever," and is made conclusive evidence in favor of such bankrupt. The benefit of the law is extended to all persons who shall, by petition, set forth all their creditors, and "an accurate inventory of their property, rights, and credits, of every name, kind, and description, and the location and situation of each and every parcel and portion thereof, verified by oath." It is further provided that all transfers, agreements, preferences, etc., and all payments, securities, conveyances, and concealments made in contemplation of bankruptcy (with notice, etc.), shall be deemed "utterly void and a fraud on the act," and the person making such, "shall receive no discharge" under the act; and the effect of the discharge as a protection to the bankrupt, is without limit, "unless impeached for some fraud or willful concealment of property or rights of property contrary to the provisions of the law."

When we reflect maturely upon the whole scope of this legislation, it becomes manifest that good faith on the part of the bankrupt, who initiates the proceedings, is the grand essential of the law. The nature of the proceedings, the relations of the parties thereto, the unusual and extraordinary results flowing therefrom, and the express terms of the act, all make it a prime necessity. This leading purpose stamps the true character upon all minor matters of the law; in interpreting other provisions and assigning each its due weight and its function, we bear this in mind so as to preserve, secure, and effectuate this cardinal and controlling intention of the legislature. The act was designed to relieve honest but unfortunate men from the thralldom of debt—but to extend no aid or countenance, for the present or in the future, to the unprincipled party who sought a discharge while he secreted his property, or defrauded his creditors under the form and with the fiat of the law.

Under this law Buckner & Stanton are discharged bankrupts. Did they make a full and fair surrender of all their property? Did they deal honestly with their creditors and with the court in obtaining their discharges? The bill charges, and the demurrer admits, transfers, conveyances, preferences, and secretions to a vast amount, by them made "in contemplation of bankruptcy" and in fraud of the law, and such the law denounces "as utterly void," and that a person thus acting, shall "receive no discharge under its provisions."

And the fact further is, that of these proceedings, the complainant or his assignors had no knowledge until within eighteen months past.

With such premises, the defense is rested on this provision in the 5th section of the law: "That no creditor or other person coming in or proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt."

The true intent of this section, when we bear in mind what has gone before, is very obvious. A certain class of creditors are exempted from the operation of the law, as well as peculiar rights, and there are others who are not bound by it, such as fiduciary creditors, those holding liens, etc., and foreign creditors. It was the wish of Congress to induce a complete settlement of a bankrupt's estate by one and a joint proceeding of all creditors of every class. Therefore it simply provides, that though not bound to come in, yet if a party will voluntarily so do, he shall be held to the natural consequence of his own action. If the fiduciary creditor comes in, he is forever barred from suit when the bankrupt has acted in good faith, and so with the holders of liens, etc., and so with the foreign creditors. The general creditor, whether he comes in or stays out, is barred from the recovery of his claim where there has been *bona fides* on the part of the bankrupt. Every person who voluntarily participates in the bankrupt proceedings is held to yield his assent thereto, and the law will shield the debtor by its own decree of discharge; but *never*, except upon the assumption that he has acted in good faith, and fairly and openly with the law itself. This assumption is the very gist and essence of the whole system, the life-blood of the law which lends a healthful vigor to all its provisions, both great and small, and without it the law itself becomes a delusion and a fraud.

Guided by the dictates of sound justice and a correct interpretation, I am clearly of opinion that no creditor of any class, whether he has proved or not proved his claim, whether he has come in or staid out, is barred from suit and recovery, when he can show that the discharge was fraudulently obtained, and that the bar is a nullity: *Provided*, he was ignorant of the fraud, and there were no circumstances which would justly put him upon inquiry, and he has not delayed action too great a length of time after he came to a knowledge of the fraud. To my mind, to hold otherwise is to involve a monstrous assumption, which is, that the 5th section was not only intended to hold parties to the just and natural consequences of their coming in and proving their demands, and to protect fair and honest bankrupts from harassment and litigation, but that the legislature, while inviting all, as if for purposes of entrapment, further intended to protect alike good faith and fraud, honesty and dishonesty. Such is the practical result of the arguments addressed to me, to which I can never assent. I admit that Congress designed to free the land from a load of debt which crippled the resources and crushed the energies of our people. I admit its design was to secure a prompt and complete settlement of a bankrupt's estate, and to put an end to litigation. But this relief is had and settlement secured, and litigation ceases only where good faith and fair

dealing are observed. Such, and only such, as act on these rules are intended to be benefited by the law, or can be protected by the courts acting under it.

The law itself pronounces such conduct, as these defendants stand confessing, "utterly void, and a fraud upon the act," and such person shall receive "no discharge under the provisions of the act." It further empowers the bankrupt to use his discharge at any time and everywhere, "in all courts of justice and in any court of judicature whatever" "unless impeached for some fraud or willful concealment contrary to the law." Is it not manifest that this recognizes the right of any party to impeach a discharge for fraud to the same broad extent at which the party holding it is authorized to use it? But by the rule asserted, the 5th section will annihilate the plea of fraud, or, rather, the fraud itself, on the day of the creditor's coming in, while the 4th section leaves standing the discharge in full vigor ever afterward. Yet by the same law this discharge can and may be at any time "impeached for fraud!" If this be so, are not the two sections in conflict? Do they not practically contradict and refute each other, if it is possible both should operate? This can only be by giving such weight to the coming in of a creditor as naturally belongs to it; to bar his suit where the debtor has acted in good faith; to make it an estoppel of litigation and a waiver of rights—not an estoppel of justice and a sanctification of fraud, for which the discharge may be impeached whenever it is interposed between him and the right of whose exercise he has been fraudulently deprived.

In a bankrupt proceeding in one sense, the petitioner acts as the trustee of his creditors. He brings them into court. He makes his own showing. *Quo ad hoc*, the proceedings are *ex parte*. The creditors do not represent or protect each other. The petitioner on oath represents each and is bound to protect all. If he is guilty of fraud or concealment, it is not probable they can or will be apprised of it. The presumption is, in fact as well as in law, that he is acting fairly, and this presumption is the primal warrant for the extraordinary relief he seeks. Viewing, then, the practical as well as legal nature of these proceedings, is it consonant with reason to say that "the creditor has had his day in court, was a party to the proceedings, was invited to litigate the discharge, and is therefore bound in the face of concealed fraud?" He was invited in, but he was invited to participate in a fair and not a fraudulent proceeding. He came into court where presumptions both of law and fact favored fairness—where the solemn oath of the party bespoke fairness—and he knew of no fraud and had no right to suspect fraud. But there *was* fraud—fraud on him—fraud on all creditors, fraud on the court and on the law. Can the bankrupt say: *True*, but you are estopped by the law—the 5th section is a waiver and a bar. Can he plead the protection of a law whose spirit he has wronged, and whose letter he has defrauded? No one can say such a position is sound in morals, and to my mind it is equally untenable in law, and especially in a court of conscience.

I would here remark, that even admitting there is force in the position assumed in regard to those creditors who are not included in the

law, and who are not bound by proceedings under it, unless "*ex mero motu*" they become parties thereto, it loses any such force, and for a palpable reason, when applied to those creditors whose claims are barred, whether they come in or not. Their action does not alter their condition. The law confiscates their debt in any event. I might trace the consequences of such a rule as to them by striking illustrations, but more I think is not needed.

I have carefully examined the authorities relied on by counsel, but find nothing to shake my conclusion.

The majority simply decide that fiduciary and foreign creditors, and those having liens, etc., who are not within the law, may yet come in under it, and if so, they are held to the election thus made and barred of remedies thus yielded. 5 Law Rep., 225, so much relied on, was a proceeding by creditors against their debtor. In such a case they will be held bound by all the legal results flowing from and growing out of a proceeding of their own institution. None of them are cases of fraud in the bankrupt.

31 Maine, 194, *Humphreys* vs. *Sweet*, is the only case in which fraud was charged on the bankrupt, and the creditors who had proved against him were held to be barred. But the court in its opinion evidently speaks upon the assumption that the creditors were cognizant of the fraud at the time, and failed to litigate it. It says: "If the creditor was one who came in and his claim was allowed against the estate of the bankrupt, he was entitled to object, for all legitimate causes embracing fraud and willful concealment, and the fullest opportunity was afforded by the law for him to do it. *If he omitted to make the objection*, or having made it without success, he was debarred from instituting suit upon his debt or other claim, which had been allowed."

It is true that if the creditor was aware of the fraud at the time, he is barred, for he then acts knowingly, but can it be said that the law afforded him an oppprtunity to object, or that he *omitted* to object matter of which he had no knowledge. This would not savor of reason. The bill states that neither Oakey, or Montgomery & Boyd, or the complainant had knowledge of the fraud charged within eighteen months of the filing of the bill, nor had they knowledge of any facts which would properly put them on inquiry. Therefore, though I may not question the law as laid down in 31 Maine, it does not apply to the case made by the pleadings.

On the other hand, several courts of high authority give their sanction to a different rule.

In 8 Iredell, 242, Chief Justice Ruffin, an eminent jurist, speaks this manly language:

"Though it may be in the power of Congress to discharge insolvents from their debts at their own instance, it was, we believe, a new principle in the law of bankruptcy, and so strongly tends to encourage men dishonestly to contract debts which they do not intend or mean to pay, as to make it highly proper, as far as possible, to guard the courts from imposition, and to protect creditors from fraud in obtaining discharges. It is enough to put it in the power of a man after running in debt to spend all his property, and then, on his own motion, and upon

his own oath, free himself and his future acquisitions from liability to his own creditors." * * * * * He says, "where they have acted fraudulently, the discharge should be refused, and in the next place to hold a discharge obtained by such means ineffectual and void, whenever the fraud shall appear."

The supreme court of Tennessee, in a case where the creditor unsuccessfully resisted a discharge, allowed him afterward to impeach it and say, "if the fraud appear pending his suit against his creditor, no decree of discharge could be made. If it appear afterward, its effect is to annul and destroy the discharge and certificate as though they had never been obtained." (11 Humphreys, 289.)

And in 2 Barb. Ch. R., *Haxtun* vs. *Corse*, 508–533, Chancellor Walworth, in a masterly opinion, has explained the decisions under the English bankrupt laws (our laws as to excepted creditors), and the difference between those laws and the Act of 1841 as regards the rights of general creditors. The doctrine of election of funds and proceedings "in rem," etc., belong to the one, while they have no bearing on the other. Creditors in England, and here a certain class, can go against the after acquired assets of the bankrupt. But general creditors can only reach the fund surrendered. The one elects under the law, and is bound—the other is bound with or without an election, and confined to the fund surrendered. The chancellor concludes by saying:

"Therefore, notwithstanding the general language contained in the 5th section of the act, the law makers did not intend that the proving of debts by creditors should be an absolute abandonment of all claim against the future acquisitions of their debtor if his discharge is refused (for the argument is as good where the discharge is refused as where it is granted), or if it was void for any of the frauds specified in the act; but merely that the proving of debts under the decree should be considered as a waiver of the right of the creditors at law or in equity, which were in any way inconsistent with the election of such creditors to obtain satisfaction of their debts out of property of the bankrupt under the decree, and as a consent to be barred by the discharge in case the bankrupt should obtain one which was not impeachable for fraud or willful concealment of his property."

In concluding the point, I can not help remarking that if the creditor is stripped of the power of impeaching his debtor's discharge under such facts as are here presented, you strip him of the only material privilege reserved to him by the law. Counsel have characterized this law as a statute judgment with execution in favor of creditors. I rather regard it as a legislative confiscation of existing rights for the benefit of the debtor, with the privilege to creditors to avoid it for fraud when known to him; and this right the court should sedulously guard and preserve for him. (See generally, 2 Howard U. S., 302; 5 Law Rep., 259; 1 Cushman, 275; 7 Metcalf, 152–424; 26 Wendell, 54.)

(V.) The next and the last defense which I shall notice is of the statute of limitations.

On behalf of complainant it is said, that he and his assignors have

been prevented from recovering these claims by the frauds of the defendants, that these frauds were unknown to them, and were concealed from them by the defendants, and that a court of equity will not extend to them the benefit of the statute on account of their fraudulent conduct.

On the part of defendants, it is answered that a court of chancery is bound by the statute and can create no exceptions to it—that the defendants have never concealed the frauds or the cause of action of complainant, and that it would be productive of confusion and litigation to maintain this suit.

On the issue thus joined it is said there is some conflict of authority. Therefore I will first present my own view of the law upon principles of reason and justice before looking to adjudged cases.

I premise, then, that courts of equity are not bound by statutes on this subject. They are not within the statute. They look to the true merits of each case and decide it on its own equity. As is aptly said by a learned judge, they use the statutes as aids to their conscientious discretion. Where there is no controlling circumstance to prevent, they act in obedience to the statute, but the statute is never permitted to be used when conscience would be violated.

A court of equity, I apprehend, never says that it will deprive a party of the *right* to the benefit of the statute of limitation; because a party has no absolute right to it in that forum; the right is a qualified one, qualified by the principles of the forum in which it is sued for, and by the character and conduct of the party seeking it. It is an equitable plea, addressed to the sound discretion of the court, which is always exercised in analogy to the rules of law unless their adoption would violate those principles which stamp the jurisdiction of the court. It must then depend on the attitude of the parties before it, whether the court will exercise its discretion so as to extend the benefit of the statute or refuse it.

Upon the highest principles of justice, a court of equity will never enable a party to avail himself of the statutes for purposes of fraud or injustice, or where it will protect him in the commission of fraud. Nor will it permit him thus to secure to himself the consequences or fruits of his fraud. When the party whose rights are injured is ignorant of the fraud, or the fraud is concealed from him, lapse of time is not permitted to destroy the one or to sanctify the other. If apprised of the fraud, his acquiescence is presumed; but concealment of fraud, however prolonged, whether directly practiced or as an essential constituent of its perpetration, avails nothing, and when brought to light, leaves the parties as they stood when it was first committed.

Guided by these views, I have no difficulty in coming to a conclusion in this case. The defendants obtained a discharge by a fraud on the bankrupt law, and by a fraud on the rights of their creditors. They have defeated the recovery of these claims by fraud, and they confess the fact. In this simple sentence consists the whole case. They appeal to this court to lend them its aid in availing themselves of a defense which has grown out of their own unjust conduct. Can or will it do so? I answer No.

To do so, it would no longer be a court of conscience. It would no longer punish fraud. It would no longer administer equity. Its pure and enlightened system would be resolved into mere technical and arbitrary rules, to be invoked for the protection and sustenance of fraud and covin, and not for the aid and furtherance of justice and equity.

That the defendants are guilty of the frauds charged, and that these frauds have prevented the recovery of the complainant's demand, is not denied.

But it is said that defendants did not conceal the alleged frauds, and that, therefore, complainants are in default for not assailing them. To this I can not assent.

Concealment is an ingredient of all fraud, for it is essential to its commission. It is an element in the thing itself, because fraud can not exist without it. In nine cases out of ten the fraud of a transaction consists in its concealment from the party whose rights are to be injured.

But here the fraud was directly concealed. As before said, a petitioner in bankruptcy occupied a peculiar relation to his creditors. He was bound in conscience, and by his oath, to make a full and fair disclosure of his assets, as required by law. They look to him for information, and have a right to look to him. They have a right to rely on him. If he fails to make a full disclosure it is a fraud. To the extent of his failure it is a concealment, for it withdraws from the eye of the creditor a knowledge of transactions which constitute fraud, which would deny him his discharge, and which would vitiate and annul it when obtained. If A occupies such relation to B as authorizes him to go to B for information on a given subject, to enable him to act, and B affords him partial information only, and A is induced to act thereupon, though the information given may be true, yet B is none the less guilty of a fraud, and the concealment of a fraud upon A. It is a fraud to withhold the information, and it is a concealment of a fraud because A is ignorant of the suppression. It is at once a *suppressio veri* and a *suggestio falsi*—a suppression of truth in the information withheld, and a suggestion of falsehood, that the facts furnished comprise the whole case. Defendants committed the frauds; they suggested falsehood in their proceedings, and by representing them as full and fair, they concealed their commission of these frauds from their creditors.

It is unnecessary to say any thing of a concealment of the cause of action. If defendants did not conceal the plaintiff's cause of action, as is argued, it does not alter the case. The authority cited from 4 Cushing is not in point. It was decided upon a special statute of Massachusetts, and is only law under the special legislation of that state.

In my judgment, the adjudged cases amply sustain this view. I will first notice cases relied on by defendants. The cases of *Cocke* vs. *McGinnis*, Mar. & Yer., 351, and *Hamilton* vs. *Shepperd*, 3 Mur. N. C., 115, were both cases *at law*, and in the case of *Walker* vs. *Smith*, 8 Yerger, 238, no fraud is alleged. Courts of law are bound by the letter of the statute, and courts of equity, in cases free from fraud or

pure trust, also regard it. So much is actually decided in these cases, and so far they are not disputed. The case cited from 5 Mason has not been furnished me.

Courts have sometimes forgotten the difference between courts of law and equity on this subject. It is impossible to read Judge Catron's opinion, in *Cocke* vs. *McGinnis*, and then turn to the cases cited by him, without perceiving that he has not borne this distinction in mind in examining the authorities. In the leading case relied on by him, *Troup* vs. *Smith*, Chief Justice Spencer says:

"There is a marked distinction between a plea of the statute of limitations in a court of law and a court of equity;" and the Chief Justice sums up by saying the plea must prevail at law, and will *not* prevail in equity, on the principles stated by me. And yet Mr. Justice Catron has used Mr. Chief Justice Spencer's reasoning in showing that a court of law is bound by the statute to support his own position, that a court of equity is also bound, when Judge Spencer unequivocally says it is not bound.

Our own court has settled the question for us. In the case of *Livermore* vs. *Johnson*, MSS. Op., Chief Justice Smith says:

"It has long been the settled rule in England, that where a party has been kept in ignorance of his rights by the person sought to be charged, the statute shall not begin to run until after the fraud has been discovered. The reason assigned why the statute bar will not be applied in a court of equity in a case of that character, is that it would be a violation of the principles of natural justice to permit a party to avail himself of the lapse of time as a bar to the suit where the party has by fraud kept concealed the rights of the complainant, and has thereby delayed him in the assertion of those rights. *Hoveden* vs. *Ld. Annesly*, 2 S., and Lafroy, 634. Such is without doubt the doctrine of courts of equity in this country. Story Eq., 738. And such is unquestionably the law in this country. Angell on Lim., 188, and cases cited."

Lord Redesdale, in the case cited, expresses the whole doctrine in one admirable sentence: "That the statute ought not in conscience to run, the conscience of the party being so affected then he ought not to be allowed to avail himself of the length of time."

In New York, Chief Justice Spencer says, 20 Johnson, *Troup* vs. *Smith*:

"Courts of equity not being bound by the statute any further than they have seen fit to adopt its provisions as a reasonable rule, and then only in analogy to the doctrine of a court at law, are perfectly right in saying that a party can not in good conscience avail himself of the statute, when by his own fraud he has prevented the other party from coming to a knowledge of his rights, until within six years prior to the commencement of the suit."

The same principles will be found acted upon by the supreme court of the United States, in a recent case in which the court has gone even further than is demanded here. (10 Howard, S. C. R., 174.) And the same will be found in many decisions of the state courts, as well as elementary works of first authority. (See generally, Angell

on Lim., 20, 28, 188, *et seq.*; *Livermore* vs. *Johnson*, MSS. Op. Ct. of Appls.; 2 Schoale & Lefroy, 634; 2 Story Eq. Ju., § 1521, 2; 20 Johnson, 45; 19 Connecticut, 435; 3 Leigh, 732–5–8; 6 Yerger, 90; 3 Murph. N. C., 593; 6 Wheaton, 497.)

Holding, then, that the defendants, as applicants for the benefit of the bankrupt law, were bound to observe good faith toward their creditors, believing that their discharge is fraudulent as this case now stands, and that the complainant has been prevented from a recovery of his demands by the frauds and willful concealments of the defendants, and by the concealments of these frauds by defendants, and that to a knowledge of his rights consequent thereupon, complainant hath only come within eighteen months, I must further hold with the supreme court of the United States, in 6 Wheaton, "that length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length to time during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief."

I have given due weight to the warnings of the senior counsel of the defendants, that suits and litigation may grow out of the result I have reached. I can only say, if so, the innocent are in no danger, while the offending party will meet but a just reward.

In conclusion, it may be noted as a significant fact, that the case stands upon the bill and a simple demurrer, unaccompanied by an answer denying the frauds.

*Let the demurrer be overruled, with leave to the parties to answer, etc.*

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## FRAUDS ON BANKERS.

[*Ellis & Morton* vs. *The Ohio Life Insurance & Trust Co.* Before the Superior Court of Cincinnati. June Term, 1854.]

STORER, J.—The plaintiffs are bankers and brokers, and the defendants are bankers in Cincinnati. In this action a recovery is sought upon the following facts: On the fourteenth day of December, 1852, the defendants presented at the counter of the plaintiffs, for payment, a check for seven thousand five hundred dollars ($7,500) purporting to be drawn upon the plaintiffs by the mercantile house of Evans & Swift; that firm kept a large deposit with the plaintiffs, and at that time a much larger sum than the amount of the check was at their credit on the plaintiffs' books: the check was paid to the defendants, and the same day the amount was charged up to Evans & Swift. On the 23d of the same month, the account of Evans & Swift was discovered to be overdrawn, and their bank-book sent for to be adjusted. The next day, Mr. Evans called at the plaintiffs' banking-house, and on examining the checks charged to Evans & Swift, discovered that the check paid to the defendants on the 14th was a forgery. The plaintiffs immediately informed the defendants of the fact, and de-

manded that the amount should be refunded. This was declined. It is also in evidence, that the check in controversy, with some others, making in the aggregate $10,000, and all drawn upon the plaintiffs, were presented for payment between 10 and 12 o'clock in the forenoon of the 14th December; that the checks were pinned together and attached to a memorandum or ticket, made out at the office of the defendants, stating the several amounts in figures only; that when the checks were paid they were not examined, but the payment was made of the amounts as stated on the ticket. In the afternoon of the same day, the checks were severally charged up to the parties by whom they purported to have been drawn, and then laid away. It is further in proof, that the business relations between the parties were somewhat different from those which existed between the defendants and the other bankers of the city. Between these parties a rule had been established, that the checks taken by either should be redeemed in cash, with the understanding between them, if any mistake occurred in the payment of checks during the hurry of business, it might be corrected on the same day. It is also in evidence, that on the morning of the 14th, the check referred to, with another for a similar amount, was presented at the defendants' office by a person in the dress of a drover, with a request that the defendants should purchase it, and pay in Kentucky funds or gold. The paying-teller, to whom the application was made, referred the matter to the cashier, who, after having seen the checks, decided that they should be purchased, and they were accordingly cashed; gold at a small premium being given in return.

The paying and receiving tellers of the Trust Co. both testified that the checks of parties upon other banks were often received from strangers in payment of exchange or the purchase of gold, a large amount of which was then in the vaults of the company; that the transaction was in the usual course of business, and there was nothing in it to excite suspicion or distrust. The paying-teller further says, that he saw nothing in the manner or appearance of the person who presented the checks to excite his suspicions; that he was a stranger, but checks to large amounts were frequently presented by drovers, and paid without any hesitation, unless there was some fact out of the ordinary course to put the officers of the bank on their guard. It is also in evidence, that when the check was cashed by the defendants, it was in the middle of what is called the pork season; that the drawers of both checks were large purchasers of produce, and their checks for large sums were given in the course of their business. It is further in proof, that Evans & Swift had kept their cash with the plaintiffs for seven or eight years, and the average balance to their credit would be $15,000 or $20,000.

No general usage by the bankers of the city as to the purchase of checks is proved; the witnesses all uniting in the opinion, that every bank and banker pursued his own course, exercising at the time the best judgment in every such matter. Several witnesses, who were tellers and clerks of banks, have testified that they would not, as a general rule, take so large a check upon another bank, unless some reference was given, or they were satisfied the check would be paid, by in-

quiry; this, however, is limited by some to those checks that are made payable to order, others make no distinction. Other witnesses, one of whom is among the oldest cashiers in the city, state that in all cases there is a discretion to be used, and unless there is something in the form or manner of the application, or the check itself, that excites suspicion, if they were satisfied of the ability of the drawer, and had no reason to doubt his signature, they would not hesitate to purchase or receive the check.

All the evidence before the jury is that which is offered by the plaintiffs; the defendants have introduced none. The testimony offered was admitted subject to every proper exception, both to its competency and relevancy.

A non-suit is asked by the defendants' counsel, who contend that the plaintiffs have made out no such case as will entitle them to recover. They insist:

*First.* That the party who accepts a bill of exchange, or pays a check or draft drawn upon him, is estopped from denying the genuineness of the drawer's signature.

*Second.* That the only exception to the rule is, when the party who holds the bill, check, or draft has been guilty of fraud, or such gross negligence as would be equivalent to fraud; in other words, that the holder must be held, actually or constructively, to be a participant in the act by which the drawee has been made liable to payment or subjected to loss, and there is no such evidence of *mala fides* in the transaction on the part of the defendants.

*Third.* That when payment of a forged bill or check is once made by the drawee, the party to whom the payment was made is entitled to notice of its invalidity, the same as the indorser of a bill of exchange; and that such notice, in a case like the present, must be given on the same day that the payment was made; that the drawee, on that day, was bound to examine all such checks, bills, and drafts, and to notify the former holder if any error or mistake has been made in their payment; that the duty to thus examine, if not performed, is an act of omission equivalent to an adoption of the check, and a discharge of the person who presented it and received the amount.

*Fourth.* That no general usage or custom among banks or bankers, in relation to the purchase or receipt of checks or money drawn on other banks or bankers, can be received in evidence, but testimony may be given as to the particular usage and understanding that existed between the plaintiffs and defendants in relation to their daily business, and upon which they mutually acted.

The plaintiffs do not deny the general principles of law as to the effect of an acceptance or payment of a forged bill, but contend that the present case is an exception to the rule; that the peculiar circumstances connected with it necessarily exclude it from the operation of that rule.

They claim:

*First.* That money paid under a mistake of the fact, or where there is misrepresentation, fraudulent pretense, or concealment, may be recovered back by the payer.

*Second.* That when payment by the drawee of a forged check does not work an injury to the holder of the check, such payment does not estop the payer from proving the forgery; and, as in this case, the holders of the check must have lost their remedy upon the person who sold it, as he was a stranger, so soon as they had paid him the money, that their condition is not changed by the receipt of the money from the drawees; and in such a case, notice of the forgery, as would be required in other cases, need not be given, for it would be a vain thing, and the law requires no such act to be done.

*Third.* That the numbers and amounts of the checks, stated on the ticket sent by the defendants to the plaintiffs, were a guarantee that they were such checks, and if paid by the plaintiffs, they can compel the defendants to refund. The plaintiffs' counsel also contend that there is a distinction in the books, between the notice required to be given to the guarantor, and that which is required to be given to an indorser.

*Fourth.* That when the fault that caused the loss can be traced to either party, there the loss must fall.

*Fifth.* That the check or draft must have been purchased or received in the usual course of business, in good faith, and without suspicion.

*Sixth.* That here there is a total failure of consideration, and the amount paid can not *ex æquo et bona* be retained by the defendants.

*Seventh.* That there are questions of fact before the jury, that they alone are competent to try, and the case can not properly be taken from that tribunal.

The last proposition, if true, must decide the present motion. Let us examine it.

A motion to arrest the evidence in any case from the jury, and to grant a non-suit, necessarily assumes the fact that upon the case as presented, there can be no recovery by the plaintiffs.

There is an admission, also, that the testimony offered by the plaintiffs is true, and taking it as true, there is no ground to sustain the action.

If there is doubt as to the facts proved, if the credibility of witnesses is called in question, if there is a dispute as to any material part of the testimony, a jury is the proper tribunal to decide the controversy; but where, as upon a demurrer to evidence, all the matters in evidence are held to be fully proved, and the only real question can be the application of the law to those facts, it is not only within the power, but it is the duty, of the court, to take the responsibility, and direct or refuse a non-suit, as in their judgment shall be right and proper.

At this period in our judicial history, the power to grant a non-suit can not be seriously questioned; it is a part of the machinery by which justice is administered, and without whose existence parties would be involved in useless, it may be said endless, litigation. Whenever a court is fully satisfied that the action does not lie, and that even if a verdict should be found for the plaintiff, it could not be sustained, they ought to interfere. The plaintiff having offered all his testimony, it is for the

court to decide what effect is to be given to it, and what the law is that controls it. And in a case where all the facts are admitted, there can be nothing left for the jury to decide, if the law of the case is at last to determine the controversy.

We find nothing in the present case to prevent a full exposition of the law as applicable to the rights of the several parties; and upon what that law is found to be, the controversy must be determined. This has been the invariable practice in Ohio.

(*Herf & Co.* vs. *Schulze et al.*, 10 Ohio Rep., 263, 268; *Powell* vs. *Jones*, 12 Ohio Rep., 35.)

What, then, is the law upon the facts proved in this case?

Since the case of *Price* vs. *Neal* (3 Burrows, 1355), decided by Lord Mansfield in 1762, it has uniformly been held in England, that the acceptor of a bill, by the very act of acceptance, admits the genuineness of the drawer's signature, and will not, as a general rule, be permitted to dispute it in the hands of a *bona-fide* holder for value, without notice of any fraud; and if the bill is paid by the drawee, he is precluded from recovering back the money, on the mere allegation that the drawer's name was forged. The principle thus asserted was but the recognition of the ruling of Chief Justice Pratt, in *Wilkinson* vs. *Lutwidge* (1 Strange, 648), and in *Jenys* vs. *Fowler* (2 Strange, 946). It is now the settled law in Great Britain.

(Bayley on Bills, 5th ed., ch. 8, pp. 318, 319; Chitty on Bills, 11th Am. ed., 307; *Smith* vs. *Chester*, 1 T. R., 655; *Bass* vs. *Clive*, 4 M. & S., 15; *Smith* vs. *Mercer*, 6 Taunton, 76; *Wilkinson* vs. *Johnson*, 3 B. & C., 428; *Cocks* vs. *Masterman*, 9 B. & C., 902.)

The American courts have, without an exception, adopted the principle, and it may now be regarded as the law of the land.

(*Levy* vs. *Bank U. S.*, 1 Binney, 27; *Bank U. S.* vs. *Bank of the State of Georgia*, 10 Wheat., 333; *Salem Bank* vs. *Gloucester Bank*, 17 Mass., 33; *Bank St. Albans* vs. *F. & M. Bank*, 10 Verm., 141; *Bank of Commerce* vs. *Union Bank*, 2 Comstock, 230; *Goddard* vs. *Merchants' Bank*, 4 Comstock, 149; *Marsh et al.* vs. *Small et al.*, 3 Lous. An. Rep., 402; Story on Bills, § 262; Story on Prom. Notes, § 197; Parsons on Contracts, § 220.)

The reason of the rule thus established is, that by his acceptance the drawee has given currency to the bill; on the faith of that acceptance it may have been afterward negotiated, and become a representative of important commercial transactions. If, then, after performing the function of a genuine bill, having been the means of credit, and been made a substitute for cash, it could be afterward dishonored by the acceptor, every sound principle of the law-merchant would be violated, and the foundation of mercantile confidence fatally impaired.

The drawee is supposed to know the signature of the drawer. He is generally his correspondent, and in the mutual interchange of business relations, no want of knowledge on the part of either, as to their duties or liabilities, will be presumed. And when the drawee is a banker who is accustomed daily to examine and honor the checks of his depositors, and must thereby have become familiar with their signatures, the rule applies with very great force. The plaintiffs do not deny

the existence of the rule, nor its universal acceptance as the established law; they only contend that the present case is an exception to its application.

It is admitted by the plaintiffs that the holder of the bill must have obtained it in good faith, for value, and without notice of the fraud, before they can claim to be protected. For the plaintiffs it is assumed, that the holders should be guilty of no neglect in taking the bill; if they have been imprudent or unguarded, if they have purchased it incautiously even, they ought to be held liable to refund.

What is the true rule, however, presents another question. It ought not to depend upon mere opinion, or temporary usage, or what may be adjudged, under all the circumstances, to be the equity of the case; the determination of legal questions should not rest upon any thing vague or indefinite in the application of established rules. It is not the application of the rule in any particular case, but rather its reason, propriety, and general acceptance, that must be regarded; whether it may operate liberally, or perchance severely, is not a question for the court. Whenever the rule is ascertained, and has met the acceptance of the profession as established law, it is the duty of the judge to preserve its integrity, and permit no modification to meet the exigency of any particular case.

How, then, is the holder of a bill to be protected? I reply, that he must have taken it in the usual course of business, paid a full consideration for it, and received it in good faith, without actual or constructive knowledge of any fraud on the part of the person from whom it is received. The mere neglect of the holder of every possible or supposed means to ascertain the genuineness of the bill before he purchases it, is not evidence of bad faith, for until suspicion is excited there can be no necessity for inquiry, and to question the right of the party who offers the bill for sale, before any doubts are raised as to its validity, would defeat the established maxim, that every bill of exchange upon its face imports to be genuine, and implies a consideration either paid to or received by the drawer, from the drawee.

There has been, until the last thirty years, much diversity of opinion as to the degree of prudence to be exercised by the purchaser of a bill, the omission of which would charge him with notice of the equities of the parties, but it is believed there is now no doubt as to what is the true rule.

Until the case of *Gill* vs. *Cubit et al.* was decided in 1824, by Chief Justice Abbot (3 B. & C., 466), it was held that the holder took the bill, freed from all equities, except those of which he had actual or constructive notice; and the question of neglect or omission to do what the strictest prudence might suggest, neither created, nor did it charge the purchaser with any liability for latent fraud. But in the case just referred to, without any notice to the profession, and, as it would seem, uncalled for by the commercial world, a new rule was introduced, "the court holding, for the first time, that if the bill was taken by the plaintiffs under circumstances which ought to have excited the suspicion of a prudent, careful man, the verdict should be for the acceptor." This decision virtually overruled the authority of *Lawson et al.* vs. *Weston*

*et al.* (4 Esp., 56), decided by Lord Kenyon in 1801, and established a new and, what was found to be, a very flexible and uncertain rule. In *Down* vs. *Halling* (4 B. & C., 330), decided in 1825, the law in *Gill* vs. *Cubit* was admitted; it was recognized in *Snow* vs. *Peacock* (2 Carr. & Payne, 215), and in *Beckwith* vs. *Correl* (2 Carr. & P., 261). In *Slater et al.* vs. *West* (3 C. & P., 325), Lord Tenterden held the law to be as he had decided, while Chief Justice Abbot, in *Gill* vs. *Cubit:* "This doctrine," he says, "is of modern origin. I believe that I was the first judge who decided the point at *nisi prius;* the court to which I belong confirmed my decision, and the other courts, I believe, have acted on the same principle. But in every case of this description, the question is one which ought to be guardedly and carefully considered."

The English courts were governed by the rule thus laid down, until the case of *Crook* vs. *Jaddis*, in 1833 (5 B. & A., 911), when it was held by Chief Justice Denman, Littledale, Taunton, and Patterson, justices, "that gross negligence should be proved on the part of the purchaser of the bill, or he must recover against the acceptor." "I use," says the chief justice, "the expression, gross negligence, advisedly," and Taunton, J., said: "I can not estimate the degree of care that a prudent man should take; the term gross negligence is more definite and appropriate." This came under consideration in *Blackburn* vs. *Harrison* (5 B. & A., 1106), and was fully confirmed. Patterson, J., in giving his opinion, observed, "I have no hesitation in saying, that the doctrine first laid down in *Gill* vs. *Cubit et al.*, and acted on in the other cases, goes too far and ought to be restricted. I can perfectly understand, that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bona fide*, but under the circumstances mentioned in *Gill* vs. *Cubit et al.*, did not acquire a property in it."

In *Branch* vs. *Roberts* (1 Bingham N. C., 469), though the question mooted was upon the pleadings, the authority of the last case was fully sustained. The question was again considered in *Goodman* vs. *Harvey et al.* (4 Ad. & Ell., 870), and all the prior decisions were examined. Lord Denman, in deciding it, said: "I believe we are all of opinion that when the party has given consideration for the bill, gross negligence would not be a sufficient answer to a recovery. It may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. When the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title." The case was affirmed in *Uther* vs. *Rich*, 10 Add. & Ell., 784; see also, *Foster* vs. *Pearson*, 1 Crompton & Ros. Ex. Rep., 855, and *Arbouin* vs. *Anderson*, 1 Ad. & Ell. N. S., 645, where it is said, "that the owner of a bill is entitled to recover upon it, if he came by it honestly; that fact is implied *prima facie* by possession."

In Chitty on Bills, 9 Eng. ed., 216, it is stated as the result of all the authorities, that "it is not enough to deprive a holder for value of his remedy on the bill, to show that he was guilty of gross negligence,

unless it also appears that he acted *mala fides*;" and again, at page 217, "The doctrine of Lord Tenterden is now completely exploded, and the old rule of law, that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, can give a title, which he does not himself possess, to a person taking them *bona fide* for value, again re-established in its fullest extent."

Such is the law as it now exists in England, and the American cases but reiterate the rule. In his treatise on bills of exchange, § 416, Judge Story says: "The reasonable doctrine now established is, that nothing short of fraud, not even gross negligence, if unattended with *mala fides*, will take away the right of a *bona-fide* holder of the bill;" and in § 194, he further states, "The former doctrine has been overruled and abandoned."

(See, also, Story on Prom. Notes, § 178, § 197; Parsons on Con., vol. i., p. 213; 10 Verm., 147; 3 Lous. An. Rep., 402; 4 Comstock, 147; 3 do., 230; 1 Hill, 287, before quoted; *Cone* vs. *Baldwin*, 12 Pick., 545; *Wheeler* vs. *Guild*, 20 do., 545.)

The law, as thus interpreted, can not at this time be questioned, and it is adopted by the court, as the only proper rule that should govern the commercial community. We hold that unless the defendants in this suit have been proved to be complicated with the fraud by which the plaintiffs have suffered, they can not be held to refund the amount that has been paid to them.

Does the evidence sustain this assumption? The check was purchased in the regular course of business; there was nothing in the manner of its presentment, the appearance of the holder, or the nature of the trasaction to excite suspicion. The officers of the Trust Company testify, they saw nothing to induce any particular inquiry as to the title of the holder; his demeanor and apparent calling were such as to disarm suspicion; the drawers of the check were perfectly solvent, and their signature was not doubted.

There was then nothing to put the officers of the bank upon inquiry; but if from abundant caution the cashier or teller should nevertheless have sent to the plaintiffs' banking-house, to ascertain if the check would be paid, the answer must have been that the drawers had ample funds to their credit; and is it not probable, from the fact that the drawees never discovered the forgery themselves, that they would have certified the check to have been valid? It is in proof that the signature of the drawers was well imitated, though the body of the check was a failure; but as checks are not always filled up by the drawers, there was nothing in that fact to excite doubt.

It is further urged, that a check for so large an amount should not have been taken without inquiry, and a usage is attempted to be proved that in some of the banks in Cincinnati such a course is always adopted. The proof, however, is unsatisfactory, even as to any individual bank or banker. The result of the whole evidence is, that there is no general usage, that each bank is governed by its own rule, an honest discretion being exercised in the purchase of bills and checks, as the peculiar circumstances of each case may suggest.

But if a special usage with one or more banks existed, it could not

avail; the usage, to affect the defendants, should have been general. In the late case of *Adams* vs. *Otterback* (15 How., 545), Judge McLean very clearly lays down the true rule: "To constitute a usage it must apply to a place, rather than to a particular bank. It must be the rule of all the banks of the place, or it can not consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement."

An examination of the cases, however, already quoted, will exhibit objections much stronger than the fact that is pressed upon the court, of the large amount of the check; yet these objections were all overruled and held insufficient to excite suspicion, or to lead to inquiry. We hold the true test of good faith to be, what should have been done at the time the transaction took place, when no suspicion existed and there were no obvious difficulties to avoid; not what *might* have been done, or what, after the fraud is accomplished, a more rigorous caution would have indicated. We must not determine the degree of prudence by any other standard than would have governed honest men in their ordinary pursuits; nor can we with the new light we may have obtained from the discovery of a fraud, decide that any precautions other than those that were used could have prevented its perpetration. It would be an unsafe, and certainly a most uncertain rule to permit mere opinion to give a character to a past transaction when its consequences have been injurious; such an opinion is too often produced by reflecting upon the act done, and the probable means by which it could have been avoided, when perhaps the witness who expresses it would, if he had been present, when the fraud was perpetrated, have pursued the same course that he indirectly censures.

We have said that the evidence of *mala fides* need not be such as would charge the purchaser of the bill with actual notice of the fraud; if such facts are proved as will be equivalent to constructive notice, the result must be the same. We find a very satisfactory illustration of the rule in what is required from the purchaser of real estate in order to perfect his title. *Caveat emptor* is the rule by which he is held, but it applies only when the buyer neglects the proper precautions in the investigation of his title, does not examine the usual sources of information, and shuts his eyes upon those facts that would necessarily lead him to the knowledge of a defect in his title, or an incumbrance upon the estate. If, however, the registry of deeds, and the records of the courts are examined—if the parties in possession are interrogated, all has been done that the law requires, and the purchaser is protected.

(Sugden on Vendors, 730, ch. 17; Story's Eq., vol. i., § 400).

If we apply this doctrine to the present case, the reason and propriety of the principle we adopt as the law are fully vindicated.

It is further contended by the plaintiffs, that the envelop, or ticket, within which the checks were folded when they were presented for payment at their counter, contained a list of the checks and their several amounts, and it was therefore a representation on the part of the defendants that they were *bona-fide* checks, and if so, the payment did

not change the situation of the parties. We can not so regard the evidence. The labels upon which the checks were described contained figures only; the names of the drawers of the checks or their date were not stated, and we can not regard it as any thing more than the presentation of such checks for payment, imposing no more liability upon the holder than if they were presented without any statement of their several amounts. Every person who exhibits a check at a bank for payment makes the same representation, whether he speaks or is silent. He asks for the proceeds as effectually when he shows the check and does not utter a word, as if he minutely described it. We can not assume that what was adopted by both parties as a matter of convenience only, shall impose any liability upon either to guarantee the genuineness of the checks.

The plaintiffs also contend that the money was paid by mistake, and the defendants can not in good conscience retain it. The rule is admitted that where money is paid by one party, through mutual mistake of facts, in respect of which both are mutually bound to inquire, it may be recovered back.

(Chitty on Bills, 9th ed., 425; *Commercial Bank* vs. *Bank of Albany*, 1 Hill, 287, 292, 293; *Bank of Commerce* vs. *Union Bank*, 3 Comstock, 237).

But this doctrine involves this question, whether the parties are in mutual fault. It does not apply to that class of cases we have considered, when the bill is taken in good faith and paid to the holder by the drawee, thereby admitting the genuineness of the instrument; if it could be so applied, then another rule of law, and a most salutary one, would be abrogated, "that when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion loss, must sustain it."

(Chitty on Bills, 9th ed., 256; *Lickbarrow* vs. *Mason*, 2 T. R. 70).

The principle is more fully stated by Judge Story in 10 Wheaton, 342, already referred to. "In respect to persons equally innocent, when one is bound to know and act upon his own knowledge, there seems to be no reason to change the loss from the former to the latter, and there is nothing unconscientious in retaining the sum received from the bank, in payment of notes, which its own acts have assumed to be genuine."

Any other view of the legal relations of the parties would defeat the right of the purchaser of a bill to be regarded as a *bona-fide* holder and place the parties where they would be found, if they had been implicated with the original fraud.

It has been suggested that there is a distinction between bills and checks, which takes the present case without the ordinary rule. We can not so understand the law; for all practical purposes they are the same, governed by the same legal principles, and, with some exceptions, subject to the same rules. Both may pass by indorsement; though checks generally pass by delivery; both are orders drawn for the payment of money, on a third person, and are a substitute in every commercial community for cash. They are so universally regarded as media of exchange, that to restrict their negotiability would seriously

affect commercial confidence and impair the facilities of business. We can not admit the ingenious argument of counsel by whom the distinction has been assumed; we perceive none in any important particular upon general principles, and we find none in the books. Whenever a check has been paid by a banker, drawn upon him, and which has afterward been discovered to be a forgery, the rule applicable to bills has been universally applied to such checks.

(*Smith* vs. *Mercer*, 6 Taunton, 74; *Hall* vs. *Fuller*, 5 B. & C., 750; Chitty on Bills, 429; *Young* vs. *Grote*, 4 Bing., 258; *Levy* vs. *U. S. Bank*, 1 Binney, 27; *City Bank, N. O.* vs. *Girard Bank*, 10 Louis, 562; *Marsh et al.* vs. *Small et al.*, 3 Louis. An. Rep., 402).

It is very strenuously urged that the plaintiffs were not bound to claim the amount they had paid until they had discovered the forgery. The check, it will be recollected, was purchased on the 14th December, paid the same day, and the defendants were not notified until the 24th that it had been forged. The examination of the authorities already made by the court, and the conclusion to which it has arrived, as to the position in which the plaintiffs placed themselves by the payment of the check, will preclude any further argument as to the duty of the drawees to examine the signatures of their customers. The question, however, very properly arises when the notice should have been given and the check returned to the defendants. It will be borne in mind that it is in evidence that as between these parties all mistakes were to be corrected on the same day the checks were paid; if they were found to be defective they were returned on that day, and all errors were rectified. This was the mutual understanding of the parties, and imposed upon both the duty of examining all checks on the day they were received, and to communicate at once any discovery that would affect the relations of either. Their liability to refund for checks improperly paid was limited to the day upon which the payment was made.

If there had been no such agreement, we should hold that the claim must have been asserted, and the demand for repayment made, on the same day. Any other rule would measure the degree of diligence in giving notice by the circumstances of the case, and that to be determined by mere discretion or perhaps caprice.

In *Wilkinson* vs. *Johnston* (3 B. & C., 428), notice was given on the same day. In *Cocks* vs. *Masterman* (9 B. & C., 902, 907), Mr. Justice Bayley said: "But we are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is honored or dishonored, and if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it can not recover it back."

(See also *Levy* vs. *Bank United States*, 1 Binney, 27; Story on Bills, § 451).

The situation of the parties would be different where the forged notes, or checks of third persons, or of other banks, had been received. Then there would have been no legal payment, as no consideration passed, and the question of notice to the party from whom they were received would be one of time only, to be determined by circum-

stances. This was the ground of the decision in *Jones* vs. *Ryder* (5 Taunt., 488), and *Bruce* vs. *Bruce*, *ib.*, 495.

The rule is very clearly stated by Judge Parker, in *Gloucester Bank* vs. *The Salem Bank* (17 Mass., 33). "The party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. The principle will apply in all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay; for he knows better than any other whether they are his notes or not, and if he pays them or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

But it is said that the strict rule should not be applied here, because the defendants lost nothing by the delay; that the moment they purchased the check their remedy was gone, as in all probability the forger immediately fled. The receipt of the money, it is said, did not alter the situation of the parties, or place the defendants in a better condition than they held before. This proposition is but a *petitio principii*, it involves the propriety of the rule the court has already adopted, and might well be considered as sufficiently answered and refuted. But it may well be asked, if we should permit the inquiry, is there not a full reply to the question in the facts of the case? Can it be said with any certainty, that if notice had been given on the same day the check was paid, the culprit might not have been secured? At any rate the probability of his arrest would have been stronger than if the knowledge of the fraud had been postponed, and opportunity thereby given for escape; the chances of detection would certainly decrease with the delay.

We think there is no propriety in discussing the question whether the defendants might or might not have suffered by the postponement of the notice; it is sufficient that no notice was given. It is the settled law that "the death, bankruptcy, or known insolvency of the maker or acceptor, or his being in prison, do not constitute an excuse to give due notice of non-acceptance or non-payment. It is no excuse that the chance of obtaining any thing upon the remedy over was hopeless; the parties are entitled to have that remedy offered to them, if it is not, the law says they are discharged." (Chitty on Bills, 482, 483).

Some confusion has occurred in blending the case where the indorsement is forged, and that in which the name of the drawer or maker is counterfeited; and many of the elementary writers permit the notes to their text to be filled up with contradictory authorities, thereby sustaining no principle, much less describing the obvious difference that exists between cases so clearly distinguishable from each other. It is very clear that the holder who traces his title through a forged indorsement, can not be protected, though he may have been paid the amount of the bill by the drawee or acceptor. A *bona-fide* purchaser even of such a bill would acquire no right; he would be regarded as in mutual mistake with the payee as to the genuineness of the indorsement,

and be compelled to refund if he had been paid. There can be no analogy drawn from this state of facts, to affect in any degree the relations between parties situated like the plaintiffs and defendants in this suit.

(Chitty on Bills, 286, 430; *Canal Bank* vs. *Bank of Albany*, 1 Hill, 291; *Talbot* vs. *Bank of Rochester*, *ib.*, 295; Story on Bills, § 309).

We have thus considered the various questions submitted for our consideration. We have been relieved of much labor by the ability and clearness with which the counsel for both parties have stated and argued their several propositions. The case is important, not only as to the amount in controversy, but also in the many very interesting principles its decision necessarily involves. It is but just that the law should be known, and when it is known promptly administered. There should be no doubt where the business of the mercantile community may be so vitally affected by ignorance of the rule or a want of confidence in its adoption by the court. It is our duty, then, to declare what the law is, to vindicate its certainty by adhering to its spirit and meaning.

The plaintiffs must be called and a judgment of non-suit entered. Fox & Walker for plaintiffs; Worthington & Matthews for defendant.

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## FRAUDULENT BILLS AND CHECKS.

The importance attached to the recently decided case of *Ellis & Morton* vs. *The Ohio Life & Trust Co.*, at Cincinnati, has induced us to obtain a copy of the opinion of the conrt as rendered by Judge Storer. It will be found that in reviewing the case and the points urged by the counsel on both sides, the court has referred to all the important or leading cases contained in the English and the United States Reports that may be considered as similar cases or that have a bearing upon the present one.

As our readers are not presumed to have at hand the numerous law reports or cases referred to in the preceding case of *Ellis & Morton* vs. *The Ohio Life & Trust Company*, we have thought it advisable to publish a summary of these cases. The American cases of this character have been decided in the New York, Massachusetts, Vermont, and Louisiana courts, and in the supreme court of the U. S. We now proceed to give the main points decided in the cases quoted in the opinion of the superior court of Cincinnati, including those of the English as well the American courts.

### SUMMARY OF CASES.

ENGLISH CASES.—1. *Young* vs. *Grote*; 2. *Snow* vs. *Peacock*; 3. *Beckwith* vs. *Corrall*; 4. *Slater* vs. *West*; 5. *Arbauin* vs. *Anderson*; 6. *Goodman* vs. *Harvey*; 7. *Uther* vs. *Rich*; 8. *Foster* vs. *Pearson*; 9. *Bramah* vs. *Roberts*; 10. *Price* vs. *Neal*; 11. *Wilkinson* vs. *Lutwidge*; 12. *Jenyns* vs. *Fowler*; 13. *Bass* vs. *Clive*; 14 *Smith* vs.

*Mercer;* 15. *Jones* vs. *Ryde;* 16. *Bruce* vs. *Bruce;* 17. *Smith* vs. *Chester;* 18. *Lickbarrow* vs. *Mason;* 19. *Wilkinson* vs. *Johnson;* 20. *Cook* vs. *Masterman;* 21. *Gill* vs. *Cubit;* 22. *Dawn* vs. *Halling;* 23. *Hall* vs. *Fuller;* 24. *Lawson* vs. *Weston;* 25. *Crook* vs. *Jadis;* 26. *Backhouse* vs. *Harrison.*

AMERICAN CASES.—1. *Levy* vs. *Bank U. S.;* 2. *Bank U. S.* vs. *Bank State of Georgia;* 3. *Gloucester Bank* vs. *Salem Bank;* 4. *Bank of St. Albans* vs. *Farmers & Mechanics' Bank;* 5. *Bank of Commerce* vs. *Union Bank, N. Y.;* 6. *Goddard* vs. *Merchants' Bank;* 7. *Marsh* vs. *Small;* 8. *City Bank, N. O.* vs. *Girard Bank;* 9. *Herf & Co.* vs. *Schultz;* 10. *Powell* vs. *Jones;* 11. *Talbot* vs. *Bank of Rochester;* 12. *Canal Bank* vs. *Bank of Albany;* 13. *Cone* vs. *Baldwin;* 14. *Wheeler* vs. *Guild;* 15. *Adams* vs. *Otterback;* 16. *Weisser* vs. *North River Bank, N. Y.*

### *I. Checks in Blank.*

*Young* vs. *Grote and others,* 4 Bingham's Reports, 253. In this case a customer of a banker delivered to his wife certain printed checks signed by himself, but with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of the business. She caused one to be filled up with the words fifty pounds two shillings: the word fifty being commenced with a small letter and placed in the middle of the line. A clerk of the party altered it by inserting the words *three hundred* before the fifty, and the figure 3 between the £ and the 50.

Before the English court of common pleas, 1827, it was held (the bankers having paid the check) that the loss must fall upon the bankers.

### *II. Stolen Bank-note.*

*Snow and others* vs. *Peacock and others,* 2 Carrington & Payne's Nisi Prius (1827). If a banker in a small market-town change a £500 bank-note for a stranger without any further inquiry than merely asking his name, he is liable in *trover* to a party from whose possession such a note had been unlawfully obtained; and the question in such case is, not whether there was an honest holding on the part of the banker, but whether, under the circumstances, there was a want of due caution on his part. The plaintiff, however, in such case, must show that he has done every thing which in reason he ought. In this case a dividend warrant was paid into a bankers' by a customer. The bankers sent it by a porter of the house to the Bank of England, to get cash for it: he returned without the money, saying he had been robbed of it. *Held,* by the court (the porter being dead), that proof of those facts was sufficient evidence of possession on the part of the bankers to enable them to maintain *trover* for a £500-note against a party into whose hands it had come under circumstances which would not entitle him to retain possession of it.

### *III. Stolen Bill of Exchange—Failure of Notice.*

*Beckwith* vs. *Corrall and others,* 2 Carrington & Payne's Nisi Prius.

If a party possess himself of a stolen bill or note improperly, a demand and a refusal are not necessary previous to an action of *trover* brought for its recovery by the loser. This was an action on a lost bill of exchange for £33 2*s*.

*Held*, if a party be robbed of a negotiable security eight days before it is payable, and he does not give notice of his loss till the end of seven days, and then only to the payer, but gives no notice of any kind to the public, he does not use due diligence, and can not recover in *trover* against a party who discounted such security six days after the loss.

And in such case, the questions proper for the jury are, first, whether the plaintiff has used due diligence, and then whether the defendant has acted with due caution—unless there should be reason to suspect that the defendant knew when he discounted the security that it had been obtained by means of a felony: in which case the conduct of the plaintiff may be left out of the question.

### *IV. Stolen Bill of Exchange—Want of Inquiry.*

*Slater and others* vs. *West*, 3 Carrington & Payne, 325 (1828). A trader in London took a bill of exchange in part payment for goods, of a person representing himself to be a tradesman from the country, and to have been recommended by a customer, and sent the goods, in consequence of an order from the buyer to a public-house, which was not a booking-office, without making any inquiries except as to the respectability of the acceptor. The bill turned out to have been stolen, and in an action by the trader against the acceptor the defendant had a verdict, on the ground that the plaintiff had taken the bill out of the ordinary course of trade, and under circumstances which ought to have excited his suspicion.

### *V. Accommodation Bill—Want of Consideration.*

*Arbouin* vs. *Anderson*, 1 Queen's Bench, 498 (1841). Assumpsit by indorsee against acceptor of a bill of exchange alleged to have been indorsed by R., the drawer, to M., and by M. to plaintiff.

Plea that the bill was for the accommodation and at the request of M., and without any consideration or value drawn and indorsed by R., and accepted by defendant, and that there never was any consideration or value for the drawing or indorsing by R. or the accepting by defendant, or for either of them paying the bill, or for M. indorsing or paying.

Replication, that the bill was indorsed by M. in blank and that afterward, and before the bill was due, namely, on etc., A. & B., who then appeared to be, and whom plaintiff then believed to be, the lawful holders of the bill and entitled thereto, delivered the same to plaintiff for a good consideration, and for value, namely, for the amount of the said bill, and plaintiff then received the same for such good consideration, and without notice of the premises in the plea mentioned.

*Held*, on special demurrer, that the replication made out sufficient title in the plaintiff, if it showed that he received the bill *bona fide*

from persons who were the holders, nothing to the contrary appearing, and that the replication did, in effect, show such a receipt from the holders, and was well enough pleaded in confession and avoidance.

*Quære*, whether the plea was good, as it did not show that the plaintiff gave no consideration. *Per* Wightman, J., it was bad on special, and *semble* on general demurrer.

On argument of a demurrer, the paper books must state the points intended to be made on each side. The party whose pleading is demurred to can not argue that a prior pleading of the opposite party is bad, unless his paper book states the point, although the objection would be available on general demurrer.

### *VI. Failure of Consideration—Gross Negligence.*

*Goodman* vs. *Harvey and others*, 4 Adolphus & Ellis, 870 (1836). In giving notice of non-payment to the drawer of a foreign bill, resident abroad, it is sufficient to inform him that the bill has been protested without sending a copy of the protest.

In an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, Whether the indorsee acted with good faith in taking the bill? The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of *mala fides*, but is not equivalent to it.

### *VII. Bill of Exchange—Failure of Consideration.*

*Uther* vs. *Rich*, 10 Adolphus & Ellis, Queen's Bench Reports, 784 (1839). To assumpsit on a bill of exchange, drawn by defendant, indorsed by him to H. and by H. to plaintiff, defendant pleaded that he indorsed in blank and never delivered the bill to H., but delivered it to L. who, till H. became possessed, held it for the sole use of defendant and for the specific purpose that he, L., should get it discounted for and pay the proceeds to defendant; that L. fraudulently and in violation of good faith, and contrary to the said purpose, delivered the bill to H.; and H. took it without discounting for defendant, contrary to the said purpose, and in breach and violation thereof; to wit, for the purpose and under color and pretense of securing an alleged debt from L. to H.; that H. was not *bona-fide* holder for value or consideration; and that defendant never had received consideration or value from L., or H., or plaintiff, or any other, for the indorsing or payment of the bill *replication de injuria*.

*Held*, that on this issue the question as to plaintiff was, whether he gave any value for the bill, and that if he did, he was entitled to the verdict, though the circumstance of the fraud alleged might in other respects be true, and the plaintiff privy to them, for that the denial of his being a *bona-fide* holder for value, as here worded, did not raise the question of his privity to the fraud.

### *VIII. Bills of Exchange as Collaterals for Advances.*

*Foster* vs. *Pearson*, 1 Crompton, Meeson & Roscoe, 849 (1835). W. & P., brokers in London, had in their possession bills of different customers to the amount of nearly £3,000, which had been left with them to raise money upon. They mixed these bills with others of their own to about the same amount, and deposited the whole with F., who were merchants and capitalists, for an advance of £3,000 then made, and for a preceding advance, made a few days before, on a promise to bring bills. Evidence was given that it was usual and customary for bill-brokers in London to raise money by a deposit of their customers' bills in a mass, and that the bill-broker alone was looked to by the customer who gave the bill-broker dominion over the bill.

In an action brought by F., on one of the bills, against one of the customers, who was a party to the bill, the judge left it to the jury to say whether F., the plaintiffs, took the bills from W. & P., the bill-brokers, with due care and caution, and in the ordinary course of business; and the jury being of opinion that they had so taken the bills, found a verdict for the plaintiffs. *Held*, that the defendant, the customer, could not complain of such summing up, and that the court would not disturb the verdict.

In another action arising out of the same transaction, and which was an action of *trover* brought by one of the customers (who was himself also a bill-broker) against F. to recover the value of some of the bills, the judge directed the jury that the principle laid down in *Haynes* vs. *Foster*, that a bill-broker who receives a bill from a customer to procure it to be discounted, had no right to mix it with the bills of other customers, and to pledge the whole mass as a security for an advance of money, and still less had no right to such bill as a security or part security for money previously due from him, was to be taken by them as the general law; but that, notwithstanding such general rule of law, the parties might contract as they thought proper, and he left it to the jury to say whether the usage set up by the defendants as to the course of dealing in such cases was established to their satisfaction, and if so, whether they thought that the plaintiff, who was a bill-broker himself, had contracted with reference to that usage; and the jury having found for the defendants, the court refused to disturb the verdict.

A bill-broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place.

*Semble* that the old established rule of law, "that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, can give a title which he does not himself possess, to a person, taking them *bona fide* for value," is not to be qualified by treating as essential that the person so taking them should take them with due care and caution; but that the person taking them *bona fide* for value, has good title, though he take them without care

or caution, except so far as the want of such care and caution may affect the *bona fides* and honesty of the transaction.

*IX. Fraudulent Negotiation—Failure of Consideration.*

*Bramah* vs. *Roberts*, 1 Bingham's New Cases, 469 (1835). To a plea by the acceptor of a bill of exchange that it was to the knowledge of the holder negotiated by fraud, and that no consideration was given for the indorsement to the holder, it is sufficient for the holder to reply generally that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration.

*X. Forged Bill paid by Drawee.*

*Price* vs. *Neal*, 3 Burrows, 1354 (1762). Where a forged bill of exchange has been accepted and paid by the drawee, he can not recover the money back from the indorsee to whom the drawee paid it.

*XI. Bill of Exchange—Proof of Acceptance.*

*Wilkinson* vs. *Lutwidge*, 1 Strange's Exchequer, 648. In an action against acceptor of a bill of exchange the holder need not prove the hand of drawer. The chief justice was of opinion that the proof of an acceptance was a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his own correspondent.

*XII. Bill of Exchange—Handwriting of Drawer.*

*Jenys* vs. *Fowler*, 2 Strange, 946. In an action by the indorsee of a bill of exchange against the acceptor, it was held not to be necessary to prove the hand of the drawer; and the plaintiff rested on the proof of the acceptance.

*XIII. Bill of Exchange—Signature of Firm.*

*Bass* vs. *Clive*, 4 Maule & Selwyn, Nisi Prius, 13 (1815). A bill of exchange drawn in this form, "Pay to our order," etc., signed in the name of two persons and Co., and accepted by defendant, may be declared upon by the indorsees as a bill drawn by an aggregate firm, and if it be proved that the firm consists of only one person, yet it is not a variance.

*XIV. Forged Acceptance of Bill of Exchange.*

*Smith* vs. *Mercer*, 6 Taunton, 76 (1815). The defendants took a bill, accepted payable at the plaintiffs, who were the drawee's bankers, and indorsed it to their [the defendants'] agents, to whom the plaintiffs paid it when due, and seven days after sent it as their voucher to the drawee, who apprised them that the acceptance was forged. *Held*, by three against Chambre J., that the plaintiffs could not recover from

the defendants the amount which they had thus paid on the forged acceptance.

### *XV. Discount of a Forged Bill by a Broker.*

*Jones* vs. *Ryde*, 5 Taunton, 488 (1814). A person who discounts a forged navy bill for another who passed it to him without knowledge of the forgery, may recover back the money as had and received to his use upon failure of the consideration.

So a person who receives forged bank-notes in payment.

### *XVI. Forged Government Bill.*

*Bruce* vs. *Bruce*, 5 Taunton, 495 (1814). A similar case to *Jones* vs. *Ryde* was argued on a subsequent day in this term, on the forgery of a victualing bill, which the victualing officer, on whom it was drawn, had paid before the forgery was discovered; and Pell, Serg't. contended that circumstances identified the case with *Price* vs. *Neal*, 3 Burr., 1354. But the court held it was distinguishable from that case, but not from *Jones* vs. *Ryde*.

### *XVII. Bill of Exchange—Proof of Indorsement.*

*Smith* vs. *Chester*, 1 Term Reports, 654 (1787). In an action against the acceptor of a bill of exchange, it is necessary to prove the handwriting of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted.

### *XVIII. Bill of Exchange—Consigned Goods—Insolvency of Consignee.*

*Lickbarrow* vs. *Mason*, 2 Term Reports, 63 (1787). The consigner may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the consignee, but if the consignee assign bill of lading to a third person, for a valuable consideration, the right of the consigner as against such assignee is divested.

There is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person.

### *XIX. Bill paid by Mistake—Entitled to Recovery.*

*Wilkinson* vs. *Johnson*, 3 Barnwall & Cresswell, 428 (1824). Certain bills of exchange purporting to have, among others, the indorsement of H. & Co., bankers, of Manchester, were presented for payment in London, at a house where the acceptance appointed them to be paid.

Payment being refused, the notary who presented them took them to the plaintiff, the London correspondent of H. & Co., and asked them to take up the bill for their honor. He did so, and struck out the indorsements subsequent to that of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morning it was discovered that the bills were not genuine, and that names of the

drawer, acceptor, and H. & Co., were forgeries. Plaintiff immediately sent notice to the defendant, and demanded to have the money repaid. This notice was given in time for the post, so that notice of the dishonour could be sent the same day to the indorsers. *Held*, that the plaintiff having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy against the prior indorsers. *Held*, secondly, that the rights of the parties were not altered by the erasure of the indorsements, that having been done by mistake, and being capable of explanation by evidence.

*XX. Forged Bill paid—Failure to Notify—Non-recovery.*

*Cook* vs. *Masterman*, 9 Barnwall & Cresswell, 902 (1829). A bill purporting to have been accepted by A. was presented for payment to his banker on the day when it became due. The latter believing it to be the genuine acceptance of A. paid the amount; but on the following day, having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him to return the money. *Held*, that the holder of the bill is entitled to know, on the day when it becomes due, whether it is honored or dishonored, and that as no notice of the forgery had been given on the day the bill became due, the parties who had paid the money were not entitled to recover it back.

*XXI. Stolen Bill of Exchange—Want of Caution.*

*Gill* vs. *Cubitt*, 3 Barnwall & Cresswell, 460 (1824). Where a bill of exchange was stolen during the night, and taken to the office of a discount broker early in the following morning by a person whose features were known, but whose name was unknown to the broker, and the latter being satisfied with the name of the acceptor, discounted the bill according to his usual practice, without making any inquiry of the person who brought it—*Held*, that in an action on the bill by the broker against the acceptor, the jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man; and they having found for the defendant, the court refused to disturb the verdict.

*XXII. Lost Check—Want of Caution.*

*Down* vs. *Halling*, 4 Barnwall & Cresswell, 330 (1825). The owner of a check, drawn upon a banker for £50, having lost it by accident, it was tendered five days after the date to a shopkeeper, in payment of goods purchased to the value of £6 10*s.*, and he gave the purchaser the amount of the check, after deducting the value of the goods purchased.

The shopkeeper the next day presented the check at the bankers, and received the amount. *Held*, that in an action brought by the person who lost the check, against the shopkeeper, to recover the value of

the check, the jury were properly directed to find for the plaintiff if they thought the defendant had taken the check under circumstances which ought to have excited the suspicion of a prudent man. *Held*, secondly, that the shopkeeper having taken the check five days after it was due, it was sufficient for the plaintiff to show that he once had a property in it without showing how he lost it.

### *XXIII. Bank Check—Fraudulent Alterations.*

*Hall* vs. *Fuller*, 5 Barnwall & Cresswell, 750 (1826). Where a check drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures, was afterward altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum—*Held*, that he could not charge the customer for any thing beyond the sum for which the check was originally drawn.

### *XXIV. Lost Bill—Recovery.*

*Lawson and others* vs. *Weston and others*, 4 Espinasse, 56 (1801). If a bill has been lost, and the loser has advertised it in the newspapers, and it is discounted for the person who found it, and so came fraudulently by it, this entitles the person discounting it to recover the amount, if done *bona fide* and without notice of the way by which the holder became possessed of it.

### *XXV. Fraudulent Negotiation—Accommodation Bill.*

*Crook* vs. *Jadis*, 5 Barnwall & Adolphus, 911 (1834). In an action by the indorsee against the drawer of an accommodation bill, which had been fraudulently disposed of by the first indorsee, and afterward discounted by the plaintiff, it is no defense that the plaintiff took the bill under circumstances which ought to have excited the suspicion of prudent men that it had not been fairly obtained: the defendant must show that the plaintiff was guilty of gross negligence. This was an action on a bill of exchange dated May 23, 1831, for £1,000, accepted by Lord Foley. The defense was, that it was a mere accommodation bill, and had been issued by the defendant to a bill-broker to get discounted, and that the latter had fraudulently negotiated it for his own use. Judgment for plaintiff.

### *XXVI. Lost Bill of Exchange—Fraud.*

*Backhouse* vs. *Harrison*, 5 Barnwall & Adolphus, 1106 (1834). To an action by an indorsee against the indorser of a bill of exchange, who had lost the bill by accident, it is a good defense that the plaintiff took the bill fraudulently, or under such circumstances that he must have known that the person from whom he took it had no title; or that the plaintiff was guilty of gross negligence in taking it. But it is no defense that he took it under circumstances in which a prudent and

cautious man would not have taken it. Action on two bills of exchange which were dropped by a lady into the canal and much disfigured thereby, but which were discounted for a stranger who could not write his name, and had to make his mark in lieu of indorsement. Judgment for plaintiff.

AMERICAN CASES.

*I. Bank Check—Forgery.*

*Levy* vs. *Bank U. S.*, 1 Binney's Pennsylvania Reports, 27 (1801). The entry of a check as cash, made by a bank in the private bank-book of the holder, is equivalent to payment; and if the check is a forgery, of which the holder was ignorant, the bank must support the loss. It seems that the acceptor of a forged bill is bound to pay it, not upon the principle that his acceptance has given a credit to the bill, but because it is his duty to know the drawer's handwriting, which he is precluded from disputing. If a forged check is credited as cash in the holder's bank-book, and afterward, upon being informed of the forgery, and under a mistake of his rights, he agrees that if the check is really a forgery it is no deposit, he is not bound by the agreement.

*II. Forged Bank-bills.*

*Bank U. S.* vs. *Bank of the State of Georgia*, 10 Wheaton's U. S. Supreme Court Reports, 333 (1825). In general, a payment received in forged paper, or in any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand.

But this principle does not apply to a payment made *bona fide* to a bank in its own notes, which are received as cash, and afterward discovered to be forged.

In case of such a payment npon general account, an action may be maintained by the party paying the notes, if there is a balance due him from the bank upon their general account, either upon an *insimul comput assent*, or as for money had and received. [See *Bankers' Mag.*, vol. ii., p. 280.

*III. Genuine Bank-bills—Forged Signatures.*

*Gloucester Bank* vs. *Salem Bank*, 17 Mass., 33 (1820). Where a banking company paid notes on which the name of the president had been forged, and neglected for fifteen days to return them, it was held that they had lost their remedy against the person from whom the notes had been received.

*IV. Bank Check—Forgery.*

*Bank of St. Albans* vs. *Farmers & Mechanics' Bank*, 10 Vermont, 141 (1838). Where a forged check, purporting to be drawn by a customer on a bank where such customer keeps a deposit, is paid at such bank to an innocent holder, who paid a valuable consideration for

it, and who had no knowledge of the forgery, such bank can not recover of such holder the amount so paid.

If such check is purchased by another bank in good faith, and is received in the course of business by the drawee, and passed to the credit of the bank that purchased it, and notice of the forgery is not given the bank so purchasing it until two months afterward, the bank on which the check purported to have been drawn thereby makes the loss its own.

In such a case, notice of the forgery should be immediately given to entitle the drawee to a recovery.

### *V. Altered Bill of Exchange.*

*Bank of Commerce* vs. *The Union Bank, N. Y.*, 3 Comstock's Reports N. Y. Court of Appeals, 230 (1850). The drawee of a bill of exchange, it seems, is presumed to know the handwriting of the drawer.

And the payment of a bill by a drawee is ordinarily an admission of the drawer's signature, which he is not afterward, in a controversy between himself and the holder, at liberty to dispute.

And, therefore, if the drawer's signature is on a subsequent day discovered to be a forgery, the drawee can not compel the holder, to whom he has paid the bill, to restore the money, unless the holder be in some way implicated in the fraud.

But the reason of the rule fails, and the rule itself does not apply, where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill.

A bank in New Orleans drew a bill at sight upon the plaintiffs' bank in New York for $105, payable to "J. Durand." After it was issued, the bill was fraudulently altered to a bill for $1,005, payable to J. Bennet, and indorsed with that name. The plaintiffs, at sight, paid the bill to the defendants' bank in New York, which had received it for collection from a bank in Charleston. *Held*, that the plaintiffs, on ascertaining the forgery, were entitled to recover back the money, the jury having found that they were not guilty of any negligence in not discovering the forgery before paying the bill, and notice of the forgery having been given as soon as discovered.

Money paid by one party to another, through a mutual mistake of facts in respect to which both were equally bound to inquire, may be recovered back.

### *VI. Forged Bill paid Supra-Protest.*

*Goddard* vs. *The Merchants' Bank*, 4 Comstock's N. Y. Reports, 147 (1850). The drawee of a bill is bound to know the handwriting of the drawer; and if he pays the bill to a *bona-fide* holder, he can not recover the money back, although the bill turns out to be a forgery.

And the same rule applies in general, it seems, to a party who intervenes and takes up a protested bill for the honor of the drawer. If he pays the bill after seeing it, he is concluded by the act, and can not recover back the money, although the bill is a forgery.

A forged bill, purporting to be drawn by a bank in Ohio, was pre-

sented to the drawees in New York, and payment refused on Saturday, for want of funds of the drawers. On Monday following, the plaintiff, on being informed of the matter, called at the office of the notary who had the bill for protest and notice, and left his check for the amount, in order to take up the bill for the honor of the drawers. In consequence of the absence of the notary from his office he did not see the bill, but left word to have it sent to his place of business. The notary, on the same day, delivered the check over to the holder of the bill, but did not send the bill to the plaintiff. The plaintiff called again the next day at the office of the notary, and on being shown the bill, ascertained and pronounced it to be a forgery. *Held*, that under the circumstances the plaintiff was not chargeable with negligence, and that he was entitled to recover the money he had paid, on the ground of mistake.

And although in consequence of the omission on the part of the plaintiff sooner to declare the forgery, the notices of protest were not sent out until Tuesday, when it was too late, yet *held*, that this was no defense to the action. The defendant, who held the bill for collection merely, needed no recourse to any other party, and the payee who forged the bill was answerable to the owner without notice of the dishonor.

### *VII. Stolen Bill of Exchange.*

*Marsh et al.* vs. *Small et al.*, 3 Louisiana Annual Reports, 402 (1848). Where a check on a bank is received in payment during banking hours of the day on which it was drawn, in the usual course of business, and under circumstances not calculated to excite suspicion, and no negligence is shown from which bad faith can be inferred, the holder may recover the amount against the drawer, though the check was lost by, or stolen from, the real owner.

### *VIII. Bill paid Supra-Protest—Damages.*

*City Bank, New Orleans* vs. *Girard Bank, Philadelphia*, 10 Louisiana Reports, 562 (1837). Where a bill is paid supra-protest, for the honor of the drawer, he can only recover of the drawee the costs of protest for non-acceptance.

Where an agreement contains a dissolving condition on notice given by one of the parties, and before the expiration of the notice, the other desiring to continue it proposes some new modifications which are accepted by the adverse party two days after the notice to dissolve had expired—*Held*, that this was a waiver of his right of considering the agreement at an end, and that he was bound for a bill drawn in the mean time, under the agreement.

The obligation on the drawee to pay a check and a bill of exchange is the same. Both contain a request from the drawer to the drawee, to pay a sum of money to a third person, in whose favor the check or bill is drawn.

When there is no question of fact, and the sole question being the construction of an agreement or written instrument, of which the court

is the legitimate judge, although the verdict be set aside, the case will not be remanded for a new trial.

The acts of the legislature giving damages on protested bills and notes only relate to those due by the drawers and indorsers, and are silent in regard to those which are claimed from drawees and acceptors.

But when damages are claimed by the drawer from the drawee, who was bound to honor the draft, the latter must indemnify the former for the damages resulting from the dishonor, that is, whatever he has had to pay the holder.

### *IX. Informal Specification.*

*Herf & Co.* vs. *Shultz et al.*, 10 Ohio Supreme Court Reports, 263 (1840). In a *capias ad respondendum*, the insertion of the mere initial letters of the plaintiff's Christian name is a fatal defect in the description of the person.

In or about the sum of $4,930, in an affidavit to hold to bail, is not sufficiently certain. The amount sworn to in the affidavit must be indorsed on the writ.

The supreme court do not allow the writ of *certiorari* before a final disposition of the cause in the court below.

### *X. Non-Suit.*

*Powell* vs. *Jones*, 12 Ohio, 35 (1843). Whenever it appears in the progress of a trial that the plaintiff is not entitled to maintain his action, the court may interpose and direct a non-suit, although the same objection appears on the face of the declaration, and might have been made upon demurrer.

An action may be maintained before a justice of the peace by *scire facias*, against a constable, for a false return upon *mesne process*. A justice of the peace has jurisdiction of such cases under the statute.

### *XI. Certificate of Deposit—Fraud.*

*Talbot* vs. *Bank of Rochester*, 1 Hill's N. Y. Supreme Court Reports, 295 (1841). T., the owner of a certificate of deposit in the Bank of L., payable to order, caused it to be indorsed with directions that it should be paid to W. & Co., and then transmitted it to them by mail, though without their knowledge or request. It never reached W. & Co., but was stolen on its way, and their names forged upon it, after which it came to the defendants' hands in the ordinary course of business, who collected the money on it, supposing themselves to be the owners. *Held*, that T. had an election, either to sue the defendants in trover, as for a conversion of the certificate, or to recover the amount in an action for money had and received.

And though the Bank of L. had been guilty of laches in apprising the defendants of the forgery after the payment of the certificate—*Held* that this constituted no defense against T.'s claim, however the matter might stand as between the defendants and the bank.

Under such circumstances a recovery and satisfaction in favor of T against the defendants would transfer the property in the certificate to the latter.

The owner of a certificate of deposit who indorses it payable to another, and sends it to him by mail, but without his knowledge, retains the property in it until the indorsee receives it.

### *XII. Bill of Exchange—Forged Indorsement.*

*Canal Bank* vs. *Bank of Albany*, 1 Hill's N. Y. Reports, 287 (1841). The defendants, indorsees of a draft payable to B.'s order, received the same through several successive indorsements, B.'s name appearing as the first; and, as agents of their immediate indorser, but without disclosing their agency, presented it to the plaintiffs, by whom it was paid. The latter subsequently ascertained that the name of B. was a forgery, and having notified the defendants of this fact, sued to recover back their payment. *Held*, that though the defendants were innocent of any intended wrong, they had obtained the money of the plaintiffs on an instrument to which they had no title, and were therefore bound to refund; and this though no notice of the forgery was given till more than two months after they had received the money and transmitted it to their principal.

*Held*, also, that the payee was not disqualified by interest from being a witness for the plaintiffs.

None but the payee can assert any title to a bill, or note payable to order, without his indorsement.

*Semble*, that if one accept a draft in the hands of a *bona-fide* holder, he will not be allowed after to dispute the genuineness of the drawer's signature, though he may that of the indorsers, and payment operates in this respect the same as an acceptance.

Money paid to one party by another, through a mutual mistake of facts, in respect to which both were equally bound to inquire, may be recovered back.

*Semble*, where a drawer of drafts has paid to an innocent holder, on the faith of a forged indorsement, mere lapse of time in the abstract, however long, between the payment and notice of the forgery, will not deprive him of his remedy, even provided he has incurred no unreasonable delay after discovery of the forgery.

[Cases relating to the effect of delay in giving notice under these and similar circumstances commented on, and some of them disapproved, especially *Cocks* vs. *Masterman*, 9 Barnwall & Cresswell, 902.]

Where several successive indorsees have advanced money on a draft payable to order, and it turns out that neither had title, by reason of the first indorsement being a forgery, each may recover from his immediate indorser.

A bank, to which a draft indorsed and sent for the purpose of collecting it, as agent of the indorser, and which transacts the business without disclosing its agency, may be regarded and charged as principal by those with whom it thus deals; and it will be no answer that it

is the uniform custom of banks to transact such business without disclosing their agency.

### *XIII. Promissory Note—Failure of Consideration.*

*Cone* vs. *Baldwin*, 12 Pickering's Massachusetts Supreme C. Reports, 545 (1832). In an action by the holder against the maker of a negotiable note, founded on a consideration which failed, the defendant is not obliged to prove that the plaintiff purchased with full and certain knowledge of the want or failure of consideration; if the circumstances attending the transfer were such as to put him upon his guard, and he made no inquiry into the consideration, he purchased at his peril.

Where a promissory note, payable to the payee or bearer in nine months, was, within three or four days from the date, and for a full and adequate consideration, transferred by the payee to the plaintiffs by delivery merely, the payee saying that the plaintiffs must take it at their own risk, and that he would not be responsible for it, it was *held*, that the circumstances would not justify the jury in finding that the plaintiffs knew that the note had been obtained by the payee without a valid consideration or by fraud.

### *XIV. Promissory Note—Failure of Consideration.*

*Wheeler* vs. *Guild*, 20 Pickering's Massachusetts S. C. Reports, 545 (1838). Where a person takes a promissory note transferable by delivery, and not overdue or otherwise apparently dishonored, for a valuable consideration, in the usual course of business, and without actual or constructive notice that the holder has no right to collect or receive it, his title thereto is valid, notwithstanding it may have been lost by, or stolen from, the true owner, or deposited with such holder for a special purpose, without authority to collect or transfer it; but otherwise the title of the person so taking the note is not valid as against the true owner.

So, if a note is paid in full at maturity, by a party liable thereon, to a person having the legal right to the note in himself by indorsement and the possession thereof, and the party paying has no notice of any defect in the title of such holder, the payment will be good.

The plaintiff, who was the holder of a note indorsed in blank, delivered it to B. & G., who were in partnership as attorneys, to be held by them as collateral security for the payment of certain debts due from the plaintiff to B. and G. and other persons; and the note was placed among the private papers of G., by whom the business was in fact transacted. Some time after the payment of the debts so secured, but before the maturity of the note, the maker paid to B. the amount due on the note, exclusive of interest, and took therefor a receipt signed by B. alone, setting forth that it was in full payment of the note, and that the note was to be delivered up to the maker. It was *held*, that as the note was not in fact delivered up to the maker, and as the right of B. & G. to transfer and collect the note ceased upon the payment of the debts for which it was pledged, the payment to B. did

not operate as a payment and discharge of the note, and that the plaintiff might, notwithstanding such payment, recover the amount thereof of the maker.

### *XV. Promissory Note—Protest—Usage.*

*Adams* vs. *Otterback*, 15 Howard's U. S. Supreme Court Reports, 539 (1853). Where a note was given in the District of Columbia on the 11th of March, payable sixty days after date, and notice of its non-payment was given the indorser on the 15th May (being Monday), the notice was not in time.

Although evidence was given that since 1846 the bank which was the holder of the note had changed the pre-existing custom and had held the paper until the fourth day of grace, giving notice to the indorser on Monday when the note fell due on Sunday, this was not sufficient to establish an usage.

An usage, to be binding, must be general as to place, and not confined to a particular bank, and in order to be obligatory, must have been acquiesced in and become notorious.

### *XVI. Fraudulent Checks.**

*Weisser, Administatrix, etc.*, vs. *Dennison, President North River Bank, New York.* Before the N. Y. Court of Appeals, 1854. Checks forged by the confidential clerk of a depositor were paid by a bank, charged to the depositor in his pass-book, balanced, and with the forged vouchers, among others, returned to the clerk who examined the account at the request of the principal, and reported it correct. And the principal did not discover the forgeries until several months afterward, when he immediately made it known to the bank.

In an action by the administrator of the depositor to recover the balance of the deposit, *held*, that the bank could not retain the amount of the forged checks; that the bank paid the checks at its peril, and the depositor owed it no duty which required him to examine his pass-book or vouchers. The general term ordered a new trial, unless the plaintiff should consent to the reduction of the judgment to a specified sum, upon which consent the judgment was to be affirmed for the reduced amount. The plaintiff consented to the modification, and the defendant appealed from the judgment. The record not showing what items the general term rejected, was erroneous by reason of the uncertainty. But it appearing to the court that the original judgment was entirely correct, and its reduction an error, it was *held*, that the reduced judgment could not be reversed on the defendant's appeal, as he was not prejudiced either by its reduction or by the uncertainty.

What circumstances will amount to actual or constructive notice of any defect or infirmity in the title to the note, so as to let it in as a bar or defense against the holder for value, has been a matter of much

* This case, being a very recent one, is not quoted in the opinion delivered by Judge Storer; but as applicable to the points at issue, we add it.

discussion, and of no small diversity of judicial opinion. It is agreed on all sides that express notice is not indispensable; but it will be sufficient if the circumstances are of such strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry. For a considerable length of time the doctrine prevailed, that if the holder took the note under suspicious circumstances, or without due caution and inquiry, although he gave value for it, yet he was not to be deemed a holder *bona fide*, without notice. But this doctrine has been since overruled and abandoned, upon the ground of its inconvenience, and its obstruction to the free circulation and negotiation of exchange, and other transferable paper.—*Story on Promissory Notes*, § 197.

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DEMURRAGE.—LAY-DAYS IN LIVERPOOL.—CHARTER-PARTY, ETC., ETC.

[*Jonathan Pierson et al.* vs. *David Ogden.* United States District Court, in Admiralty, New York, 1854. Before Judge INGERSOLL.]

On the 28th of April, 1851, the respondent chartered the ship Hemisphere, then in this port, of the libelants, her owners, for a voyage from Liverpool to the port of New York. By the charter-party it was agreed that the ship should receive on board at Liverpool a full cargo of general merchandise, and not exceeding 513 passengers; and that the ship should not be obliged to take on board an amount of iron exceeding her registered tonnage. The respondent was to provide water, provisions, and berths, and all other expenses connected with the passengers, and to pay hospital and commutation fees in New York, and quarantine expenses. If the ship provided berths, the respondent was to pay the usual price for them, and he was to buy the passenger-stores then on board at their value in Liverpool. The lay-days for loading at Liverpool were to be as follows: "Commencing from the time the captain reports himself ready to receive cargo, fifteen running lay-days; and for each and every day's detention, by default of the respondent or agent, one hundred silver dollars per day to be paid by respondent."

The libelants now sue to recover the charter money which was agreed upon at £1,500, the value of the passengers' stores on board, and seven days' demurrage at Liverpool. The respondent denies that they are entitled to demurrage, and objects to paying the charter money, on the ground that the ship did not bring a full cargo.

By the act of 3 and 4 Wm. IV., c. 52, entitled "An act for the general regulation of the customs," it is provided, among other things, that no goods shall be shipped, or water borne to be shipped, on board any ship in any port or place in the United Kingdom, to be carried beyond seas, before due entry outward of such ship, and due entry of such goods, shall be made and cocket granted, nor before such goods shall be duly cleared for shipment, in manner therein directed, under pain of forfeiture.

It is also provided that before any goods be taken on board any out-

ward-bound ship, the master shall deliver to the collector or controller a certificate from the proper officer of the clearance inward of such ship on her last voyage, and also an account, signed by the master or his agent, of the entry outward of such ship for the outward voyage, etc.

If, however, it becomes necessary to lade any heavy goods before the whole of the inward cargo is discharged, in order to stiffen or ballast the ship, it is lawful for the collector or controller to issue to the master what is called a "stiffening note," being a permit to receive such goods for that purpose. After the whole of the inward cargo is discharged, the collector issues to the master what is called a "jerk note," being a permit which authorizes him to receive on board goods for his outward cargo.

The Hemisphere set sail from this port soon after the execution of the charter-party. She arrived at Liverpool in June, and soon after commenced discharging. On the 24th of June, having discharged a part of her cargo, her master obtained from the collector a "stiffening note," authorizing him to receive on board railroad iron only. On the 28th of June all her cargo was discharged, but the "jerk note," authorizing him to receive his outward cargo, was not obtained till the 30th. Some railroad iron was furnished previous to this, and before July 15 the whole cargo was furnished, consisting of railroad and other iron, crates, boxes of dry goods, etc., making up a cargo of general merchandise. The captain, on the 23d day of June, reported to the agent of the respondents that he was ready to receive cargo.

The libelants allege that the lay-days commenced on the receipt of the "stiffening note," on the 24th of June, which would give them seven days' demurrage; while the respondent claims that they did not commence until the receipt of the "jerk note," on the 30th, in which case they would be entitled to no demurrage.

The expression in the charter-party is, that the lay-days commenced "from the time the master reports himself ready to receive cargo." They do not commence, however, until he has a right to report himself ready, and he has no such right until the ship is actually ready; and she is not ready as long as she is prohibited by law from receiving cargo, in consequence of the non-performance of certain things to be done on her part, and there can be no delay on the part of the charterer until she has been so made ready.

The construction of that part of the charter-party relating to lay-days is, that the charterer shall have the right to detain the ship, in order to put on board a cargo of general merchandise, fifteen days after she shall have been placed at his disposal, and not detained on business of the owner or prior charterer, and after she shall have been put in such a condition that he can put on board such a cargo. She was not detained by the charterer before June 30th, but by the owner for the purpose of discharging her inward cargo. Till that time no goods could have been put on board of her except railroad iron. The respondent was not bound to put any railroad or other iron on board under the charter-party. He could not put on board a cargo of general merchandise without putting on board any iron. Till the 30th of

June, then, she was not ready to receive a cargo of general merchandise, and the lay-days do not commence till that time.

This also agrees with the custom of the port of Liverpool, as shown by the weight of the evidence in the cause.

No delay was occasioned to the ship in consequence of the passengers.

The weight of testimony is, that she was fully and properly loaded, and the respondent has no ground for claiming that she did not bring a full cargo.

Nor has he any ground of complaint as to the number of passengers. The charter-party did not require that 513 passengers should be brought at all events. A portion of the cargo was so placed between decks that so many could not have been brought without violating the act of Congress on that subject. Only 350 berths were provided by the ship, and none by the charterer; and only 350 passengers were tendered to the ship, and these she brought. The agent of the respondent did not claim that more berths should be furnished, and thereby assented that no more passengers should be brought.

The respondent is also, by the terms of the charter-party, liable for the hospital and commutation fees in New York, for quarantine expenses, and for the passenger-stores furnished by the libelant.

Decree, therefore, that the libelants recover the charter money, less what they have been paid, besides the hospital money, etc., and the price of the stores, and reference to a commissioner to ascertain the amount.

For libelant, Mr. Donohue and Mr. Parsons; for respondent, Mr. Owen.

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### LIABILITY OF MUTUAL INSURANCE COMPANIES TO TAXATION.

[*The Mutual Insurance Company of New York* vs. *Joseph Jenkins.* In the Supreme Court (New York) General Term, July, 1834. Before Judges MITCHELL, ROOSEVELT, and CLERKE.]

The plaintiffs insist that they are not liable to taxation; and have brought this action against the tax collector for wrongfully—as they contend—levying on their property. Corporations, it is admitted, are liable to taxation on their capital, but mutual insurance companies, like the plaintiffs, it is argued, have no capital. This position, seems to me, is not maintainable either in principle or in the letter of the law. The word capital, in its general acceptation, and where not otherwise specially defined, means the stock or fund on which an individual, or firm, or corporation trades or carries on business. Where a fixed sum, in a given instance, is especially declared to be the capital, that sum, whether increased by profits or diminished by losses, is taken as the measure of taxation, not from any principle, but because such happens to be the wording of the particular act or charter. Such was the case of the Bank of Utica. All moneyed or stock corporations deriving an income or profit are liable to taxation on their capital, and,

of course, if that capital be not otherwise limited, on the fund upon which they do business. A corporation authorized by law to make insurances, whether on fires or on lives, is a moneyed corporation, and may make profits, although, *eo nomine*, it makes no periodical dividends. In the Mutual Life Insurance Company, who are the plaintiffs in this case, every customer, in proportion to the business he brings to the concern, is a stockholder. His shares, instead of being, as in ordinary corporations, exact aliquot parts of the common fund, are graduated to the premiums he may see fit to contribute; and the common fund or capital, instead of being confined to a fixed invariable sum, grows with the growth of those premiums, the interest being, in the first instance, resorted to for the payment of losses. The mere circumstance that a portion of the common fund is liable to be withdrawn on the happening of a death, does not destroy its character as capital; the same result follows from death in the case of a partnership between individuals, and from fire or shipwreck, in the case of an ordinary insurance company. The company themselves, in their invitations to the public, obviously contemplate their moneys and securities as capital. They speak of the "stability and perpetuity" of their business, as founded on "an accumulated fund of a million of dollars, securely invested in bonds and mortgages," etc. And in the act of incorporation, when directing the investment of the "premiums received for insurance," it is provided that the real property to secure such "investment of capital shall in every case be worth twice the amount loaned thereon." The conclusion then is, "that the accumulated fund," by whatever name it may be designated, is the corporate property of the plaintiffs, and not the individual property of the stockholders or contributors, except in the same sense, and with the same qualifications, as the capital of any moneyed corporation not founded on the mutual principle; and that the plaintiffs, therefore, are liable to taxation in respect of such fund, in the same manner as any other corporation in respect of its capital.

Judgment of special term, for the reasons assigned by the judge who pronounced the same, affirmed, with costs.

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GUARANTORS.

[*Henry Green et al.* vs. *William T. Cutter.* In the Superior Court, General Term, July, 1854. Before Judge MITCHELL, Chief Justice; Judges ROOSEVELT and CLERKE, Associates.]

By the court, ROOSEVELT, J.—The defendants were guarantors. They loaned their names as inducements in behalf of their friends to invite credits which would otherwise have been withheld. Under the plea of alleged want of due diligence in prosecuting the primary debtors, they now seek to escape from the consequences of their engagement. At the time the goods whose payment they guarantied were sold, the purchasers resided and did business in Michigan. When

the purchasers failed to pay, the creditors, who had trusted them, brought an action in the United States circuit court in Michigan, but the sheriff or marshal, to whom the process was intrusted, returned one of the defendants as not found. Although, therefore, the suit was against both, the judgment was against one. And this judgment, it is said, merged the joint demand and converted into a claim against one only, thus, to the prejudice of the sureties, discharging the other debtor; whereas, had the creditors brought their suit, as they might have done, in the state court, the judgment, in virtue of a special state law, would have been, it is said, against both, and both would have been held to their joint obligation. The argument, it will be perceived, assumes that, by the proceeding in the United States court, one of the debtors was discharged, and that that proceeding was the voluntary and improvident act of the creditors. And as it is true, in point of law, that a judgment against one of his two joint debtors, in all cases and under all circumstances, discharges the other, and that the other, if afterward used upon the joint demand, may plead the previous unsatisfied judgment against his associate, as an absolute bar, is it no reply to such a plea to say that the creditor did not elect, but was compelled to take judgment, as he did, against the one alone, because the other had absconded? The doctrine of merger is founded upon convenience—convenience to the court and convenience to the parties—upon the consideration that two suits should not be permitted where one was sufficient. Does this reason apply in favor of a man who had rendered a joint, and of consequence a single, suit impossible? What right has he, or rather what right could he have, to complain of double vexation? Is it possible in such a case for the creditor to obtain a full remedy except by two suits? Even with the aid of a special statute, the court, having no jurisdiction over an absent party, can render no binding personal judgment against him; so that, although in four against two, the recovery in effect, if pursued in that mode, would be only against one. Wherein as a remedial proceeding, then, would such a judgment, in the state court, have been more advantageous than the judgment which was recovered in the federal court? In either case the record would have shown that the course of action was a joint demand, and that if an effectual recovery was not had against both, it was no fault of the plaintiffs. They sued both, but both were not found. Besides, a federal judgment, in some respects, may be preferable to a state judgment. Stay-laws and appraisement laws are powerless for it; and the supreme court of the United States had decided a decision, which in subsequent cases brought within their jurisdiction, they were likely to follow, that a separate judgment against one partner, even where taken without necessity, was no bar to a subsequent suit against the other. It may be that that adjudication has since been partially qualified; yet the reasoning on which it rests, in all cases of necessity, still remains. At all events, there can not be a doubt, I think, that a court of equity, in such a case, would enjoin the defendant from availing himself of such a technical bar—in analogy to the practice which allows a bill in equity against the representatives of a deceased partner, after an unsatisfied judgment

against the survivor, notwithstanding that it involves the difficulty of merger and double litigation. Double litigation is an evil; but like other evils, if necessary to the attainment of justice, it must be submitted to, especially by those whose acts or omissions have created the necessity. I assume, therefore, that whether the judgment in Michigan were in form against two, but in fact against one, or both in form and in fact against only one, it would in neither case deprive the parties of an efficient remedy subsequently, in some form, against the other. At all events, the suit, brought in the federal court, being a *bona-fide* exercise of a sound discretion, and especially as no actual loss from that election is either proved or pretended, there is no ground for charging the creditors with a want of "due and legal diligence." The effort made by them to recover of the principal debtors was a legal effort, and a proper effort, and the only one, as it appears to me, which they were bound to make. Its fruitlessness is no answer to the argument. The very fruitlessness, anticipated as possible by all the parties, was the reason for tendering the guaranty and the motive for requiring it.

It seems to be assumed—and some judicial dicta have, at times, given countenance to the idea—that in actions against guarantors all sorts of technicalities, whether equitable or inequitable, rational or irrational, are to be invoked by counsel or encouraged by the court, to prevent a recovery. For myself, I do not believe that the common law, which, in its general scope, professes to be founded on common sense and common honesty, is so inconsistent as to lose sight of these attributes the moment it approaches the boundaries of suretyship. What difference is there in principle between soliciting credit for one's self or soliciting it for one's brother? The consideration is the creditor's parting with his goods on the faith of the engagement, and the benefit the surety receives, or expects to receive, from obliging his friend. It is not only a good, but a valuable consideration—as much so, in every just sense, as if the surety had himself become the purchaser. Judgment for plaintiff.

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MORTGAGE LIEN.—SHERIFF'S SALE.

A mortgage, which is the earliest lien on a tract of land, and which was given for a part of the purchase money, is not divested by a sale on a subsequent judgment for the balance of the purchase money not secured by the mortgage.

Where a purchaser at sheriff's sale has bid the full price of property under the erroneous belief that the sale would divest all liens, it is the duty of the court to give relief by setting aside the sale.

*Semble*—That such relief may be given by the court even after the confirmation of the sale.

[*Cummings' Appeal.* Supreme Court of Pennsylvania. Opinion delivered at Pittsburg, Sept. 18, 1854.]

The opinion of the court was delivered by

LOWRIE, J.—Gibson sold land to A. J. & C. Cummings for $2,400, and to secure the price of it, he received bonds and a mortgage on the land sold for $1,900, and a judgment-note for the remaining $500 The mortgage was recorded on the 1st September, 1851, and judg-

ment was entered on the note the next day, and in February following judgments were entered also on the mortgage bonds. Gibson took out execution on the judgment on the $500 note, and had the land sold by the sheriff on the 2d September, 1852, and bought it himself for $2,125, and the sheriff made his return under the act of 20th April, 1846, applying the proceeds first to the mortgage, and then to the judgment. This being objected to, the matter was referred to an auditor, who excluded the mortgage from any share of the money applied to the judgment what was sufficient to pay it, and allotted the balance to the defendants. The court, however, applied it according to the sheriff's return.

We can not attach any consequence to the fact that judgments were entered on the mortgage bonds, for the act of 16th April, 1845, § 5, forbids it. Nor can we say that the mortgage and the judgment on the $500 note are for the same debt, though they were both given in execution of the same contract. They were, in truth, two debts, differently authenticated and secured; and the payment of one of them does not affect the existence or amount of the other. Then the case seems to be the very one provided by the act of 6th April, 1830, which declares that the mortgage shall not be discharged by such sale.

It seems, therefore, that the auditor's report is right, and that the only difficulty in confirming it arises from the fact, that this would most manifestly produce a result which no conscientious man can, without distress, be instrumental in enforcing. It is very plain that Gibson's bid was made on the supposition that it would be applied to pay his mortgage as well as his judgment. He supposed that $2,125 was the full price for a clear title, whereas it comes to more than $4,000, including the mortgage, and the defendants seek to make this profit out of his mistake.

Must we put the seal of judicial sanction on such an iniquity? There is a principle suggested in the case of *Berger* vs. *Hiester* (6 Whart., 210), that might possibly enable us to avoid such a result; but we fear that we may mar the simplicity of the law relating to the discharge of liens by adopting such an exception, especially since the act of 1845. But still we are not constrained to allow to the defendants this unscrupulous advantage.

We notice that this sale has not yet been confirmed; and even had it been, possibly this would not preclude the hearing of an application to set it aside. (2 Ves. jr., 52; 13 Wend., 224; 26 *ib.*, 143; 4 Bro. C. C., 172; 1 Judg. Wend., 67; 2 Danl. ch. Prac., 1470.)

We do not forget the rule that refuses to bear the allegation of ignorance of the law as a ground of relief; but we must be very cautious in applying this rule to judicial proceedings; for the whole doctrine of amendments proceeds upon a partial denial of it, and it is not at all of absolute obligation in questions of new trial. (18 Wend., 653; 1 Bing., 187.)

A judicial sale is a contract with the court, made as a part of a remedial process, and certainly the court has a greater power over such contracts than over any other (1 P. Wms., 747; 1 Green's Ch. R., 216), in analogy to the control which it has over other parts of its proceedings.

There are cases wherein it has exercised this control by setting aside the sale, because of the mistake of the purchaser in relation to his legal right in the proceeds. (2 Wend., 260; 8 Paige, 337.) In one of our own cases the purchaser was led to believe that he was buying a complete legal title, discharged of liens, when it was otherwise; and in relation to this it was said, that, had the purchaser brought such a case before the court below, he would probably have been discharged from the purchase, and a resale have been ordered. (9 S. & R., 404.)

And in a case exactly like the present one, it is said that if the mortgagee bid for the land under a misapprehension of his right, the mistake might have furnished a sufficient reason for setting aside the sale. (14 State R., 383.) And this suggestion is peculiarly proper in this class of cases, considering the fluctuations that have been taking place in the law. The difference of opinion arising between the legislature and the judiciary ought not to be allowed to become a snare for those who have failed to keep up with the alterations of the law, if we can relieve them without affecting the rule intended to be established.

There is a very complete remedy in a very ordinary form. We reverse the decree of the court below, and that leaves the case in the same condition it was in when the auditor's report was filed. Then the court below has power to set aside the sheriff's sale and relieve the plaintiff from his bid, rather than suffer so unconscientious an advantage to be taken. (11 Ves., 57; 1 Edw. Ch. Rep., 578; 3 Paige, 97.) We will not help out the wrong by confirming the auditor's report, because it would be very unjust, and because the discretion in relation to setting aside or confirming the sale is more properly heard by the court below.

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### EXECUTOR'S LIABILITY FOR COSTS.—DOCTRINE OF STARE DECISIS EXPLAINED.

Where an executor or administrator prosecutes a claim of the estate in good faith, and fails, he is not personally liable for costs.
A general judgment against an administrator plaintiff for costs, is a judgment against the estate only: and an execution on such a judgment, issued against him personally, is erroneous.
The case of *Ewing* vs. *Furness*, 13 State Rep.. 531, examined and overruled.
The doctrine of "stare decisis" considered, explained, and enforced.
The maxim, "communis error facit jus," in its relation to the doctrine of "stare decisis."

[*Callender's Administrator* vs. *The Keystone M. L. Ins. Co.* Supreme Court of Pennsylvania. Opinion delivered at Pittsburg, Sept. 13, 1854.]

By LOWRIE, J.—This case presents the question—Is an administrator plaintiff personally liable to execution for the several costs of the cause, on the verdict and general judgment in favor of the defendant?

This question was decided in the affirmative in the court below, and so it was decided in this court in 1850, in the case of *Ewing* vs. *Furness*, 13 State Rep., 531, without any thing having been said by the court in vindication of the decision, except that it was "on the authority of several decisions of this court directly in point."

We have failed to find any such cases, and none are cited before us, as supposed to contain such a doctrine, except *Show* vs. *Conway*, 7 State Rep., 136; *Muntorf* vs. *Muntorf*, 2 Rawle, 180; *Penrose* vs *Pawling*, 8 W. & S., 280; and these seem to be those alluded to by the court, and we shall look for the rule there.

It is not in *Muntorf* vs. *Muntorf*, for that refers to and approves the case of *Musser* vs. *Good*, 11 S. & R., 247., which expressly negatives our present question, and decides only that our rule is different from the English one in this, that the latter gives no costs at all in such cases, while ours gives costs against the assets, and not against the administrator personally.

It is not in *Penrose* vs. *Pawling*, for that decides only that an administrator plaintiff, who received his costs paid by the defendant on an appeal from an award, is personally liable for the costs thus received, if he be finally defeated in the action; and this admits that he is not personally liable for the costs generally. What he had personally received as his costs, to which he was conditionally entitled, he must personally refund on the failure of the condition, to wit: on losing the final judgment. This puts the parties in the final judgment, personally, in the same relative condition that they were in before the suit began, and is equivalent to judgment against the assets for the general costs of the defendant. Such is also the case of *McWilliams* vs. *Hopkins*, 1 Whart., 275.

The case of *Show* vs. *Conway* professes to be founded, in part, on the two just considered, and therefore it is not inconsistent with them, though the syllabus of it is. The defendant did not recover his costs from the administrator, in that case, by virtue of the judgment, but under a special decree, founded on testimony specially taken, and showing that the suit was vexatious, and for this reason the decree was affirmed here. This, therefore, is merely the affirmance of another principle of law that makes an administrator plaintiff liable for costs, when he is defeated in a wanton and vexatious suit. 7 Wend., 552; 1 Denio., 276; 3 Bos. & Pul., 115; 5 *ib.*, 72; 9 Bing., 754. And hereby our question is implicitly, yet plainly negatived, notwithstanding some loose expressions that seem to cover a broader principle than was demanded by the case.

We find, therefore, no support for *Ewing* vs. *Furness*, and every thing against it. And there are other evidences of the law still more abundant and convincing. The old English statutes, giving costs against plaintiffs, have always been construed not to apply as against executors and administrators; and subject to the modification above alluded to, we have followed the law as we got it there. The stat. 3 Jac. 1, c. 8, requires bail in error for debt and costs; but this is held not to apply to administrators and plaintiffs in error, because they are not personally liable for either debt or costs. Cro. Jac., 350; 4 Mod., 245. And such, and for the same reason, is the construction of the terms of appeal from an award under our act of 1810. 5 Binn., 400, and from Nisi Prius, 2 State Rep., 404.

The English decisions afterward received the sanction of stat. 16 and 17 Car. 2, c. 8 s. 5, which, in requiring bail in error, excepts the

case of executors and administrators. And this statute was in force with us until superseded by our more recent statutes to the same effect in the cases of writs of error and appeals of every kind from courts, awards, justices of the peace, and under the act of 1846 concerning bail and attachment.

But the denial of the principle of *Ewing* vs. *Furness* is much more direct and positive in the statutes that forbid justices of the peace to enter judgment or issue execution against administrators personally (act of 1810), or that execution issued against them at all where there is a deficiency of assets, and requires that the remedy shall proceed in the orphan's court against the estate of the decedent (act of 1834 concerning executors and administrators). With us, therefore, a general judgment against administrators, whether plaintiffs or defendants, is always against them officially, and to be paid by them out of the assets, and not personally. And such being the judgment, such must be the execution.

Nobody has ever supposed that on a general judgment against a defendant administrator, who has unsuccessfully resisted a claim against the estate, he is personally liable for the costs, and we can see no essential difference in this regard between an unsuccessful prosecution and an unsuccessful resistance of a claim.

Besides this, it is some evidence of what the law is with us, that our sister states deriving their customs and modes of thinking from the same source, have the same rule, or the old English one, and so we find it in New York, 7 Wend., 522; 4 Cow., 87; New Jersey, 1 Harrison, 210; South Carolina, 2 Ray, 165; 1 Bailey, 79, 2d, 653; North Carolina, 1 Murphy, 102; Georgia, Dudley 1; Kentucky, 2 Littell, 387; 2 J. J. Marsh, 499; Illinois, 3 Scam., 61; Alabama, 7, Alab. 251; 10 *ib.*, 600; and in Ohio by statute. In Massachusetts, it is altered by statute.

Surely such an amount of evidence is sufficient to show what the law is, and to satisfy any reasonable man that there is good reason for it, and that the decision in *Ewing* vs. *Furness* is a mistake, and ought not to be followed.

Do we violate the doctrine of *stare decisis* by now correcting the mistake, and going back to the well-established doctrine which that case has disturbed? If we do, we commit a greater error than the one we have felt bound to correct; for that doctrine, though incapable of being expressed by any sharp and right definition, and therefore incapable of becoming an institute of positive law, is among the most important principles of good government. But, like all such principles, in its ideal it presents its medial and its extreme aspects, and is approximately defined by the negation of its extremes.

The conservatism that would make the instance of to-day the rule of to-morrow, and thus cast society in the rigid molds of positive law, in order to get rid of the embarrassing but wholesome diversities of thought and practice that belong to free, rational, and imperfect beings; and the radicalism that, in ignorance of the laws of human progress and disregard of the rights of others, would lightly esteem all official precedents and general customs that are not measured by its own idio-

syncrasies; each of these extremes always tends to be converted into the other, and both stand rebuked in every volume of our jurisprudence.

And the medial aspect of the doctrine stands everywhere revealed as the only practical one. Not as an arbitrary rule of positive law, attributing to the mere memory of cases higher honor and greater value than belong to the science and natural instinct, and common feeling of right; not as withholding allowance for official fallibility, and for the changing views, pursuits, and customs that are caused by, and that indicate an advancing civilization; not as indurating, and thus deadening the forms that give expression to the living spirit; not as enforcing "the traditions of the elders," when they "make void the law" in its true sense; nor as fixing all opinions that have ever been pronounced by official functionaries; but as yielding to them the respect which their official character demands, and which all good education enjoins.

The doctrine of *stare decisis* is, indeed, one of the most important in the law; for in its simplicity it expresses man's reverence for civil authority, and the demand of his nature that it shall be obeyed—and this feeling is the surest foundation of social order. It is the expression of the people's expectation that all government shall be administered with great care and with a reasonable degree of consistency, and of their confidence that it is so; and it involves the injunction that official functionaries shall not for light reasons abandon the expressed judgments of themselves or their predecessors—especially if any serious embarrassment of public order may be the consequence. It regards all governmental, and especially judicial, decisions as the official representations of the public will in relation to civil rights and duties, and as being entitled to respect and reverence for this simple reason. To these feelings and principles we owe official reverence, and we desire to cherish it as a necessary element of social order and of judicial character.

We do not violate it when we declare that a decision made four years ago, in opposition to all previous legislation and jurisprudence, is open to correction. We should violate it by declaring that decision to be conclusive evidence of the law, and should at the same time announce a judicial heresy, involving the assertion that judicial decisions are equivalent to positive law, and that courts not only apply the law, but make it. And how palpable would appear the violation, when it should be noticed that the case which we establish is without any, against all precedent.

If it should be said that the principle of the decision in *Ewing* vs. *Furness* has entered into the customs and practice of the country, then the claim that it should stand as law would be founded upon a different principle, expressed in the maxim, *communis error facit jus*. If such a custom has arisen in this instance, it has had but a short life, and secured but a frail title to perpetuity. And surely the fact, that subordinate courts and officers may have been misled by the decision in some unknown instances in the application of the law, can have no influence in converting the error into a rule of right. Official customs affect not usually rights themselves, but the means of securing them.

The case of *Ewing* vs. *Furness* must be regarded as a divergence from the beaten path of the law, and we can not help to clear a new track in that direction. It is a plain error, and it is not our duty to set the stain that mischance has dropped upon the law. The case before us, having followed its lead, must be reversed. The judgment is against the estate of the decedent, and so must the execution be.

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## NOTICES OF NEW LAW BOOKS.

*A Treatise on the Practice of the N. Y. Supreme Court, adapted to the Code of Procedure, by Claudius L. Monell, Esq. Second Edition, with copious Notes and References to the Decisions of the Courts and Books of Practice, with an Appendix of Practical Forms. Two volumes*, 1854. *Banks, Gould, & Co., New York.*

This is the most useful work for practitioners that has appeared from the press since the adoption of our code; indeed, we do not think any member of the profession in this state can afford to dispense with the aid offered by this excellent production of Mr. Monell. It will be found of almost equal use in all states where codes exist, as they vary but slightly from the New York practice. From Maine to California it should have an extensive sale; and we can safely advise our subscribers that such as procure the work will not be deceived as to its purport. It is correct and comprehensive, giving full instructions for commencing and conducting suits in pursuance of the requirements of the law of the present time, and includes an appendix of forms so full, that it seems a school-boy, or, to say the least, any man of common understanding could, by consulting its pages, proceed from the beginning to the end of an action on special proceeding without committing errors of form. The volumes contain 1300 large octavo pages; price, $9.

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James M. Calhoun

OF ATLANTA, GEORGIA.

# LIVINGSTON'S
## MONTHLY
# LAW MAGAZINE.

CONTENTS OF No. XI., VOL. II., NOVEMBER, 1854.

LIVINGSTON'S
MONTHLY
LAW MAGAZINE.

VOL. II. NOVEMBER, 1854. No. XI.

## OPERATION OF THE USURY LAWS.

THE operation of the usury laws in the state of New York has had for many years a prejudicial effect upon its commercial movements. They restrict the free use of capital by preventing loans by capitalists when risks are, as at present, *extra hazardous*. There are certain times in commercial history when the loan of money is accompanied with a greater risk than under ordinary circumstances, and the premium (or rate of interest) on loans, during a period of financial difficulty, should be commensurate with such extra hazard.

In nearly all the states of the Union there are statutes against usury, but the penalties in each state vary, and are not generally so severe as to interfere with loans at rates beyond those provided by law. Our own state, New York, exhibits the most severe laws on this subject. Various efforts have been made by enlightened citizens, by our best merchants, by our own board of trade, to obtain a modification of the usury laws, but so far without avail. According to existing statutes of New York, a violation of these laws involves a loss of all the money loaned—a forfeiture of the contract. In criminal actions it further involves a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both.

In New Jersey also the usurious contract is void, and the whole sum may be forfeited.

In Massachusetts and in New Hampshire the penalty is the loss of three times the interest taken.

In South Carolina and Georgia the penalty is the loss of all the interest taken. The same law prevails in Florida, Indiana, Louisiana, and Mississppi; while in Iowa, Ohio, Kentucky, and Missouri, the lender is liable only to the loss of the *excess* of interest paid.

In Great Britain a more liberal view has been taken of the question within the past twenty years. In August, 1833, the British parliament abolished the usury laws so far as they applied to bills of exchange not having more than three months to mature, namely:

"No bill of exchange or promissory note, payable at or within three months after date, or not having more than three months to run shall, by reason of any interest taken or secured, or any agreement to receive or allow interest, be void; nor shall the liability of any party to any

bill be affected by reason of any statute of usury; nor shall any person taking more than the present rate of legal interest on such bill or note be subject to any penalty or forfeiture—any thing in any law or statute relating to usury to the contrary notwithstanding."

This was the opening wedge to a thorough modification throughout England, Scotland, and Ireland, of the old and restricted system of money lending; whereby capitalists would lend if money were plenty; and refuse if money were scarce.

The operation of the usury laws in England, was, by act of July, 1837, removed from all bills of exchange and notes having less than twelve months to run; but the old laws still applied to bonds, mortgages, and open accounts. Recently, these restrictions have been effectually removed, and England now presents to the world a commercial community untrammeled by the odious laws known for centuries as the *usury laws.* Enlightened legislation, in the year 1854, has demonstrated, what was in fact well known before to practical men, that capital should be set free between the borrower and the lender; and if the former can afford to pay fifty per cent. per annum, for money, the law now says *let him pay it.*

On the 28th June last, a bill for the entire abolition of the usury laws was introduced into the House of Commons, by the chancellor of the exchequer. In his remarks on the subject, he said that the usury laws were already repealed, except in a single instance, and the measure was chiefly intended to sweep away a mass of useless legislation. Tracing the history of the subject, he observed that the great offender against the usury laws had been the state. The superstitious notions on the subject, partly Judaic, partly Mohammedan, had disappeared, and parliament had disposed of the restrictions one by one, until the only one which remained was that affecting loans of money secured on real estate. Explaining the great inconvenience which had been occasioned in Scotland by the existing restrictions in regard to mortgages on land, and in England in regard to railway debentures, he observed the usury laws had driven men to an enormous system of evasion of the law. Let us, he urged, fully recognize free trade in reference to money, and let those who desired to borrow, obtain money at the current price of the day.

In moving its second reading, the Marquis of Lansdowne said:

It might be in the recollection of their lordships that great inconveniences had been experienced from the effect of the laws of usury; inconveniences which had presented themselves in so many shapes that, notwithstanding the prejudice which existed upon this subject, notwithstanding the reputation of the words "usury and usurer," it became a matter of absolute necessity to relax those laws in some degree from time to time. At a time when commercial failures to a great extent had taken place, it had been found that one of the greatest reliefs which were then experienced, was experienced in consequence of some clauses having been inserted in the last renewal of the bank charter bill, by which the bank was enabled to dispense with these laws and to accommodate persons with money at a higher than the existing rate of interest. In consequence of this, he had proposed to their lordships a bill with

respect to bills of exchange, by which the amount of interest allowed to be taken was indefinitely extended; but he had been induced to make that, in the first instance, a temporary law, and it was only to remain in force for two or three years. At the end of that period, as no inconvenience or difficulty had been experienced from the measure, he had again proposed that it should be made a permanent law; but, although it was admitted that no inconvenience had resulted from it, apprehensions still existed with regard to it, as some persons never could be brought to consider that money was as much a commodity as corn or any other produce, and that it was just as impossible to regulate it by law as it was to regulate the supply of corn or any other produce. The greatest inconvenience had been experienced during the last five or six years from the operation of the present law. Persons had not been deterred from raising money at a higher rate of interest than could lawfully be taken, but because they were debarred from lawfully raising money on real estate, at a higher rate of interest than 5 per cent., they had been obliged to pay 7, 8, 9, and even 11 per cent. (Hear.) If that had been true with respect to England, it was still more true in respect to Ireland, where a great number of persons during the last few years had been compelled to raise money on the security of their estates. In order to evade the law, parties had been driven to every kind of subterfuge. Any amount of interest could be raised by means of annuity or the promise of an annuity, and in this mode the law had been extensively evaded in the sister country. The time had now arrived for doing away with this law, which had been condemned by many eminent persons. Calvin, whose authority might be considered greater as a theologian than as a political economist, had been one of the first who doubted the policy of the usury laws, and among later authorities they had been condemned by Adam Smith and Jeremy Bentham. He trusted that their lordships would give a second reading to this bill, and that it would pass through parliament during the present session. (Hear, hear.)

Lord Campbell wished to express his high satisfaction that he had lived to see the day when the usury laws were to be entirely swept away. During his long experience in the courts of justice he had seen the most mischievous results from the operation of these laws, which were not only contrary to principle, but in practice had produced the most vicious effects. In many cases the usury laws had caused the ruin of those whom they were intended to protect. A few years ago the laws relating to usury were swept away, except in cases of real security. The exception had caused a great deal of litigation, and had been extremely disastrous to many proprietors of land, especially in Ireland, where it had sent many proprietors before the Incumbent Estates Court. He believed the bill met with the unanimous support of their lordships, and in a very few days he hoped to see it the law of the land. (Hear, hear.)

Lord Brougham rose to express his entire concurrence in the remarks of his noble and learned friend, and his joy that the usury laws were now about to be abolished. Upon moral grounds nothing could be worse than the effects of the usury laws.

The lord chancellor said that there could be no doubt that the present laws were capable of being evaded, if a person were guilty of something approaching to fraud. He had been engaged during the last week in hearing a case in the court of chancery which forcibly showed the impolicy of the laws, and the means which were found of evading their operation through the instrumentality of building societies.

Lord Redesdale wished that this measure had been brought in at an earlier period of the session, when it could have been more adequately discussed.

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The following is a copy of the recent memorial of the New York chamber of commerce to the legislature of this state, in reference to the existing usury laws. The memorial was duly presented, but no measures were adopted by that body toward the relief desired.

CHAMBER OF COMMERCE, NEW YORK, *Jan.* 6, 1854.

*To the Honorable the Legislature of the State of New York, in Senate and Assembly convened:*

The memorial of the chamber of commerce of the state of New York respectfully represents,

That the present law of this state, regulating the rate of interest, is more stringent and severe than any other usury law in the United States or in Europe.

That in the ratio of this increased severity has been the tendency of said law to disturb and agitate the price for the use of money, when any circumstance has arisen to carry the price of money the smallest fraction above the legal rate, and this, because of the increased compensation consequent upon the risk of illegality, also caused, in part, by the driving away of law-abiding competitors.

That it can be shown by historic facts from the earliest ages, that wherever the usury laws have been the most lenient, other things being equal, the rate of interest has been lowest.

That the impression which has sometimes prevailed as to the movements for a modification coming from money-lenders in Wall Street, is entirely erroneous; much the greater portion of the parties now asking a relaxation borrow more money than they lend.

That your memorialists are confident in the opinion that the law relative to the interest of money should merely fix a rate to govern in the absence of a written contract between the parties, and leave borrowers and lenders free to contract upon any terms they themselves may deem advisable.

That, notwithstanding this opinion, your memorialists, with all deference to certain hereditary or other feelings cherished by portions of their fellow-citizens in regard to usury, would, in the spirit of compromise, recognize the principle of some penalty for infractions of the usury law.

Pursuant to this, your memorialists, in conclusion, would most respectfully ask that the penalty may be changed from fine and imprisonment and loss of the entire sum loaned, to a loss of the interest only.

ED. C. BOGERT, Secretary. P. PERIT, President.

At the monthly meeting of the New York Chamber of Commerce, on Thursday, September 7,

Mr. Caleb Barstow remarked that he desired to say a few words relative to the subject of the usury law; and in this connection he desired to offer a series of resolutions, which embodied his views on the subject, and which he proceeded to read, as follows:

*Whereas*, it is especially within the province of this chamber to express an opinion as to the laws of our country relating to currency; and whereas, the present disturbed and greatly embarrassed state of our money market renders the duty particularly imperative upon business men to seek some means of alleviation; be it, therefore,

*Resolved*, as the sense of this chamber, That the *usury laws* of this state greatly aggravate our present financial difficulties, and on that account, and for many other good and substantial reasons, need a radical reform. By the usury law of 1837, and which law still exists, the lender who receives any thing over seven per cent. per annum for the use of money, forfeits the whole amount lent; is liable also to fine, not exceeding one thousand dollars, and to *imprisonment* not exceeding six months. Both borrower and lender may be made witnesses on the civil trial—the *criminal* process being subject to the same rules of evidence as govern in *other criminal* trials.

The law also contains a specific clause, declaring it to be the duty of all courts of justice to charge the grand jury especially to inquire into any violation of the act.

*Resolved*, That the faults of this law are too plainly manifest to need any extended argument, every reason assigned, and every declaration that has been made to sustain the law in its present form having been repeatedly overthrown and refuted.

The present usury law has been most truthfully pronounced, not only by intelligent and standard writers upon political economy, but by our courts and grand juries, to be "futile in attaining the end proposed, inexpedient relative to public prosperity, unjust toward holders of capital, and oppressive toward the needy borrower."

The law referred to is stigmatized in a public document of one of our grand juries, as "highly injurious to public morals, as well as to the lawful business of the people," also as being flagrantly unjust in its operation, is used to defraud honest creditors, and, in short, has become so utterly odious as to weaken the general respect for law, and almost make a virtue of disobedience. The law was thus presented, and denounced as a public evil.

The principal reasons urged for sustaining these laws are only two:

*First*. It is said that money is the creation of government, and deserves, some say, *all* its intrinsic value—others say its *chief* element of value—from legislative action, and that this imposes upon our civil rulers the duty to determine what compensation the people may agree to allow each other for the use of it.

*Secondly*. The advocates of restrictive usury laws declare that borrowers, especially farmers who borrow upon mortgage, ask for, and need the severity in this law, to shield them from the oppressive exactions of lenders.

To note these points in their order, it may, in the first place, be said that money is *not* formed by legislation. As a mere matter of convenience, and as the better mode of the *two*, the people have invested the government of the United States (*not any of our state governments*) with authority to stamp certain pieces of gold and silver, carried to them by the people as their own, the people's property, with a device and lettering indicating their value. This is a mere certificate of a fact existing before such certificate was affixed, but of course adds no *intrinsic* value to the metal: indeed, were Congress now to repeal all laws relating to the mint, business men would immediately assemble and agree upon some convenient mode of certifying to the value of the precious metals. Governmental action in coinage is the most convenient mode of the two, but is not indispensable.

The position that the incorporating of institutions for dealing in money invests the giver of such act with a right to govern the *price* of money is, in the opinion of this chamber, entirely wrong.

A society of men applying for such act, ask for no favor beyond what each individual, standing alone, already possesses.

In regard to our currency, the only legitimate concern of the government is to prepare the substance previously determined upon by the people as the one most suitable for a circulating medium.

Government is also under *obligation* to afford every possible aid required by their constituency, in securing the utmost useful efficiency of such circulating medium. But when our public functionaries suppose that all this gives them the right to fix the *prices* that one neighbor may charge another for lending him some money, they err as much as they would were they to insist upon arranging the *prices* on the fabrics made at an incorporated cotton-mill, or the rates of premium on an incorporated fire and marine insurance company.

What is said about the wishes of borrowers is summarily overthrown by the plain *fact*, that thousands upon thousands of borrowers are pouring in their names to memorials in favor of free laws as to the interest of money, and borrowers upon bond and mortgage can bear testimony, by hundreds, that such extortions were never before known as have been practiced since the enactment of this most extraordinary law of 1837. From 1837 to 1854 we have witnessed, in the most prominent avenues of the money market, the most shameful and remorseless extortions that have ever been heard of since the earliest history of commercial civilization.

It is well urged by a recent writer, "as a sound principle of jurisprudence, that when the reasons for a law, or its usefulness, cease, the law should cease, and this ought to be absolute and imperative in those cases where a regulation is found not only to fail of the purpose for which it was designed, but is found to produce, in its operation, the very evil it was intended to remedy."

In view of this state of the question, be it further

*Resolved*, That a committee of five be appointed, with instructions to prepare a suitable memorial for circulation among our citizens, praying our legislature, at the earliest moment of the next session, to remove *all* restrictions in our usury laws, except establishing a rate to govern

in the absence of a bargain, also a rate to accrue upon an unsatisfied judgment in law.

*Resolved*, That the aforesaid committee be further instructed to prepare and report, at a special meeting of this chamber, a tract or a circular embracing such arguments and facts as will tend to remove all false impressions now entertained by portions of our fellow-citizens in the interior of our state. The committee also to open a correspondence with any and all boards of trade or chambers of commerce in the cities of our state, invoking their hearty aid and support in bringing about the much-desired reform.

Mr. Barstow said that they contained the substance of what he wished to say upon the subject, and he would like to see them published. It was decided that they should be published, and that a committee of five be appointed to take into consideration the whole subject, draw up memorials, and report to the next meeting of the chamber. The committee appointed consists of the following gentlemen:

Caleb Barstow, George Curtis, J. de Peyster Ogden, Robert Kelley, Henry K. Bogart.

Mr. Ogden remarked that one of the most important facts relative to this subject of a reform in our usury laws, was to find how far the reform shall go. Shall it extend to banks and corporations, as well as to private individuals?

Mr. Barstow observed that he had found by experience and observation that there is no sense in trying to compromise the matter. He was in favor of making the law cover every thing. Corporations, banks, and every similar institution shall be as free as the butchers in Fulton Market.

Mr. Ogden again remarked, that as regards bonds and mortgages, he was perfectly willing to have the restriction removed; but to give that power to our corporations and banks, standing as they do, was a step which, he thought, should be thoughtfully considered before its adoption.

Mr. Barstow replied, that in regard to banks, a great change has taken place since the establishment of free banking associations. The character of the banks is now very much altered; and he thought we should have banks as perfectly free as individuals, or as bonds and mortgages.

The resolutions were received with approbation, and were unanimously adopted.

After the nomination and election of two new members, Mr. John O. Baker, and Mr. Samuel Glidden, the meeting adjourned.

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Mr. McCulloch's article on the subject of Usury, in the Encyclopedia Britannica, was republished in New York in the year 1826. From the preface to that article (attributed to the pen of Professor McVickar of Columbia College) we copy as follows:

It is indeed time for a revision of our legislative enactments on this subject; they have too long continued in open defiance both of reason

and experience, grounded upon fallacies which are now exposed, and a bigotry which no longer subsists. On this point, namely: the justice, the inefficacy, and the inexpediency of all penal laws regulating interest, there may be said to be but one opinion. All scientific men are opposed to them—all practical men contemn them. Society, in all its branches, suffers from them; and most of all, in that class of needy and ignorant borrowers upon whom these laws, professedly framed for their protection, operate as an engine of grinding exaction.

Laws which are thus inefficacious ought to be repealed—laws which are thus injurious must be repealed!—the public voice demands it, and wise legislatures will hear it. Some falsely imagine that the evil is confined to the moneyed transactions of the city, while to countrymen they suppose the law serves as a security against exaction; the reverse of this position would come nearer to the truth. In a commercial city these laws are set at defiance. As a regulator of interest they have not the slightest influence—they are altogether a dead letter. All that they actually do is, in times of scarcity, or in case of distress, to add a new premium of risk to the heavy rate at which the necessitous must borrow, while the penalties annexed to such contracts are generally voided by the distinction recognized in our courts between business and usurious paper, by means of which an almost perfect freedom is given to such transactions. Not so in the country: there the laws are not inoperative, and it is the farmer who pays the penalty. When money is worth more than legal interest, the law is no benefit to him, for he can not borrow except by paying a commission or bonus upon the loan, which being equivalent in the eye of the law to a usurious premium, is made proportionably great in order to cover the risk of the legal penalty.

Again, when money falls below the prescribed rate, as it has been for several years past, the law is a disservice to him, for he still continues to pay the legal premium, the authority of the law naturally deciding the question of rate, which would otherwise be determined by a reference to the money market of the city—by turning to the regular price-current in which money would form an item, and which consequently no man would buy above the market price.

A reference to the state of the money-market in this and other great commercial cities during the past year will be found to support these two fundamental principles:

1st. That laws can not regulate the price of money; and,

2dly. That all penalties attached to such laws tend to raise the price of it in periods of scarcity.

Thus, while the scale of variation will be found to have been great in every part of the commercial world, it will also be found to have been greater by several per cent. in places where usury laws exist—as, for instance, in London and New York, than in those countries where money is free—as in Holland or Hamburg; and that for a plain reason, because the risk of the legal penalties demands a new and additional premium. Thus in London the scale of variation will appear to have been from about 3 to 13 per cent., in New York from about 4½ to 15 or 20 per cent., while in Hamburg and Amsterdam it has prob-

ably never risen above 10 per cent., the extent of the variation of price being there limited, as in the case of all other commodities, by the competition in open market between demand and supply."

On the 11th February, 1834, a public meeting of merchants was held at the Merchants' Exchange in New York city, when a committee was appointed to make "an inquiry into the causes of the public distress," and to memorialize Congress on the subject. This period, it will be recollected by many, was immediately following the removal of the public deposits from the Bank of the U. S. by President Jackson. The substance of the report was published in the *American Quarterly Review* for June, 1834, and afterward (July of the same year) republished in a pamphlet of fifty-two octavo pages. In that report, a survey was made of commercial affairs during the preceding thirty years; and the causes of the distress of 1834 were alluded to or pointed out. Among these numerous causes, the committee placed the then existing usury laws, their remarks on which we now copy.

"It may also be observed, in noticing the causes of the present difficulties, that they have been aggravated by certain legal regulations, not ascribable strictly to any recent action on the currency, and the removal of which rests with the state legislatures. We refer particularly to the usury laws, which, in spite of the conclusive arguments of all moralists and economists, from Calvin to Bentham, exist in several states of the Union.

Interest is, at no time, a true criterion of the rate of profit where the amount of the currency fluctuates, either by the greater or less supply of ordinary currency, or by the expansion or contraction of commercial credits, though it is the consideration by which it is ultimately regulated. The depreciation or appreciation of the currency has, of course, no permanent effect on interest, as it is capital, not currency, which is lent or borrowed; but if a large amount of bank-notes be suddenly added to the circulating medium, through the operation of discounts or other loans, there would be an increased supply of capital to be lent, and of course the rate of interest would momentarily fall, according to the principle of supply and demand. So in case of a contraction, there must necessarily be a rise in the rate of interest till prices adjust themselves to the new medium in which they are to be estimated. The increase of currency primarily effects the rate of interest, and at all times diminishes the value of money. In like manner, the fall of prices, and the temporary rise of interest, is the consequence of a contraction. Banks, by increasing currency, may rise prices, but they can not permanently lower interest. They can have no effect on interest, except during the period that the prices are accommodating themselves to the new order of things."

As a matter of history, we have undertaken to furnish, in the following pages, some facts as to the laws relating to usury in the early periods of commerce, and thence down to the end of the eighteenth century. From all these it will be seen that the ancients were prone to charge the fluctuations in the value of money to the usurers and money changers: and, during the eighteen centuries, all sorts of measures were adopted, to compel, by law, a uniform rate for loans. It seems

that these laws were of very little avail, and only trammeled, instead of encouraging, commerce.

In the year 550 B. C., we find that the interest of money was reduced to 12 per cent. Athens was sorely troubled with usurers, who, by existing laws, were entitled to the services of their debtors and those of their children. Solon remedied these evils by reducing the rate of interest to 12 per cent.

In 324 B. C., interest was regulated by law in India, and also the rate or premium for advances on bottomry. These and other circumstances show that commerce had long flourished and was well understood.

In the year 29 B. C., the rate of interest at Rome was reduced by law from 10 to 4 per cent., in consequence of the great influx of money from the conquered provinces.

In the year 30 A. D., interest was allowed on loans by the bankers of Judea, who made a trade of receiving money on deposit and paying interest thereon (Matthew, c. 25). Such instances were not known in Greece or Rome at that period. The Roman *nummularii* were the only exchangers of money then known.

A. D. 230, by law the rate of interest was reduced by Alexander Severus to 4 per cent., in order to induce foreign merchants to resort to Rome.

A. D. 527–567, the rate was settled at 6 per cent. by the Code of Justinian. Persons of rank were not permitted to take more than 4 per cent.; while 8 was allowed between merchants and manufacturers, and 12 per cent. upon bottomry.*

A. D. 800, the taking of interest was by the clergy denounced as sinful, during the time of Charlemagne. The fairs at Aix-la-Chapelle and Troy were frequented by traders from most parts of Europe.

A. D. 950, the taking of interest was by the Basilics, or laws of Constantine, denounced as sinful. The clothing trade was then mostly in the hands of the Flemings. Fairs or weekly markets for manufactures were established at Bruges, Torhout, Mount Casel, etc.

A. D. 1126–1138, the Popes were eager to suppress the practice of lending money at interest. In a council held at Westminster, all clergymen were ordered to abstain from interest and *base lucre*.

A. D. 1171, at Venice the rate of interest was fixed at 4 per cent. for the Chamber of Loans. This latter was the origin of the Bank of Venice, as the contributors to the state loan were made creditors of the "chamber." The rate of interest and the loan itself were considered compulsory.

1197. Richard I. of England passed a law for the uniformity of weights and measures. Christians were not allowed to take any interest for the use of money, and secret bargains between Jews and Christians were prohibited.

1198. By law in England this year the rate of interest upon mortgages was limited at 10 per cent. The canons against taking interest did not then extend to the Jews.

1215. After the time of King John, Magna Charta provided that the

* MacPherson's Annals.

debts of a minor should bear no interest during his minority, whether they be owing to a Jew, to the king, or to any other person.*

1231. The law of interest (Henry III.), as applicable to minors, was now revived and sanctioned by a special act.

1251. In Italy, at this period, the borrowing and lending of money on interest was an established trade. The business of trading in money became more general, and was followed by the merchants of Milan, Placentia, Sienna, Lucca, and other cities in the north of Italy.†

1270. At Modena, the legal rate of interest was four pence per month for every pound lent (or *twenty* per cent. per year).

1274. Interest was avowedly paid by King Edward I., for money borrowed by him while in the Holy Land, and this is believed to be the first instance of payment of interest by express contract. Every Jew lending money on interest was compelled to wear a plate on his breast, signifying that he was a usurer, or to quit England.

1277. The Jews in England were hanged and quartered for clipping coin.

1281. A marriage contract entered into between Scotland and Norway, provided for the payment of interest.

1487. By act of parliament (Henry VII.) interest in England was prohibited, and "all dampnable bargayns *grounded in usury*, however disguised," were annulled; and a fine of £100 for any violation of the statute.

1546. By act of parliament (37 Henry VIII.) the rate of interest was fixed at 10 per cent. This was the first time that the rate was established by law in England. All former acts concerning usury, shifts, forfeitures, etc., were declared void.

1552. Parliament again took the subject in hand (Edward VI.) and repealed the act of 37 Henry VIII. At that period the monarch could not borrow without the collateral security of the metropolis. All loans at usury were declared illegal, and might be forfeited.

1558. In the reign of Queen Mary, interest was paid by the government at the rate of 12 per cent. on a loan, by the citizens of London, of £20,000. For this sum the queen *bound* (mortgaged) *certain lands.*

1560. The ordinary rate of interest at Antwerp was 12 per cent., and fixed at the same rate in Spain, Germany, and Flanders, by Charles V. A *Bourse* had been established at Antwerp, which was attended, mornings and evenings, by merchants, interpreters, etc., for sale of merchandise, bills of exchange, etc.

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* This seems to authorize interest, although repeatedly forbidden by ecclesiastical canons.

† It became general in France and Britain to give the application of *Lombard* and *Tuscan* merchants to all who were engaged in money transactions. As early as the year 1318 (and perhaps before), Lombard Street in London had its present name, which was probably derived from its being the residence of Lombard merchants or bankers, as it is still the chief residence of London bankers. These Italian merchants became dispersed throughout Europe in the thirteenth and fourteenth centuries, and become very convenient agents for the popes, who employed them to receive and remit the large revenues that were drawn from every country which acknowledged their ecclesiastical supremacy. [*See MacPherson's Annals, etc.*]

1571. By act of parliament (Elizabeth, queen) the rate was limited to 10 per cent., being a restoration of the policy adopted by Henry VIII. Large accumulations of gold from America, and the increase of wealth, led to the more general adoption of deposits with bankers.

1587. The Scottish parliament (James VI.) adopted 10 per cent. as the maximum rate, "or an equivalent to five bolls of victual for £100 by the year."

1601. In France (Henry IV. and Sully) the rate of interest was fixed at 6¼ per cent.; and high rates of interest were declared as having "ruined many good and antient houses," as well as obstructed commerce, tillage, etc.

1620. King James, of England, borrowed 100,000 dollars of the government of Denmark, at 6 per cent.

1624. By act of parliament (21 James I.) the rate was reduced to 8 per cent., under a penalty of three times the money lent, and the word interest substituted for that of usury; and in 1625, King Charles I. acknowledged a debt of £27,000 at 8 per cent.

1632. The rate of interest was reduced in Scotland from 10 to 8 per cent., being nine years after it was so reduced in England.

1651. In England (Cromwell) the rate was further reduced to 6 per cent., by the Rump parliament, and confirmed at the Restoration. (12 Charles II.)

1655. In Holland the rate was reduced from 5 to 4 per cent., whereby the state saved 1,400,000 guilders per annum. This was about the first time that the "sinking fund" became a principle of government.

1660. In Turkey, interest was 20 per cent. In Spain, the usual interest was 10 or 12 per cent.; "and there, notwithstanding they have the only trade in the world for gold and silver, money is nowhere more scarce; the people poor, despicable, and void of commerce, other than what the English, Dutch, Italians, Jews, and other foreigners bring to them; who are to them, in effect, as leeches who suck their blood and vital spirits from them." [*Sir Josiah Child.*]

1661. In Scotland, the rate was reduced to 6 per cent., "free of all retention or other public burthens whatsoever." In England, the melting of silver coins was prohibited by statute of 9th Edward III.

1685. The Pope of Rome, by compulsory process, reduced the rate on his public debt from 4 to 3 per cent.

1714. The rate in England was further reduced to 5 per cent., and all contracts at a higher rate were declared void.

1773. By law (14 George III.) the interest of money in the British provinces in India was fixed at 12 per cent.

1776. In Scotland money was loaned as low as 3 per cent. to the bankers.

No material modification of the English laws in reference to usury were made till the year 1833, when the restrictions were removed from all commercial paper having less than three months to mature. In the year 1837 this was further modified so as to apply to commercial paper having twelve months, or less, to mature.

# CONDENSED REPORTS OF RECENT CASES.

## LAND CASE DECIDED BY THE SUPREME COURT OF TEXAS.

THE supreme court of the state of Texas, sitting at Galveston, has just rendered a decision of great importance to settlers and purchasers of land in Texas, settling a principle which applies to hundreds of land titles. The question at issue was, what, under the colonization laws of Texas, constituted a residence which entitled a man to enter land, as head of a family, and transmit it to his heirs, he never having carried his family to reside there.

The case before the court was that of one Russell, from the state of Maine, who went to Texas in the year 1834, and in August, 1835, obtained a grant of land in the then county of Montgomery, representing himself as having come to the country with his family to reside. Shortly after, he went back to Maine, for the alleged purpose of bringing out his family, but died soon after. In 1841, his daughter's husband took possession of the land, and made a crop. In 1849, one Randolph located a land-warrant upon it as vacant land, alleging it to be public domain, by reason of the invalidity or forfeiture of the grant to Russell, first, as a non-resident, and then for fraudulent description of himself.

The court sustained the grant on both grounds. It decided that Russell's residence, with the intent to make his home in Texas, departing only with the purpose of bringing back his family, entitled him to enter the land, and that, constructively and legally, the domicil of his family was with him, and his declaration that his family was with him was legally correct according to the laws of Texas. The departure, with a *bona-fide* intent to return, did not affect the domicil he had acquired, and the grant of land inured to his heirs.

## JOINT-STOCK COMPANIES.

The registered officer of a joint-stock banking company applied to prove against the estate of a deceased shareholder for calls due. By the deed of settlement, an option was given to the representatives of deceased shareholders either to sell the shares or become members of the company on certain conditions. Prior to the exercise of this option, the directors were empowered to retain the dividends, and, after notice, to declare the shares forfeited. No option had been exercised by the executors in this case, and the directors had retained the dividends, but had taken no steps to declare the shares forfeited. They were not held to be entitled to prove for calls due. (Eng. Law Times, Rep. 256.)

MORTGAGE TO SECURE FUTURE ADVANCES.—MECHANICS' LIENS.

A mortgage given to secure future advances is good against subsequent liens, although the covenant to make the advances is contained in a separate instrument not recorded.
Where such a mortgage was given to secure advances, to enable the mortgagor to build, it was held that the liens of mechanics for building materials and labor were not to be preferred to the lien of the mortgage, which was recorded prior to the commencement of the building, although the advances were not made until afterward.

[*Moroney's Appeal.* Pennsylvania Supreme Court, 1854. Pittsburg Legal Observer.]

The opinion of the court was delivered

By LOWRIE, J.—Montgomery gave to Cadwallader several mortgages, conditioned altogether for the payment of $12,000, and we may treat them all as one. Shortly afterward Montgomery commenced the erection of several houses on the mortgaged property, and liens for the work and materials have been filed, and judgments obtained on them, which claim precedence of the mortgage. It appears that no money had been actually lent to Montgomery on the mortgage until after the buildings were commenced, but that its true consideration was a covenant, not recorded, by which Cadwallader agreed to advance $12,000 in defined installments, in order to enable Montgomery to make the improvements, and that it was actually advanced in accordance with the covenant. Does the omission to record the covenant have the effect of postponing the mortgage to the liens for building?

Why should it? Is it because the consideration of the debt is not set out in the bonds and mortgage? The expression of a consideration, as such, is never necessary to the validity of sealed instruments. But the debt expressed in the bonds is the consideration and subject-matter of the mortgage, and as subject-matter it was necessary to set it out, and it is done truly, and the parties have by their contract created a lien for that very debt.

It is said, however, that it was not properly a debt then owed, because the covenant, which was the consideration of it, had not then been performed. But this conclusion is very plainly inconsequential: for a promise to be performed in future is one of the most common of all kinds of considerations for a present debt. The strict legal character of the transaction depends upon the form in which the parties have invested it; the bonds for the covenant, and the covenant for the bonds, each independent debts. How are they connected? Only by equity. If Cadwallader breaks his covenant, Montgomery may obtain relief in equity as against the bonds and mortgage. But he might not need this, for the remedy on the covenant might be complete.

If equity interferes to change the form given to the matter by the parties, it does so for the purposes of equity, not iniquity—to establish the claim according to its spirit, not to defeat it—to save the mortgagor and his creditors from the forfeiture and from the penalty, and compel the creditors to accept the real debt and interest—to save him and them from any fraud or mistake, and not to let them gain an advantage by it. The relevancy of Cadwallader's covenant is therefore only contingent. It might be important as a ground of equitable relief, but it has no strictly legal connection with the mortgage. It is entirely

irrelevant, except on the allegation that the consideration of the bonds has failed. Here it did not fail, and therefore the legal and the equitable aspects of the transaction coincide.

And such a covenant or collateral agreement as we have here has never been required to be recorded. The acts of Assembly simply require the recording of the mortgage. True, it was decided in *Hamilton* vs. *Freedly*, 17 S. & R., 70, that where the mortgage consists of a conveyance with a separate defeasance, the recording of the conveyance is not a compliance with the law, because by such a record it does not appear as a mortgage transaction. But the sharpness of this principle has been somewhat moderated in *Jacques* vs. *Weeks*, 7 Watts, 261, by holding such a record sufficient if the mortgagee is in possession; because this is notice enough to put people upon inquiry, when they may ascertain the true character of the claim. Yet such implied notice contains in it no indication of the terms of the mortgage. Of the same character is *M. and M. Bank* vs. *the Bank of Pennsylvania*, 7 W. & S., 335, where actual notice of the defeasance supplied the neglect of recording it. Of course these cases refer to the effect of such matters upon subsequent liens and purchases, for the mortgagor could not raise the question.

So in *Garber* vs. *Henry*, 6 Watts, 57, the conveyance contained a condition that it was to be void on the payment of certain sums of money, said to be mentioned in another agreement, but not set out in the conveyance. It was entirely imperfect as a mortgage, and in strict law it was absolute, for the condition was void for uncertainty, taking it by itself and as it was recorded. Yet this reference to another instrument was regarded as sufficient in equity to make that instrument a part of the conveyance, and thus convert it into a mortgage; and therefore in equity it was a recorded mortgage, containing sufficient notice of a defeasance, which was substantially unrecorded. And such is the case of *Crane* vs. *Dening*, 7 Conn. R., 388, and there it is said to be sufficient that the defeasable character of the instrument appear, with such information in relation to it as will direct inquiry and guide investigation, and that it is no objection that the inquiries may be difficult to make because of the distance of the mortgagor's residence. (7 Conn., 396; 4 *ib.*, 162; 5 *ib.*, 449; 6 Watts, 59.)

The case of *Lyle* vs. *Ducomb*, 5 Binn., 585, is very nearly like the present one. It was, as recorded, a mortgage for a sum absolute; but there was an agreement showing that it was for indorsements made and to be made, which agreement has been ascertained to have been unrecorded, though this is not noted in the report of the case. It differs in this, that the indorsements were made, but not paid, before the contesting lien was created.

It was held, however, that the fact that the debt was stated in the mortgage as absolute when it was not so, and that the collateral and qualifying agreement was not set out nor referred to, did not invalidate the lien of the mortgage as to subsequent lien creditors; and this is the point of its relevancy here. And for this point the case of *Lyle* vs. *Ducomb* has become an authority all through the United States, and has never been doubted. The principle of it is affirmed every-

where. (7 Cranch, 24, 50; 9 Paige, 132; 8 Conn., 219; Paine's C. C. R., 525; 4 Johns. Ch., 64; 1 Pet., 448; 7 Vin. Ab., 52, pl. 3; 1 Watts, 140.) It is involved in *Gordon* vs. *Preston*, 1 Watts, 385, where it is decided that the fact that the mortgage is for a greater sum than is due, does not avoid it as to other lien holders, unless there be fraud; and in all the numerous cases where mortgages to secure future advances are held to be good, for in these cases the information is necessarily indefinite and demands investigation.

It has been supposed that there is a public policy that demands that the record of the mortgage shall be more specific than it is in this case; but the supposition is plainly disproved by the cases above referred to, and their evidence is corroborated by the practice in relation to judgments. Nothing is more common than to enter judgments for the penalty of bonds, without any notice being taken of the real debt in any part of the record. Unless when oyer is craved, the condition is no part of the record, where the old common law form of a record is still adhered to.

In *Parmentier* vs. *Gillespie*, 9 State R., 86, this point was raised, and it was decided that a judgment confessed for a certain amount as due was good, though it was really given for advances made and to be made, and this as against liens entered before the advances were made, if they were made in pursuance of a previous agreement. The same principle is held in *Ter Hoven* vs. *Kerns*, 2 State R., 96, and in many other cases. 1 Watts, 140, 374; 3 Pa. R., 374; 5 Johns. Ch., 320. It has never been supposed that such a judgment was void because of the neglect to change the common law form of a record in order to set out the equitable conditions on which it was given; and there would not be much equity in now declaring that the common law, and common customs, and common forms of conveyancing are all wrong. In New York it has been considered important to have the true state of such judgments specified, and an act of the legislature has been passed requiring it.

Besides this, an assignment to secure debts is not void, because of its being absolute on its face—2 Johns. Ch., 283. A pawn or pledge of any kind is not void, because its conditions do not appear. In debt on bond to secure the performance of conditions, only the broken conditions appear on the record, yet the judgment for the penalty is a lien to secure the performance of others yet remaining unbroken.

And why should it not be so? No man deals in real estate on faith in the liens as recorded; for subsequent facts are continually changing their true character by payments and otherwise. To direct inquiry and guide investigation is therefore a main purpose of the record.

But it is argued that, since Cadwallader had not advanced the money when the buildings were commenced, it was his duty to see that it was properly appropriated to pay the builders, and thus discharge their liens. The least reflection will show, however, that this is only another mode of stating the proposition which we have already disproved: for his lien is postponed if its priority is conditioned upon his paying theirs; but we may notice it further.

We have shown that the record of the mortgage is notice of the lien which Cadwallader had obtained; and it is therefore very plain that the builders undertake to work subject to Cadwallader's rights; in other words, they have no claim upon him, either to yield the position which he has obtained, or to treat with them, that he may be allowed to maintain it; they can claim no right, under such circumstances, which the owner could not grant.

Cadwallader's covenant binds him to aid the work by advancing money in proportion to the progress of the work. But, as soon as the work commenced, the builder's liens commenced; and it is argued that, as Cadwallader had then advanced no money, their liens took precedence of his, and that, of consequence, he was not bound by his covenant to make advances, and those made after that were voluntary, and could not cut out the builder's liens.

This argument begins by assuming the proposition which has already been disproved, that the advances, and not the mortgage, created the liens; though the contract with the parties is, with notice to all the world, expressly otherwise. It is arguing in a circle by using the conclusion as a means of proving itself.

Next, this argument makes the commencement of the work, for which Montgomery had Cadwallader's covenant to aid him, the very ground of relieving Cadwallader from his covenant—the commencement of the work created a prior lien, and therefore Cadwallader is excused from making his advances until that is removed. This is to make the contract defeat itself; it makes it void from the beginning, because it is impracticable; and the houses can never be erected, because the first shovelful of earth removed creates a lien that shuts down the coffers out of which it is to be paid for; or the laying of the first floor of joists on these thirty-two houses stops their further erection, because it creates a lien that cuts off the mortgage by which the money was to be supplied. If the owners of these liens trusted Montgomery without examining the state of the records, the law provides no relief from the consequences of their negligence, and morality does not demand that it shall, and even charity will not allow it at the expense of more careful men. If they did examine the records, then they found the lien of Cadwallader standing good against Montgomery, and honesty forbids them to cut it out for their profit. If they found it, and still trusted Montgomery without inquiry, then they agreed to trust him even with a lien against him of $12,000, and with no apparent means to pay them. If they made inquiries, then they learned that he would have $12,000 in hands to pay for the improvements he was making, and they trusted him that he would appropriate it properly. In no way that we can regard this case, can we perceive that the appellants have any show of equity to demand that their claims shall be preferred to the mortgage.

Decree affirmed at the costs of the appellants.

WILLS.—ESTATE TAIL.

Testator after giving a life estate to a grandson, proceeded as follows: "and at the end of his life, I give and allow the plantation to come to the nixt mail heair neerest in kindred and relation to mee according to law, and so on in suckcession on that line." *Held*, that on the death of the testator his eldest son became seized of the remainder in fee simple.

[*Ramsay* vs. *M'Intyre*. Pennsylvania Supreme Court. Not yet reported.]

This was an amicable action of ejectment, in which Milton M'Intyre, a minor, was plaintiff, and William B. Ramsey was defendant. The court below entered judgment for the plaintiff on the following case stated.

William M'Intyre died seized of the tract of land in dispute, having made his last will and testament, dated June 17, 1803, whereby he devised the same as follows, to wit:

"I give and bequeath to my grandson, William McAntier McCoy, all the profits of that plantation that formerly belonged to young John Baxter, to school him and *cloath* him till he arrived at the age of twenty years; then, when he comes to the age of twenty years, then it is my will that there is three *pattans* and some *warnted* land, down the *rone*, the whole containing upwards of two hundred acres; I give the above described plantation to my grandson, William McAntier McCoy, during his natural life, and at end of his life, I give and allow the plantation to come to the *nixt mail heair neerest* in kindred and relation to *mee*, according to law, and so on in *sucksession* on that line."

William M'Intyre M'Coy, the tenant for life above named, died in May, 1850, above the age of twenty-one years, leaving a daughter, but no male issue.

The testator had issue, Samuel M'Intyre, who died after the testator, and before McCoy. He left several children, the oldest of whom was named William. This action is brought by William M'Intyre's eldest son, who claims the whole estate as heir in tail male of Samuel M'Intyre, the testator's oldest son. Judgment for plaintiff and defendant appealed.

Lewis J.—After giving a life estate to M'Coy, the testator allows "the plantation to come to the *nixt mail heair neerest* in kindred and relation to *mee*, according to law, and so on in *sucksession* on that line." The person who filled the description here given, at the time of the testator's death, became seized of the estate in remainder. Was he seized in *fee simple* or *fee tail male?*

The rule in England is, that the heir-at-law is not to be disinherited except by express direction or necessary implication. That rule should be observed with more strictness here than in England, because our laws of inheritance are more equal. (2 Bin., 20.) "Entailments are recommended in monarchical governments as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited by the genius of the institutions to depend upon his own merit and exertions." (4

Kent, 20.) As the rules of descent established by law are presumed to be founded on wisdom, and as the policy of the law stands opposed to entailments, the remainder man must be deemed to be seized in fee simple, unless we are forced by the clear language of the will to give it some other construction. Words of procreation are as necessary to the creation of an estate tail, as words of inheritance are to a fee simple (2 Bl. Com., 114). But we have no words of procreation here. Even the words which designate the first taker after the life estate do not necessarily import that he must be one of the heirs of the testator's body. He may be his "next mail heir nearest in kindred," without being lineally descended from him. The words "so on in succession on that line," do not, therefore, necessarily mean that the estate shall go to the heirs of the devisee. The words "according to law" are not to be rejected in the construction of this will. It is true that the testator may have meant that the law is to be regarded in ascertaining who is his next male nearest in kindred and relation to him; but he may also have meant that the estate shall come to him in the same manner that the law would have given it to the heirs of the testator. We adopt this as the true meaning. The words "on that line" do not necessarily mean the male issue of the devisee, but simply his heirs, as contradistinguished from the heirs of the tenant of the life estate previously given. If we create an estate tail by construction in this case, we must do it not only without words of procreation, but without any words which can supply their place. If the succession is not to be regulated according to law, but must be governed by the description given to designate the first taker after the life estate, the result would be inconvenient, and, as we think, contrary to the testator's intent. Upon the death of every tenant it would be necessary to ascertain not only his male heir, but the male heir nearest in kindred and relation to the testator. This, in process of time, would become impossible. And yet this is the line we should be compelled to seek for, if we departed from the rules of descent established by law. An estate tail is so readily docked, that we are not willing to suppose the testator had such an important object in view, where his will does not clearly express it. We are of opinion that Samuel M'Intyre, the son of the testator, was seized in fee simple of the remainder, and that the plaintiff in error is therefore entitled to judgment on the case stated.

Judgment reversed.

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WILLS.—LEGACIES.

A testator left property to his wife during her widowhood, and ordered that after her marriage or death it should be divided, and $500 given to each of four nephews and the residue to a fifth, with a proviso that in case of her marriage or death during their minority, the executors should take charge of their shares until they should arrive at full age. The widow married during their minority—*Held*, that the nephews were entitled to interest from the time of the marriage.

[*Laport* vs. *Bishop*. Pennsylvania Supreme Court. Not yet reported.]

Testator by his will gave certain real and personal property to his wife, during widowhood, and directed that after her marriage or decease,

it should be divided, and five hundred dollars given to each of four nephews, and the residue to a fifth one. The testator also directed, that in case of his wife's death or marriage before the arrival of the legatees at the age of twenty-one, then the property should be divided, and the executors should take charge of the sums given to his nephews, until they should be entitled to their respective shares, with a provision that if either of the legatees should not be of steady habits in the opinion of the executors, his share should be given to the rest.

The widow married while the legatees were minors; the property was turned into money; the executors took charge of the shares, and, when the claimants were twenty-one, paid the principal, but refused the interest. Interest was demanded from the marriage of the widow. This is a suit brought by one of them to try the question.

BLACK, C. J.—We are of opinion as the court below was, that the interest is demandable as well as the principal. It is to be presumed, that the money, after it was received by the executors, produced a profit of six per cent. at least. If this accumulation is not to go to the several general legatees in the same proportion as the principal is divided, then there can be only two other ways to dispose of it. It must all be given to the fifth nephew, who is the residuary legatee, or else the executors may keep it as their own. The latter will hardly be contended for, and the former, though not quite as absurd, would violate the apparent intention of the will almost as palpably.

It is, to be sure, the general rule, that a legacy carries no interest until the time it becomes payable by the terms of the bequest. But when were these legacies payable? The plaintiffs in error say, when the legatees became of age; but this, we think, is a mistake. They were payable upon the death or marriage of the widow. If she had lived unmarried for fifty years, they could not have been demanded. As she was married while the legatees were in their minority, the legacies were payable then, but not into the hands of the legatees themselves, for the testator knew that an infant was not to be trusted with his own money. He provided for the contingency which has occurred by directing his executors to take charge of it for his nephews, until they should be *sui juris*. The executors held it in trust for the legatees—had it in charge to make the most of it, and were bound to account for the profits. Their relation to the legatees was, to all ordinary intents and purposes, that of testamentary guardians.

There is a provision in the will that, if either of the legatees should not be of sober and steady habits, in the opinion of the executors, the share given to him should be divided among the other children of the same family. This is relied on as proving that interest ought not to be allowed, because it shows that the rights of the legatees could not be finally settled and determined until they became of age. But this argument will make no impression upon any one who reflects, that the executors were charged with the money in trust for all the legatees who were sober and steady; and, in case of one or more becoming intemperate, then the trust was to be executed precisely in the same way, only in favor of another *cestui que trust*, substituted in the place of the first one. At the death of the widow, the property was to be

divided into shares, corresponding in numbers with the legatees. These shares were to be placed in the hands and under the charge of the executors, whose duty it thus became to invest them carefully, and pay principal and interest to each legatee, as he came of age, if sober, and if not, to put the other persons designated in his place. The duty of the executors to make interest on the money is not diminished by this provision, and their right to appropriate the interest, when made, to their own use is not increased. Judgment affirmed.

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PROMISSORY NOTES.—SURETY'S LIABILITY.

An agreement by the holder of a note to give the principal debtor time for payment, without depriving himself of the right to sue, does not discharge the surety. *Two cases.*

[*Patterson* vs. *Grier*. Pennsylvania Supreme Court. Not yet published.]

This was an action of assumpsit by Grier against Patterson as indorser of a promissory note, drawn by one Root. The defendant pleaded that he was discharged by virtue of an agreement for further time, which, without his consent, Grier had made with the drawer *after the maturity of the note.*

On the trial, the plaintiff proved the execution of the note, the plaintiff's indorsement, demand, and notice of protest.

The defendant then called George W. Patterson, who stated, that in a conversation between Grier and the defendant, Grier admitted that he had not complied with his agreement about the note, that he had agreed to sue on it, if it was not paid, but that he had given Root time, and agreed to take it in small payments.

The plaintiff gave several letters written from Patterson to the plaintiff, requesting him to sue Root on the note. The note fell due in March; several of the letters were written in July following. The letters also contained promises on the part of Patterson to pay the amount, if it could not be made by a suit against Root.

The court below instructed the jury, that if the agreement between the parties, that Grier should not be held liable if the money could be collected from Root (if there were any such agreement) was made without any new consideration, and after the liability of Patterson had become fixed by the dishonor of the note, the plaintiff was entitled to their verdict for the amount of the note and interest.

Verdict for the plaintiff, and defendant appealed.

WOODWARD, J.—We are of opinion that the agreement, whether made before or after the dishonor of the note, was not such as would discharge the indorser. The only proof we have of it consists in the admissions of Grier at a settlement of accounts with Patterson, in November, 1847. Those admissions, as detailed by the son of Patterson, were, that "Mr. Root was a good, clever fellow, and he had given him time, and agreed to take it in small payments." There was no consideration suggested or admitted. He had given him time. Mere indulgence of the principal debtor, it has been often ruled, does

not discharge the surety He had agreed to take it in small payments, an arrangement calculated to encourage payments, which, being without consideration, was not binding. According to the admissions of Grier, there was no point of time when he had tied up his hands and deprived himself of the right to sue Root. This is the test which determines the continued liability of the surety short of the period when the statute of limitations would discharge him, as is abundantly shown by the cases cited at bar; and hence it follows that, in submitting the defense to the jury at all, the court erred in favor of the defendant, and of this he had no reason to complain.

The judgment is affirmed.

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[*Draper* vs. *Raneyn*. New York Supreme Court. Not yet reported.]

Action against the defendant as surety of a promissory note.

Defense, agreement by the plaintiff with the principal to extend the time of payment.

It appears when the note fell due, the principal, who is employed by the plaintiff as his agent, called upon him to obtain an extension of time, and in urging him for it, expressed his willingness to forward the sale of his lands, during his absence in Europe, without any additional cost to the plaintiff. The plaintiff agreed to let the note stand for some days, but refused to fix any specified time for payment.

CLERKE, J.—Did the plaintiff make such an agreement with the principal as to entitle the surety to a discharge from his liability as surety?

It is a rule too well settled to admit of dispute now, that an extension of the time of payment, for a single day, without the consent of the surety, would exonerate him. But this extension of the credit must be founded on a consideration, and must be such an agreement as precludes the creditor from enforcing payment against the principal until the expiration of a specified period. In this case, the evidence in relation to the alleged extension shows nothing like an agreement of this nature. There is nothing in it from which a sufficient consideration can ever be inferred, or such a promise on the part of the plaintiff, as could prevent him from commencing an action against the principal at any time after the note became due. The willingness of the principal to serve the plaintiff in another matter could not be deemed a legal consideration sufficient to support an agreement; and even if it were, the promise was too indefinite and uncertain to debar the plaintiff from resorting to his legal remedy against the principal at any time after the note became payable by its terms. The promise, at most, was merely gratuitous, and imported no legal obligation whatever.

MALICIOUS PROSECUTION.—PROBABLE CAUSE A QUESTION OF LAW.

In an action for malicious prosecution, the question of probable cause is one of law, not one of fact.

[*Bulkeley* vs. *Ketellas*; 2 Selden's (N. Y. Court of Appeals) R., 884.]

Action for malicious prosecution. Judgment for the plaintiff, and appeal by the defendant.

The only question of interest in the cause was whether in such an action the question of reasonable cause for the prosecution was one for the judge or the jury to determine. The facts necessary to an understanding of the case appear sufficiently in the opinion of the court, which was rendered by

GRIDLEY, J.—When there is no dispute about the facts, the question of the want of probable cause is for the determination of the court; where the facts are controverted or doubtful, whether they are proved or not, belongs to the jury to decide. Or, in other words, whether the circumstances alleged are true is a question of fact, but if true, whether they amount to probable cause is for the court. (*Baldwin* vs. *Weed*, 17 Wend., 227; 1 T. R., 542; 2 Wend., 424; *McCormick* vs. *Sisson*, 7 Cowen, 715; *Pangburn* vs. *Bull*, 1 Wend., 345.) And when the judge ought to have non-suited the plaintiff for the failure to prove want of probable cause, a new trial will be granted. (7 Cowen, 715; 2 Wend., 424; 1 *ib.*, 140.) The following case will show with how much precision the respective duties of the court and jury are laid down and enforced in England. It was there held in a recent case, that though the question of the probable cause depends not upon a few and simple facts, but upon facts that are numerous and complicated, and inferences to be drawn from them, still it is the duty of the judge to inform the jury, that if they find the facts to be proved, and the interferences to be warranted by such facts, that the same do or do not amount to probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. (*Panton* vs. *Williams*, 1 Gale & Davison, 504; S. C. 2 Ad. & El. N. S., 160.) In the case before the court, the defendant's counsel made a strenuous effort to induce the judge to perform his duty which the law has assigned to him, but without effect. The fifth proposition submitted by the defendant's counsel, and which the judge was requested to charge, affirmed, that if the jury were satisfied of the honest belief and understanding of the defendant on the point that the plaintiff testified that he had no interest in the suit in the common pleas, then the other facts and circumstances proved in evidence did not establish the want of probable cause.

To this the judge charged, that it was for the jury to determine "whether these circumstances proved in evidence do or do not establish a want of probable cause." Again, the seventh proposition, which the judge was requested to charge, asserts that the plaintiff had failed to show the want of probable cause; to which the judge responds: "This I say is for the jury." These two instructions to the jury are clearly erroneous, and that there is a subsequent part of the case a distinct ex-

ception to these decisions. The jury are told that it is their province to determine whether the facts and circumstances proved in evidence do or do not establish the want of probable cause. The judge does not decide whether these facts and circumstances are sufficient or not, provided the jury believe them to be proved, but leave the whole matter to the determination of the jury. If the judge had supposed that the truth of the facts as sworn to admitted of a doubt, he should have expressed his opinion on the law arising upon those facts if proved, and then submitted to the jury the question whether they were credibly proved or not.

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CONSPIRACY.—INDICTMENT.

H. and others were indicted for having conspired to cause the officers of the F. D. Bank to violate the statute prohibiting the circulation of foreign bank bills of a less denomination than five dollars, and for having then threatened them with a number of actions for penalties, unless they paid to them $3,000—*Held*, that the indictment was good.

[*Hazen* vs. *The Commonwealth*. Pennsylvania Supreme Court. Not yet reported.]

This was an indictment against Hazen and others, for a conspiracy to induce the officers of the Farmers' Deposite Bank of Pittsburg to violate the 48th and 49th sections of the act of the 16th April, 1850. One of them prohibits the circulation of what are commonly called foreign bank bills, of a less denomination than five dollars, under certain penalties to be sued for as debts of a like amount. The other contains the same prohibition, under the penalty of indictment in the criminal courts for a misdemeanor. In one count, the prisoners were accused of having caused the officers of the bank to violate the statute, and then threatened them with a great number of actions for penalties (amounting in the aggregate to $20,000), unless they would pay the sum of $3,000 to the conspirators. In another count they are accused of having actually offered, for the sum of $3,000, to bind themselves against bringing any action for penalties, and to "tear up, burn, and destroy" the evidences of fourteen violations of the law, in which the penalties amounted to the sum of $70,000. The prisoners were found guilty, and appealed to the supreme court. The principal question of interest arising in the case was, whether the acts were indictable.

Lewis, J.—An indictment lies not only where a conspiracy is entered into for an illegal purpose, but also where it is to effect a legal purpose by the use of unlawful means; and this, although such purpose be not effected. (2 Lord Ray, 1167; 8 Mod., 11; 6 Mod., 185; 8 S. & R., 420; 4 Met., 126; 2 Russ., C & M., 553.) Where the object itself is unlawful, the means by which it is to be accomplished are not material ingredients in the offense, and therefore in such a case it is never necessary to set them forth. The offense is complete the moment the conspiracy is made, whether any acts be done in pursuance of it or not. Such acts form no part of the offense, and the statement of them in the indictment is but surplusage.

It is by no means necessary that the object to be accomplished should be *malum in se*. It is sufficient if it be made criminal, or even

be prohibited under penalties by statute. The indictment against workmen for a conspiracy to defeat the operation of the act of parliament regulating their wages, and that for a conspiracy to violate the acts of assembly prohibiting the sale of lottery tickets, were sustained on this principle. (8 Mod., 10; 4 Met., 128; 7 S. & R., 476.) In an indictment for conspiracy to do an act prohibited by the *common law*, where the act has a specific name which indicates its criminality, it is not necessary to describe it minutely. But it has been thought that where the *object* of the conspiracy is merely forbidden by the *statute*, it can be described only by its particular features." (*Com.* vs. *Hartman*, Lewis' U. S Crim. Law, 223.) But even in offenses of this character, it has never been held necessary to set forth the unlawful object, with the precision required in an indictment for perpetrating it. It is the *conspiracy*, and not the *object* sought to be accomplished by it, that is the subject of the indictment. Where the indictment is for *an act done*, it is always in the power of the prosecutor to lay it with certainty, and this the accused has a right to require, as well for the purposes of his defense, as for his protection against a second prosecution for the same cause. But this reason does not extend to an object *which may never have been accomplished*, and which is not the *gist* of the offense charged, although an essential ingredient in it. (*Commonwealth* vs. *Gillespie*, 7 S. & R., 475–6.)

Let us apply these principles to the case before us. There can be no doubt that the statute prohibiting the circulation of foreign bills under the denomination of five dollars is founded on the soundest policy, and that the public interest would be greatly promoted by its faithful observance.

A conspiracy to defeat its operation is a combination against the public welfare, and we can have no hesitation in declaring that such a conspiracy is an indictable offense. If the first count contained nothing more than this charge, the offense would be complete. But it goes further. It avers that the purpose of the conspirators, in causing the officers of the bank to violate the act of the assembly, was to compel them "*unjustly and unlawfully*," *to pay large sums of money*, "*for the corrupt gain*" of the conspirators. If the object was merely to compel the payment of the penalties by a *bona fide* prosecution for them, the offense of inciting persons to violate the law remains. But a recovery of the penalties, even in that case, could not be "unlawful." We are, therefore, left to infer, that the "large sums of money" were to be obtained by some other means than a fair prosecution of the offenders. In a subsequent part of the indictment, it appears that the money was to be drawn from the victims by *compounding their offenses*. If the object was merely to detect and bring to punishment suspected violators of the law, there was nothing indictable in the transaction. Norder's case in Porter's Crim. Law, 129, and many other cases in detecting post-office larcenies, and other offenses, are instances of this. But it was the business of the plaintiffs in error to show on the trial the lawfulness of their acts. They had their day in court for this purpose. The mistake of the jury, if there be one, can not be corrected here. A writ of error reaches nothing but the errors manifest upon the record.

The evidence submitted to the jury is no part of the record, and is, therefore, not before us. It is found as a fact, that the objects of the defendants below, was not the detection and suppression of crime, but the promotion of their own *corrupt gain.* The idea of procuring the violation of the law for the purpose of detecting and punishing suspected offenders no where appears upon the record. On the contrary, this motive is entirely excluded from the averments in the indictments, all of which the jury have found to be true. It is not material whether the "corrupt gain" of the conspirators was to be secured by recovering the informer's share of the penalties, or by receiving money to suppress prosecutions for the offenses committed. In either case there can be no doubt of the criminal character of the transaction. The double iniquity of inducing a person to commit a crime, and then extorting money from him to suppress a prosecution for it, is such a plain violation of public and private rights, that it requires no argument to show that a conspiracy to promote such an object is indictable. The act of inducing a person to commit an offense for the purpose of recovering the penalties against it may be less in the degree of its enormity, but it is in principle the same. It is an offense not unlike that which was punished in the case of *King* vs. *McDaniel et al.* (Foster's Crim. Law, 140.) In that case there was a conspiracy to procure persons to commit a robbery upon *one of the conspirators* for the purpose of obtaining the rewards given by act of parliament for the conviction of highway robbers. Although the means used to induce the perpetration of the robbery were not more seductive than those adopted in the case before us, the prisoners were convicted of the conspiracy, and the conviction, upon the fullest consideration, was affirmed. They were set in the pillory twice, and committed for seven years, But the offense of inducing others to commit crimes for the purpose of obtaining the rewards given for their conviction was so abhorent to public feeling, that one of them lost his life in the pillory through the resentment of the populace. (Foster, 130.)

It is true that the means made use of, to prevail over the virtue of the victims in this case, were not such as could have succeeded with persons of ordinary devotion to the law. But as the *conspiracy itself* is indictable, without regard to the result, or to the means used to effect it, the facility with which the result was effected may prove that the officers of the bank were unable to resist a very slight temptation; but it is far from extinguishing the guilt of the conspirators. Their offense is none the less because aimed against persons too weak to resist a small temptation. If the means resorted to had failed, there is no reason to believe that the conspiracy would have been abandoned. On the contrary, as the plaintiffs in error had bound themselves together to accomplish the unlawful object the presumption is, that if one measure failed, another more effective would have been adopted. But all this is immaterial, for, as already said, neither the final result, nor the means used to effect it, vary the legal character of the offense. We are of opinion that the first count charges an indictable offense.

The judgment of the court of quarter sessions is affirmed.

RIGHT OF WAY.—LIMITATION.

A right of way over the land of another to a particular lot, can not be extended without the consent of the grantor.

[*Shroeder* vs. *Brenneman*. Pennsylvania Supreme Court. Not yet reported.]

Action of trespass on the case by Brenneman against Shroeder. Judgment for plaintiff and appeal by defendant.

Shroeder, it seems, in 1851, purchased a lot of land in the city of Lancaster, Pa., from one Withers. In 1852 he purchased an adjoining lot from one Metzgar. Both of these lots were bounded by a private alley-way belonging to Brenneman. A right of way through this alley belonged with the lot purchased from Metzgar, but not with the lot purchased from Withers. Shroeder, however, placed a door or gate on the eastern line of the lot purchased from Withers, opening into this alley, and also placed a hydrant close up to the wall, which did not, however, obstruct the alley-way. This action was brought to recover damages for the interference of defendant with plaintiff's right to the alley.

WOODWARD, J.—It is a well-settled rule of law, that if a man have a right of way over another's land to a particular close, he can not enlarge it and extend it to other closes, and this whether his right be by user or by deed. (Rolle, 391; *Howell* vs. *King*, 1 Mod., 190; *Henning* vs. *Burnett*, 8 Exchequer R., 192; *Davenport* vs. *Lawson*, 21 Pick., 72; *Kirkham* vs. *Sharp*, 1 Wh., 323; *Lewis* vs. *Carstairs*, 6 Wh., 207.) The reason of the rule is stated in *Howell* vs. *King*, and runs through the subsequent cases, that if the law were not so, the owner of the close to which the right is appurtenant might purchase an indefinite number of adjoining acres and annex the right to them by which the grantor of the way might be entirely deprived of the benefit of his land—a reason which applies with all its force to a private alley, like that in respect to which this suit was brought. Entitled to the use of this alley for the purposes of the lot purchased of Metzgar, if Shroeder can use it also for the convenience of the lot he purchased from Withers, there is nothing to prevent his use of it in connection with any other lots he may purchase along the alley, and thus Brenneman may be annoyed with the general use of a right granted only for a special purpose. The right is not personal to Shroeder, but appurtenant to his one specific lot, and the necessary limitation of its extent is found in the terms of the grant. It can not be carried beyond without invading the reserved rights of the grantor.

Judgment affirmed.

# HON. PETER HITCHCOCK,

## LATE CHIEF JUSTICE OF OHIO.*

THE subject of this memoir was born in the town of Cheshire, in the county of New-Haven, and State of Connecticut, October 19, 1781. Like other youth of New-England, he had the advantages of a common school education, such as they were near the close of the last century; and when of suitable age, turned his attention to classical studies. At the age of seventeen years, he entered Yale College, as a member of the Sophomore class, and graduated in 1801. The pecuniary circumstances of his father were limited, so much so, that in order to acquire the means of defraying the expenses of an education, he was compelled to rely measurably upon his own exertions. For this purpose he spent his vacations, and occasionally some portions of the college terms, in teaching school. In consequence of this embarrassment, he did not succeed as well in his college studies as might otherwise have been expected, although his character as a scholar was reputable. His fellow-students regarded him as a young man of excellent habits and judgment, a careful and accurate, rather than a brilliant student. He did not so particularly attract the attention of the faculty as to excite on their part anticipations that his future course would do eminent honor to his alma mater. In this respect, his case was not unlike those of the late Henry Baldwin and Daniel Webster, in their retirement from college. Like those eminent men also, by his subsequent life, he demonstrated most clearly, that his instructors had signally failed to appreciate his intellectual capacity and power.

After leaving college he made choice of the law as a profession, and engaged in its studies, in the spring of 1802. These studies were pursued with private instructors, and mostly in the county of Litchfield, in his native State. He was admitted to the bar in March, 1804. His examination for admission evinced that his preparatory studies had been pursued with diligence and attention, and that he was well qualified to engage in the practice of his profession. He immediately opened an office in his native town, and continued in practice there for about two years, with fair success for a young man well qualified, diligent, and attentive to business. In 1805 he was married to Miss Nabby Cook, of his native town, who still survives him. Although his prospects for business in Connecticnt were as flattering as could have been reasonably expected, yet he was fully aware of the difficulties which a young lawyer must necessarily encounter, especially where the profession is crowded, and the business principally in the hands of old practitioners of established character. He therefore concluded to "try his fortune" in a new country, and in

* A brief sketch of this distinguished jurist was published in "Biographical Sketches of Eminent American Lawyers," in June, 1852, but he has since deceased, and a more extended notice is deemed due to his memory

the spring of 1806, removed with his family to Geauga county, in the State of Ohio, and settled on the farm in the township of Benton, on which he resided until his death.

The State of Ohio was at that time truly a new country. It was almost entirely a wilderness, although in some portion of it settlements had been commenced, and here and there might be found an occasional cabin. The entire population did not much exceed one hundred thousand. It was extremely difficult to get from place to place, as the roads, where there were any, were almost impassable, and frequently the traveller was guided by nothing better than a blazed or marked line through the forest. That portion of the State in which Mr. Hitchcock located himself, and which is known as the Connecticut Western Reserve, had, perhaps, fewer inhabitants in proportion to the extent of territory than most other parts of the State. The Western Reserve was at that time divided into two counties, Trumbull and Geauga, the latter having been organized in the spring of 1806. Their population did not then exceed five or six thousand, nor did it increase with much rapidity until after the close of the war of 1812. Western New-York was, at that time, a new country, and its territory had first to be supplied with inhabitants, before it could be expected that many emigrants would venture as far west as Ohio. The Western Reserve, which, in 1806, constituted but two counties, is now divided into ten, and parts of it are attached to three others. In 1850 its population exceeded two hundred and ninety-six thousand, and that of the entire State had increased to nearly two millions.

Judge Hitchcock was not disappointed in his expectations in removing to Ohio. True, law business, as might have been expected, considering the sparseness of the population, was small, and for several years his time was somewhat divided between his profession and the "clearing up" and cultivation of his farm. During several different seasons also, after his arrival in Ohio, he was engaged in teaching school. But notwithstanding these interruptions, and the disadvantages of a residence at some distance from the county-seat, he had his full share of what legal business there was. His practice constantly increased with the increase of population and the improvement of the country. Nor was it confined to one county, but extended over the entire Reserve; throughout all of which, he soon acquired the reputation of a leading lawyer. In the practice he was successful, and had the satisfaction of believing that his clients were well satisfied with his management of the business committed to his care. In conducting this business he was compelled to trust principally to the knowledge of the law acquired in his preparatory studies, as books were scarce in that part of Ohio, and he had not much time for reading. Few now remain who can speak of his early efforts at the bar from personal knowledge; but the records and files of the causes in which he was employed, sufficiently indicate that he was then a well-read lawyer, familiar with the leading principles of the science, and possessed of an acute, practical, discriminating, and logical mind. His cotemporaries describe him as one that came to the trial of his causes well prepared; skilful in eliciting and arranging his proofs; of familiar and persuasive eloquence, united with a happy faculty of

taking a natural view of the most intricate and complex case, and so simplifying it, as to render it easily understood, and clear to men of ordinary comprehension; and withal possessed of talent sufficient to grapple, successfully, with any amount of new and unexpected matter of law or fact, that should happen to be thrown suddenly upon him, and handle it, apparently, with the same ease that he managed a case composed of the simplest elements. To all this he added the moral influence of a high character for candor, personal integrity, and fairness.

Perhaps the safest opinion of his intellectual capacity and power may be formed from the fact, that he held a leading position at the bar, when it embraced men of signal ability, with whom he was brought into daily conflict. The grave is now closed over most of the eminent lawyers that attended the courts within the circle of his practice, between the years 1806 and 1819. The present generation know but little of the treasures of knowledge and talents brought to the West by those energetic and enterprising pioneers. Tradition sometimes speaks of them. Still the present generation is inclined most erroneously to arrogate to itself superior ability in proportion to its greater facilities. On hearing a remark claiming this superiority, the reply of one of the survivors of that day, himself a competent judge, was, "You are mistaken; I tell you there were giants at the West in those days." Perhaps this reply may be deemed a little extravagant; but the names of those who were wont, at that time, to attend the courts in Trumbull county, furnish, at least, an apology for it. Hon. Elisha Whittlesey, and the late Judges Tod, Pease, and Goodenow were residents, and the Hon. Benjamin Tappan, Philip Doddridge, Charles Hammond, Justice Baldwin, of the United States Supreme Court, and several other prominent lawyers, were frequent attendants. Most of these have departed this life, and have left a posthumous fame for learning and ability, not often equalled by those whose reputation is acquired at the early age at which theirs was. Of the survivors it is unnecessary to speak. Their high standing and eminent ability are well known to their fellow-citizens. These men would have been ranked with the proudest intellects that adorn the profession, in whatever section of the country they had lived.

It was in a new country, not well supplied with books, with the cares of a pioneer, and the charge of a young family upon him, and pitted against such men, that young Hitchcock was obliged to struggle up the hill of fame, in those primitive times; and successfully did he struggle, and secure to himself a proud eminence. It was under such auspices, with but a mere trifle of inherited property, that he was obliged to earn his daily bread and provide for the education of his increasing family, and to bear, in the mean time, his full share of the current burdens of society, at the same time that he provided the means of support for his declining years: yet he was always found undiscouraged and equal to his task. An active and efficient member of society and of the church, he was there, no less than when representing the people in the legislature, in Congress, and in convention, or while discharging the duties of chief-justice of the State, the same self-possessed, imposing, but modest, unassuming, unofficious man of

influence; the same unobtrusive individuality of character and sterling rectitude of conduct, in all stations of life, marked him as a man of more than ordinary mould, and failed not to secure the respect and confidence of his fellow-men, in whatever capacity they became acquainted with him.

Judge Hitchcock possessed a strong physical frame, and, during a considerable portion of his life, especially during the last twenty years of it, was favored with good health, and was capable of uncommonly severe mental endurance. His head indicated the possession of a massive, finely-developed brain. The calm self-possession, evenness of temper, firmness of purpose, and self-reliant judgment which he uniformly exhibited, would have been indicated by nature's endowments; yet he had improved upon these natural faculties by constant habits of sobriety, personal restraint, and untiring industry.

In early life he acted efficiently with the political party that brought Jefferson, Madison, and Monroe to the Presidency; and was one of the most successful advocates of their principles in Ohio. This course in politics, and his eminence at the bar, soon brought him prominently before the people; and in 1810 he was elected a representative to the General Assembly of the State. In 1812, he was elected to the State Senate; and in 1814 re-elected. He served during both terms of two years each, and was speaker of that body for one session. As a member of the General Assembly, whether in the house or in the senate, he occupied a prominent position, and exerted his full share of influence. In the fall of 1816, at a warmly-contested election, he was returned to the Congress of the United States, and took his seat as representative in that body in December, 1817. Before the close of his congressional term, he was, in 1819, by the legislature of Ohio, elected a judge of the Supreme Court of that State, for the constitutional term of seven years. He was re-elected to the same office in February, 1826, in March, 1835, and in January, 1845; and finally retired from the bench on the 9th of February, A. D. 1852, at the advanced age of seventy years. He had been returned and served in the State Senate during the term between 1833 and 1835, and was again for one session its speaker. The fact that he entered public life in 1810, and continued to occupy, for a period of forty years, the most important stations within the gift of the people of his adopted State, is an eloquent commentary on his character, expressive of their decided opinion of his merits. It tells better and more forcibly than words can express, how his long and faithful services were appreciated by those who best knew their worth. Nor was this abiding confidence less creditable to those who so cheerfully continued it, than to the worthy recipient of so much public favor. Public applause was never won by him with any of the artifices by which some acquire an evanescent popularity and become great men for a day. He never practised any of the arts of the demagogue; and if he possessed that power, he scorned to use it, but regarded it as a faculty never to be put in requisition. His judicial station, so ably filled for twenty-eight years, was one illy calculated to secure an available popularity, in a community where party lines are closely drawn. The judge who, like him, does his duty, his whole duty, and nothing but his duty, and thereby earns and wins golden

opinions from the learned and the good, must, by the very act of performance, sufficiently thwart the course of the dissolute, corrupt, and criminal portions of community to secure their enmity; and he necessarily incurs the hazard of their holding the balance of power between the contending parties of the day, and of their using it under the false pretence of avenging a real injury.

Moreover, as has been stated, Judge Hitchcock was originally a republican of the Jeffersonian school, and, from his arrival at full age until the formation of new parties, or the re-construction of old ones, subsequent to the election of John Quincy Adams, had uniformly and efficiently acted with the Republican party. Although personally preferring the election of that gentleman to the Presidency, he had, in 1823, presided at a meeting in Geauga County, which nominated Andrew Jackson for that office; and had been as freely berated for what were called his radical notions, at an early day, as were the active supporters of Jackson at a subsequent period. He had strenuously sustained the war of 1812; and for the other supposed political sins of the old republicans, his opponents taxed him with a partisan's full share of responsibility. He, however, in common with many of his political friends, advocated the election of John Quincy Adams, and sustained his administration. He insisted that he could never discover wherein that administration differed materially from those which preceded it, which were admitted to be republican. He ever afterwards acted with the Whig party, because he believed there was more of the spirit of genuine republicanism in that than in the opposing party, and that its measures, if adopted and persevered in, would conduce to the best interests of the whole country. He was conservative in his feelings although not opposed to judicious reforms; but in effecting them, thought gradual, rather than great and sudden, changes most prudent. With the agrarian movements of the present day he had not the slightest sympathy.

His political course subsequent to 1824 (especially as those of his early associates who attached themselves to the Democratic party charged him with a departure from the true faith) placed him in a position to receive the decided opposition of that party, whenever an opportunity was furnished to politicians to make him sensible of their power. Hence arose the two interruptions of the continuity of his judicial service. But these things did not affect him. On his return to the bench, he bore himself with such dignity and fairness, and evinced such ability, as won from those of the profession who acted politically against him, opinions as favorable and an esteem as warm and abiding as those entertained for him by his political friends and associates. His brethren upon the bench who, at different times, had thus displaced him, could never discern the least evidence that the occasion had left upon his mind anything to render their position as associates less acceptable to him or less pleasant to themselves than it would have been if they had been brought upon the same bench under auspices the best calculated to produce friendship. This is decided language; but it is the testimony of one who has means of knowledge possessed by no other man, and who speaks from that personal knowledge. It is what could be said only of a liberal, generous, noble mind. It is saying much for the magnanimity of one who for

years was regarded by all classes as a leading spirit of the Whig party in Northern Ohio; and who had long been a shining and conspicuous target for the shafts of political opponents of all grades.

That this favorable opinion is not the expression of a single friendly individual, may be shown by a single illustration, and its introduction will exhibit this distinguished citizen again acting in a most important station. A practical test of public opinion, in regard to him, was furnished in the election of delegates to the Convention for the revision of the Constitution of Ohio, in the spring of 1850. The district in which he resided was entitled to three delegates, and was pre-eminently the stronghold of Free-soilism. That party outnumbered each of the others by some 500 or 1,000 voters. Actuated by what, under the peculiar circumstances of the case, was considered by the Whigs and Democrats an illiberal policy, and contemplating, as was supposed, measures extremely obnoxious to them, the Free-Soilers put in nomination a full ticket of men of their own party. This course on their part produced an agreement of the other two parties to support a Union ticket, composed of sound Whigs and Democrats—the Whigs nad the greater number of voters, and of course a superior claim to two of the three delegates; but inasmuch as their excess of numbers was not in that proportion, in order to compensate for the deficiency, they very generously offered to the Democratic party the selection of the Whigs that should be placed on the ticket. The offer was accepted, and the Democrats, with great unanimity, named Judge Hitchcock, the great leader of their political opponents, and the man of the most influence among them, as their first choice. He then held the office of Chief Justice of Ohio, and with much reluctance accepted the nomination. He, however, did so, and, with the whole ticket, was elected in spite of a severe and bitter opposition, receiving the support of almost every regular Democrat in the entire district. That was a proud day in the life of a toil-worn public servant, and it is believed that its results were not less important to the people of the State of his early adoption, than honorable to him.

Judge Hitchcock took his seat in the convention at the time it assembled, and was active in the discharge of his duties. He performed his full share of labor in the most important committees, examined carefully every subject that underwent discussion, frequently took an active part in the debates, and was conspicuous among the most useful and valuable members of that most distinguished body of men. He returned to his constituents after the close of his labors, and had the signal good fortune to learn from them that they were well satisfied, that his course had fully justified their preference in selecting him. They were satisfied that his constant aim had been to present for the action of the people an instrument as perfect in itself, and as well calculated to promote the happiness and prosperity of the present, and future millions of Ohio, as could be formed; and that he had pursued that object with a singleness of purpose, that had elevated him entirely above the level of a partisan, to the dignity of the experienced, practical statesman.

It was not to be expected that he would agree in all things with the majority, nor did he. When others differed, he heard them attentively,

and used his best efforts by argument to modify their views, and to produce unity of action, by reconciling conflicting opinions. The working of the new constitution will soon test the question how far he was right, and wherein a departure from his counsels was the result of a prudent foresight. He entered the convention a man of large experience, of clear, methodical mind, and probably better understood the defects of the old system than any other man in Ohio. In his recorded votes, and the reported debates, he has left ample means by which posterity can form a correct judgment upon his every act in that body.

He was decidedly in favor of transferring directly to the people the election of the judiciary, and of all State and county officers. The conviction of the policy of a change in this respect had been produced in his mind by careful observation of the operation of the old system. He was opposed to reducing the term of office to the judges, believing that public policy, as well as the interests of persons and property, required its increase rather than its diminution. He would have much preferred that it should have been fixed at fifteen years, with a prohibition against re-election. With the arrangement of the judicial system he was not entirely satisfied. He regarded it as quite problematical, whether the contemplated legal reforms would be found of practical use, especially in the State of Ohio. It had been the effort, both of the legislature and the courts of that State, to simplify legal proceedings as much as possible; technicalities had been in a great measure discarded, and brevity in pleadings was encouraged. True, the common law form of the action of ejectment was retained, but in practice no evil resulted from it, and in no form of action were the rights of parties litigant more easily ascertained and determined than in this: under the rules of court, the issue was so made up, that the great question, and indeed, generally, the only question, was that of title, or the right of possession. Under the new constitution, all distinction in the forms of action and proceedings at law and in equity have been abolished. Whether this experiment will conduce to the ends of justice, time and experience must determine. Many competent men and intelligent lawyers begin to think that the Chief Justice was far from erring in his anticipations on this subject, and to speak of the necessity of modifying the judicial system, and the code, to prevent the failure of both. Doubtless, a future trial should be made before attempting any change, and perhaps the result will be entirely satisfactory.

Judge Hitchcock favored decidedly the provisions of the new constitution recognizing the public debt, and providing for its payment, and limiting the power of the legislature to incur additional liabilities; also, the different clauses requiring the equal taxation of all the property in the State; and the incorporation of the principle of individual liability of stockholders in corporations; although he probably would have preferred to have excepted from the operation of this rule corporations designed especially for purposes of internal improvement.

In reviewing the course of Judge Hitchcock as a legislator, the future student of the history of Ohio will find some things worthy of particular note. He will find votes of his at an early date, that give

evidence of a well-informed and mature judgment, far in advance of the age; and that its dictates were by him fearlessly acted upon then, when they run counter to the opinions of both political parties; and afterwards, with his characteristic independence, acted upon, when the Whig party, with whom he was associated, very generally opposed them. History teaches us, that Governor St. Clair owed much of his unpopularity to his efforts to induce the territorial legislature to define and limit in their charters the specific grants of corporate power intended to be conferred upon the artificial bodies which they created. His vetoes of bills, deemed defective in this respect, are supposed to have hastened the period of a change from the Territorial to a State government; and not only to have excluded from the constitution the veto power, but to have caused the introduction into that instrument of that peculiar clause which, for many years, was construed by the republicans as conferring upon any association, for a lawful purpose, a constitutional right to demand a charter; and such a charter, as would confer upon them all the powers that might be exercised by the individual in his private capacity.

Acting under this conviction, the legislature had been liberal in the unrestricted grant of corporate power prior to 1810; and it was considered a heterodox notion, a departure from the true republican faith, to attempt to trammel the powers of a corporation by legislative restriction, when Judge Hitchcock entered the house as a member. He, however, met the question fearlessly, and successfully maintained that the legislature had that power, and that duty required its exercise, by a careful scrutiny of all such enactments, and a strict definition of the powers intended to be conferred.

He also labored to secure in such grants a clause reserving to the legislature the right to modify or repeal the charters, whenever demanded by a due regard to the public welfare. This proposition found but few supporters in 1810. It was far in advance of the democratic confidence in the people at that day. It was an original movement in Ohio, and was regarded as ultra-radical and impracticable by both political parties. The Federalists, of course, regarded it as entirely unsafe to trust corporate rights to the action of subsequent legislatures. But the experience of forty years produced a great change in the public mind, and the effect was to induce the two millions of people in Ohio, in 1850, to embody in their organic law the rejected principle of 1810. Its introduction was more than acceptable to Judge Hitchcock. At an early day he considered it but the dictate of prudence to thus provide a remedy for incautious, hasty, and ill-advised legislation. He was early convinced that it was a measure of safety, necessary for the proper protection of the public, and this conviction of his early manhood had never been shaken, but on the contrary had increased in strength, as his years and experience matured his judgment.

He was anxious for, and labored to introduce a clause requiring compensation to be made for any individual injury that might be caused by the exercise of this reserved power, and claimed that such clause would be but the declaration of a principle of natural justice, which was unalterable, and of moral force at all times. In this he failed, but yielded with commendable grace to the force of numbers.

He did not regard the absence of such clause as an insuperable objection to the instrument, but expressed the opinion that the rejected provision was one that obviously addressed itself to the sense of justice, inherent in the bosom of every member of community, that no legislative assembly could ever be long sustained in a wanton repeal, injurious to private property. He deemed it hardly probable that a future legislature should coolly disregard a fixed principle of right, or deliberately refuse a remedy for a positive wrong; and utterly improbable that the people of Ohio would ever, knowingly, sustain them in so doing, or hesitate to adopt the appropriate means for redressing such a wrong, should it ever be perpetrated.

In the opinion of Judge Hitchcock, there were other defects in the constitution submitted for adoption by the people in 1851, and some provisions with which he was not entirely satisfied; still he voted for it, believing it to be an improvement upon that of 1802, and was anxious for its adoption by the people, and used his influence to secure that end.

The labors of Judge Hitchcock in the Convention did not prevent the performance of his usual circuit duties on the bench, nor his sitting as a member of the court in bank; but the two offices occupied his whole time, and made that year of his public life one of continuous toil. He had, however, the consciousness of having labored faithfully for the performance of his entire duty to the public, and this was to him an ample reward.

Important and useful as were the services of Judge Hitchcock in other departments of public life, it was upon the bench of the Supreme Court of Ohio that his severest and most untiring efforts were put forth. And he, who states the full extent of his merits as a jurist, is liable to be suspected of presenting the overwrought panegyric of a too partial friend, especially by those not familiar with the nature and extent of the duties performed by him during the long period of his judicial service. Those living in the older States know but little of the labors required of one placed in his position, and are illy prepared to appreciate the disadvantages under which he must act. The State of Ohio was comparatively new and thinly settled in 1819. All the earlier States, and many foreign countries, had contributed largely to its population. This tide of immigration had continued to flow in, and at the time of his leaving the bench had, with the natural increase of population, swelled the number of inhabitants to about two millions. The State which he began to traverse, with two-thirds of its surface in its native forests destitute of the first signs of civilization, had become densely populated, was traversed by rail-roads, canals, and other public improvements, with thriving villages thickly interspersed over a rich and highly cultivated country, which embraced several cities, whose growth and prosperity far exceeded the most sanguine hopes of any who had early prophesied favorably of the prosperity of the Western country—of course the changes were rapid, and the habits, feelings, and opinions of the people were far from being settled and uniform. The task of a judge among such a people is far different from that of one in an old and established community, where the habits of the people have become fixed; the laws have been reduced to a regular sys

tem, and by time and experience adapted to the state of society; and where the masses have all been trained in the same school of morals and policy, and comprehend alike the same subject. In such a community, legislative, executive and judicial action naturally assumes the consistent form of a settled policy, produced in the wisdom acquired by experience, instead of being, not unfrequently, the result of sanguine theory, or bold speculation, crudely attempted to be reduced to practice, without the experience necessary to give it practical form to foresee its evils. The duties of the judges of the English courts require them to possess learning, integrity, justice, industry, astute minds, and thorough knowledge of the people of England, and of her public policy, but they have a beaten track to tread, upon which the learning of centuries has shed beams of vivid light. Even the Lord Chief Justice has to pioneer few unexplored regions of thought, where he can derive no aid from precedent well settled, and acquiesced in for ages. He is rarely vexed with crude and ill-digested statutes, the work of minds not familiar with the old law, the supposed mischief, or the means of providing a proper remedy, or (what is still more embarrassing) of a mind more partial to some provision of the German, French, or some other foreign code, than to the English law. A State that changes from a forest to a flourishing community, that increases its numbers more than twenty-fold in fifty years, mainly by an immense immigration, embracing a fair share of the enterprising citizens of every civilized country of the world, necessarily requires time to settle her own policy upon a consistent plan, to regulate her own laws, and to bring the different elements of public thought to act together in harmony. Every man of intelligence comes to a new State more or less attached to some of the institutions, and forms of legislation, and civil procedure of the country of his birth, and will strive, until better informed, to incorporate in the legislation of the State of his adoption whatever he thought worked well elsewhere. Influences of this kind have frequently broken in upon the common law basis of legislation in Ohio, and disturbed the harmony of the system—sometimes, perhaps, for good; sometimes otherwise. But this unsettled state of the public mind, this constant change, necessarily increases the labors of the judge. Let a man of the highest and most cultivated intellect, and of the most untiring industry, be placed in the court of last resort, to expound statutes framed under such auspices, and to decide the numerous other questions necessarily arising; require him to hold court six months upon the circuit, and six weeks in bank each year; and to pass upon more questions thus arising every twelve months, than any judge in England would be required to decide in twice that time; and compel him when in bank to write out and deliver to the reporter his opinion by the morning after he made a decision, and he would soon learn how to appreciate the labors of Judge Hitchcock as a jurist, and to award to him the credit justly his due, upon comparing the reports of his judicial decisions, prepared under such circumstances, with those of men of standard ability, found in other law reports.

It was amid this unsettled state of society and law, and this constant change, and under circumstances such as have been described, that he was called upon to discharge his duties as judge. He labored faithfully to introduce system, to sustain and enforce those principles

of law sanctioned by the wisdom and experience of ages, to adapt judicial proceedings to the character and wants of the people, and to give permanency and consistency to the jurisprudence of the State. In any emergency, he seemed to bring to his aid intellectual strength and research adequate to the occasion, and his success was not only highly satisfactory, but highly honorable to him.

Ohio gave unequivocal evidence of her opinion of his sterling worth and great fitness for judicial station, by continuing him so long in her service in that capacity. The careful reader of the twenty volumes of Ohio Reports, who reflects upon the nature of his labors, and the circumstances attending them, will never condemn his judgment. To him these volumes are a monument of enduring fame. They exhibit the solid structure of his mind. They show him, as he was, a man well versed in the elementary principles of law, anxious to do right, and to give plain reasons for his own belief that what he did was right, without making any pretence of superior ability, or aiming to embellish his opinions by any of the ornaments of fine style. That he never erred, is what can be neither said of him nor any other man. But with him an erroneous decision was a very unusual occurrence. Some years since, Chancellor Kent, whose opinion is entitled to the highest credit, speaking of the first eight volumes of reports containing Judge Hitchcock's early decisions, said they exhibited a sound and healthy administration of the law in Ohio, which compared favorably with the jurisprudence of the older States.

On the bench Judge Hitchcock was laborious, systematic, punctual, and attentive. He dispatched business with peculiar facility, although not without deliberation. His official life was one of constant labor, but he was rarely, if ever, in a hurry. He readily ascertained the points in a case which were decisive of its merits, and his mind seemed at once to reject every thing that was immaterial. He read the manuscript pleadings, evidence, and arguments submitted, with great rapidity, and never contented himself until he had read every paper connected with a case. His memory was retentive, and by a single reading of the papers in a chancery case, however voluminous, he seemed to acquire a perfect knowledge of their entire contents, and of the whole matter in controversy, and would, almost uniformly, state with accuracy the exact point upon which the case turned, and name the evidence that bore upon it. This faculty enabled him to concentrate his whole mind upon the question in hand, to recur in debate without loss of time to the proof that would correct or strengthen a first impression, and, united with his habit of persevering with an investigation once begun until he had finished it, enabled him to turn off, well done, a mass of business that more sprightly but less methodical minds would not be able to dispose of as well in the same length of time.

He understood the great object of the whole machinery of courts to be the enforcement of justice between man and man, and thought, that if all were so instructed as to entertain correct notions of right and wrong, and would observe the sound moral rule of doing to others as they would that others should do to them, there would be very little need of courts of justice. His anxious desire ever was, that strict justice should be done between parties litigant, and to arrive at this

end, he perhaps sometimes too much disregarded technicalities. He had very little reverence for a rule, the justice of which he could not discern. If, in a given case, a technical rule was sought to be used to bring about a result which conflicted with his strong sense of justice, he was apt to suspect it was misapplied, and seek some way to avoid its force, and would invariably resist its application, until convinced that there was no way of escape, but by unsettling the rules of established law. In the estimation of some, this characteristic of his mind was a defect. If so, it was an amiable one. It existed in the minds of Chief Justice Marshall and Theophilus Parsons to an equal degree. And whatever counsel, in the excitement of the moment, may think, suitors will ever appreciate the judge whose aim is to have justice done in all cases that come before him. Such a judge will ever, of necessity, suspect either the soundness of the rule itself, or the propriety of its application to a given case, whenever he sees it working an unjust result. Regarding justice as the paramount object of the court, he will be loth to defeat that object, and will never suffer it to be done where he has the power of preventing it, without departing from the known rules of settled law.

A firm, consistent thinker, relying on his own judgment, and carefully surveying his ground before forming a conclusion, it was no easy matter to effect a change in his opinion, when once decidedly formed. However highly he might appreciate the ability of one who should differ from him, still that difference, unless sustained by fact or law, which undermined the pillars upon which he had based his own conclusion, never seemed to shake his confidence in the correctness of his own judgment. Opinions, with him, were not a matter of choice, but the result of study and reflection, and both were uniformly put in requisition and exercised, until a definite and satisfactory conclusion became the result. To move him afterwards from the ground he had assumed, it was ever necessary to understand his reasoning thoroughly, and to show him that, as to some one fact or legal proposition, he was mistaken; and to enable one to thus meet, and, if possible, overthrow him, he would frankly expose the whole basis of his conclusion, and if met by a fair exposition of a false position, would readily see it and yield to its force, without an effort to sustain a first impression by resorting to insufficient reasons. He never, on the bench, exhibited the weakness of a drowning man, catching at whatever his hands could reach, for self-support. He brought nothing to his aid, save what he regarded as reliable. This characteristic of a powerful intellect made him a very influential member of the court at all times, and his habitual courtesy and candor rendered him not less agreeable than reliable as an associate.

Much the most laborious and important of his duties during his twenty-eight years of judicial service were performed upon the circuit. Of the extent and character of this service, none except those immediately concerned, or connected with him, can form any adequate or correct opinion. No report of such cases was ever made; none can now be made—yet they embraced, probably, forty-nine out of every fifty causes that he ever passed upon. Almost uniformly these cases were studied by him with the same care as those determined in bank·

and in pronouncing his circuit opinions orally, he took pains to state clearly all the questions made, and the views entertained by the court upon each, and seldom left a cause without satisfying the counsel concerned, and all familiar with it, that he, at least, had investigated the matter until he thoroughly understood it, even though he were unable to convince them that he had escaped error in its determination.

In committing his opinions to writing, Judge Hitchcock was not always, perhaps, the most happy, not because he was incapable of inditing a close, terse, and pointed opinion, but because he could seldom take the time requisite to prune, condense, and weigh as would be desirable, the exact force and power of the language used. The necessity for this hasty preparation of opinion arose from the constant pressure of business in the Supreme Court during the whole of his long period of service, and from the fact that a law of the State required manuscript opinions to be forthwith handed to the reporter, on the making of a decision. This statute often deprived the judges of the requisite opportunity of revision, and is believed to have been without a parallel in any other State. Notwithstanding these disadvantages, naturally inducing a habit of writing with great rapidity, and its legitimate effect upon his style, the opinions of this eminent man still exhibit him in a light that will, in the estimation of sound lawyers everywhere, stamp him as a jurist of no ordinary ability, and give him a high rank.

It was felt by the bar of Ohio, and well said by one of its members, in their behalf, on announcing to the court in session at the time of his decease, the sorrowful event, that since the last adjournment of that court, a most distinguished man had fallen, one whose death created a void, whose departure was a loss to them, to the State, and to the cause of justice. In the death of such a man, society is bereft of a most valuable member, and has just cause to mourn.

During the last term of his official service in the court in bank at Columbus, in 1852, the bar of Ohio furnished a highly complimentary testimonial of their estimate of his merits. They procured an eminent artist to paint for them a portrait of the venerable judge, with a view to have it placed in the court-room, where his countenance had been so long familiar, and where his ability had been so conspicuous. It of course represents him as he appeared when about to retire from public life, at the advanced age of seventy-one years, more than forty of which had been faithfully spent in the service of the State. The feelings which prompted honorable and liberal-minded men to endeavor to perpetuate, and preserve in their hall of justice, a striking resemblance of one generally esteemed, and eminently distinguished in that high tribunal; of one who through a period of twenty-eight years had discharged the duties of his exalted station patiently, faithfully, without fear or favor, and uninfluenced by any illegitimate consideration, may be readily appreciated. It was a tribute of affection and respect, from his professional brethren, which they regarded as having been nobly earned. No one in Ohio more richly deserved a similar tribute. He had done more than any other man in the State to elevate the character of the profession, and to establish the jurisprudence of the State on a scientific, sound, practical basis. In private life, and in the public stations which he had so long and so ably filled, his life

had furnished a practical example, well worthy the emulation of the young men who should succeed him, that few great men had equalled, still fewer had excelled; and when the venerable judge had nearly accomplished his public labors, and was about to retire from the stage of public action, those who knew him best felt the force of this truth, and hence this spontaneous token of its acknowledgment. It was but a modest tribute, nevertheless it went to the full extent that the modesty of the honored subject of the compliment was willing to permit. None of his predecessors had been thus honored, and his delicacy of feeling rendered him reluctant to assent even to this.

Judge Hitchcock was esteemed by those who intimately knew him, not less as a man and a Christian, than as a jurist and a civilian. In all his social and domestic relations, he exhibited qualities of heart and action that ever endeared him to those brought into near contact with him; the memory of which, stealing with sweet fragrance over their minds, will often awaken the feeling of fond regret at the bereavement they have sustained.

Descended from a Puritan stock, and reared amid the influences which, in olden time, were wont to cluster around the well-ordered New-England home, he imbibed in childhood the principles of sobriety and uprightness which adorned his subsequent career, and formed the basis of that distinguished confidence which was in after life reposed in him, even by his most decided political antagonists. His youth was marked by general correctness of deportment, and he entered upon the scenes of public life with those moral and industrial habits which, in connection with elevated aims and fair ability, give a sure prestige of success and eminence in any honorable vocation.

The moral and religious sentiments inculcated under the paternal roof became with him, in riper years, matters of fixed and controlling conviction; hence when, long before he professed a personal interest in the Gospel, his lot was cast in a new settlement, he freely and devotedly gave his influence and aid to rear and support its institutions. His house was the home of the pioneer missionary whenever one happened to pass that way. When no minister was present, he was wont to aid in sustaining Sabbath worship, by reading sermons, and on several occasions, when but a single professor of religion was present, and he perhaps a diffident youth, he persuaded him to lead in prayer, and himself conducted entire all the other exercises of the day.

On the 4th of March, 1832, at the age of 51 years, (and just twenty-one years before his decease,) he made a public profession of religion, uniting with the Congregational Church in Benton, of which he remained, until his death, an esteemed and efficient member. In the discharge of the duties pertaining to this relation, he was equally strict and faithful, as in the discharge of those of his official life, and presented a model of exemplariness which is rarely exceeded. When at home, nothing but infirmity in himself or family was ever permitted to detain him from the services of the sanctuary, and other stated or occasional gatherings for Christian culture, or the promotion of the general interests of morality and religion, and usually he was prompt to render such counsel and aid as the case might require. A distinguishing element

in his Christian, as well as judicial character, was a steadfast integrity in obeying his convictions of duty. Though no stranger to deep religious sensibility, the fitful impulses of emotion were not needed to arouse him to action.

He was the hearty and liberal friend and patron of the leading benevolent enterprises of the day; and though sometimes reproached with an unduly cautious, and obstinate conservatism, few have had more nearly at heart the best interests of humanity, or more sincerely wished success to every judicious effort for its elevation and improvement.

In deportment, he was reserved and unassuming; in taste and feeling opposed to artificial parade and show; a lover of republican simplicity of style and manners; but at the same time, a pattern of generous and hearty hospitality. By many who viewed him at a distance he was regarded cold, and unsocial; but a more intimate acquaintance disclosed a heart glowing with all the genial sympathies of love and friendship. The needy and afflicted ever found in him a judicious and kind benefactor and counsellor. His reproofs and sarcasms sometimes fell upon the misdoings and follies of those around him with withering power, but usually his intercourse with others was marked with great comity, and a tender regard for their feelings. Ever ready to bestow his influence and active aid to promote the personal and social welfare of those around him, his removal has left a vacuum in the neighborhood circle of his late residence, which will long be painfully felt.

His social attachments were unselfish, enduring, and practical; and everything within his power which the subjects of them might need, was ever freely and cheerfully bestowed; and the gratification he evinced when the welfare of friends was thus promoted, presented a beautiful illustration of the Divine saying—"It is more blessed to give than to receive."

His domestic affections were especially strong and tender. The bosom of his well-ordered and intelligent family was emphatically the earthly home of his soul, his cherished and earnestly-coveted retreat from the cares and toils of public life. In the relations of husband and father, he was ever the faithful, considerate, and affectionate counsellor, guardian, and guide. Controlling his children with a mild yet firm discipline, savoring not less of reason and love than of authority, he won to himself, in an eminent degree, not only their respect and veneration, but their confidence and love. Deeming preparation for practical usefulness in life the best patrimony he could leave them, he directed his efforts in their behalf not to the amassing of wealth, but to the bestowal of that mental and moral discipline and training which should qualify them to be the artificers of their own fortune, and sustain with success and honor the responsibilities of life. And in this he had his reward. He lived to see his seven surviving children, three sons and four daughters, all settled in life, and occupying positions of respectability and usefulness, and, what was yet more grateful to his heart, all professed followers of the Saviour. The two eldest of these sons were educated at Yale College, and one of them is now a Judge of the Court of Common Pleas in one of the judicial districts of

the State; the other a minister of the Gospel, and pastor of one of the churches in Columbus, Ohio. The youngest son is a farmer, and occupies the old homestead.

Full to overflowing was the cup of earthly happiness of the venerable father, when, in later years, Providence permitted a family gathering around his hearth-stone, to mingle mutual sympathies and congratulations, and join in prayer and praise to the Father of Mercies. Never will those thrilling interviews and seasons of prayer be forgotten by any who were favored with the privilege of participating in them. From the heart of his children never will be effaced the memory of paternal fidelity, tenderness, and wisdom, with which he watched and guided their early ways, until they were prepared to assume for themselves the responsibilities of life; and painfully will they miss the counsel which, in their riper years, they were wont to seek at his lips.

He was privileged not to outlive his activity and usefulness, but to fall at the post of duty, in the unabated vigor of his strong intellect. Early in December last, he repaired to Columbus to attend the annual session of the Supreme Court. He was retained in some cases of importance, and one in particular which required profound effort in the preparation of the argument. His intense application developed and aggravated disease of the liver, to which he was predisposed; and that induced ulceration of the larger intestines, which was the immediate cause of his death. The symptoms, however, were not sufficiently striking to alarm, or cause him to suspend his labors, until it was too late for remedial aid.

His debility gradually increasing, he left Columbus February 21st, and arrived at his son's, the Hon. Reuben Hitchcock, in Painesville, the same day. Though extremely anxious to reach his home, his failing strength forbade it. From this time he declined rapidly. Stupor, and slight wandering of mind supervened, and prevented his having much conversation with his friends. On the morning of the 4th of March, the entire family having arrived, Mrs. Hitchcock, with some difficulty, aroused him to consciousness, and remarked, "Our children are all with us now." He replied, "Oh, my children! all be Christians." This was his last utterance. A farewell more characteristic of the Christian father, or more worthy of the occasion, could not have been chosen. After this, he lingered in great agony until about two o'clock, P. M., when he gently fell asleep in death.

His remains were conveyed to Benton; and on the following Sabbath, a large and deeply-affected concourse of people attended a funeral service at the church where he had been accustomed to worship, and followed him to the grave.

The light of his active usefulness and living example in Church and State is extinct; but a precious legacy remains, for "the memory of the just is blessed."

The news of his decease, as it spread through the State, produced a deep sensation, as it called forth such expressions of regret, of affectionate remembrance, and of esteem, as might be expected on the death of so great and so good a man. In the principal cities in the State and counties where courts were in session, meetings of the bar were held, addresses made, and appropriate resolutions adopted.

The resolutions adopted in Mulhenning county were presented to the court, by Judge Birchard, who had in 1842, been the opposing and successful candidate in opposition to him for election to the Supreme Bench, and who afterwards served as associate with him for several years. On moving that these resolutions be entered on the journals of the court, judge Birchard, among other remarks made, bore the following honorable testimony to the character of the deceased :—

"I feel that in the loss of such a man society has cause to mourn. It has been bereft of an experienced, learned, able jurist; of one patient, careful, and untiring in his investigations, and as I think, of great integrity. In the varied relations which he and I have occupied, placed as we have been, in opposition to each other by our political friends as candidates for the honors of the Supreme Bench, and radically differing, as we often did, upon many of the exciting political questions which have agitated the people of the Union within the last twenty years, and changing, as you are aware we have, our relative position from the bar to the bench, and from the bench to the bar, and finally for a series of years being brought into intimate relation as members of the same court, I have had means of knowing Judge HITCHCOCK, such as few men possess. I speak not to create fame for the dead, that was unmerited in life—there is no need of that. The proceedings of the Legislature when he was a member, and of Constitutional Convention, bear some evidence of the ability of the man, and the first twenty volumes of the Ohio reports, will carry down to posterity full and ample testimony of his learning, his sound judgment, and patient and careful industry as a jurist; to him a memento of fame more lasting than monuments of brass or marble.

"In recurring to the years of our acquaintance, now more than a quarter of a century, I cannot recall to mind an act of the great man who has fallen, that would tend to mar the beauty of his character, public or private; I know of none. A man of strong intellect, he naturally was fixed in his opinions, when once deliberately formed. But I ever found him patient, and cool in investigation, free to consult, free to consider the suggestions of others, free to trace out a point of difference, free to place another in full possession of the exact position upon which he predicated a conclusion; and if the ground of his argument ever failed him, he was always of too proud an intellect to attempt to sustain his favorite conclusion by seizing a false premise. In fine, he was a man, that not only invariably aimed to do right, but his mind was so formed, as to be admirably well calculated to come to the knowledge of the right.

"So long as his own convictions of duty were clear and unshaken it was impossible to move him. Popular prejudice might be against him, but its force would seem to be spent with as little effect, as the ocean wave has before the granite of its own beaten shore. This was the general character of the man. It enabled him to hold, on exciting occasions the 'even scales of justice,' with a firmer hand than any man with whom I was ever brought in contact. An apparently cold exterior, and sometimes an abrupt manner of speaking, have doubtless sometimes given offence to those who did not thoroughly

understand, that within that bosom beat the kindliest sympathies, and yet his was a bosom that possessed such sympathies.

Much might be said of his personal and private character, but I am admonished to forbear, since my tribute can add but little to the honor of one who was beloved by all who knew him.

The resolutions adopted by the bar in Cleveland, are a fair specimen of those adopted elsewhere in the State—they are as follow:—

"*Whereas* authentic intelligence has been received of the death of our distinguished friend and fellow-citizen, PETER HITCHCOCK, of Geauga—a man who, during a period of forty years, has been eminent in this State for his ability and usefulness, in almost every department of the public service—

"*And whereas* the members of this bar, deeply sensible of the loss which the profession and the public have sustained by this dispensation of Divine Providence, are desirous of giving utterance to their sorrow, as well as of publicly testifying their regard for the memory of a great and good man—

"*Therefore, Resolved,*—That, in the death of Peter Hitchcock we deplore the loss of a patriot distinguished for his advocacy of popular rights, and for his attachment to free institutions; of a legislator eminently practical, wise, and sagacious; of a judge, unsurpassed in integrity, in firmness, in strength and grasp of mind, in clearness of perception, and freedom from extraneous influences, and who, in the combination of qualities that go to make up a great judicial character, has probably never been equalled among the jurists of this State; of a faithful public servant, whose agency is perceivable in everything that has imparted value to legislation, or inspired confidence in judicial action; whose usefulness is to be measured, not only by the positive good that he has done, but by the evil that he has prevented; who, beyond any other man, has impressed his mind and character upon the institutions of the State; and who, as much as any other, is entitled to be held in grateful remembrance by the people of Ohio.

"*Resolved,*—That the proceedings of this meeting be published in the daily papers of the city; and that a copy thereof be forwarded to the family of the deceased, as expressive of the respectful condolence of this bar in their afflictive bereavement."

At the time of Judge Hitchcock's decease, the legislature of the State was in Session, and before its adjournment adopted the following joint resolutions:—

"*Whereas* we have heard with the deepest concern of the death of the Hon. Peter Hitchcock, late Chief Justice of the Supreme Court of the State: *And Whereas* the deceased, by his long, faithful, and distinguished public services, has endeared himself to the people of Ohio: Therefore, be it

"*Resolved, by the General Assembly of the State of Ohio,* That in

the death of the Hon. Peter Hitchcock, the State has lost an able jurist and faithful public servant, and society an honorable and useful citizen—

"*Resolved*,—That we deeply sympathize with the family of the deceased in their sad bereavement.

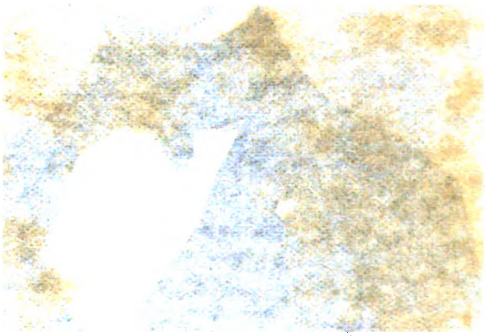
"*Resolved*,—That the Governor be requested to transmit a copy of the foregoing resolutions to the family of the deceased."

These testimonials show most clearly the estimation in which Judge Hitchcock was held by the people of his adopted State, and that by his death she lost one of her greatest—one of her best men.

But his memory still lives. The impression made by him upon her institutions, and upon society, still remains; and the influence of his example and his active life will not cease with the present generation, but will long continue its effect for good.

Horace Mann.

PRESIDENT OF ANTIOCH COLLEGE, YELLOW SPRINGS, OHIO.



# TO SUBSCRIBERS.

THE present number completes, with the year, the second volume of LIVINGSTON'S MONTHLY LAW MAGAZINE. Subscribers will perceive that the volume for 1854 contains a greater number of pages than were promised in the prospectus. Sixty-four pages a month would have given the volume 768, whereas, including the index, it contains upward of 850 pages. But, notwithstanding the insertion of these additional pages, much useful matter has necessarily been omitted. To give the greatest possible amount of matter, the editor has therefore determined to enlarge the dimensions of the page and reduce the size of the type, whereby each page may include double the quantity heretofore given. This arrangement will commence with the forthcoming January issue, so that the volume for 1855 will contain at least twice the material in either of the two volumes already published. The dimensions of the paper to be used will, however, remain the same, so that the future volumes may be bound uniform in size with the former ones. The margin of the pages must of course be smaller.

The editor may perhaps be permitted here to observe, that he has expended much time and labor in the preparation of this journal; he has sought diligently for facts from every accessible source; he has endeavored to obtain reports of the latest and most important cases, more especially such as are of general application and influence, and tend to settle new principles of law, or involve the novel application of principles already established. Assisted by the judges of the higher courts throughout the United States, who have kindly furnished manuscript decisions, and by several state reporters who have supplied early sheets, it is believed he has been able thus far to give the earliest information of nearly all cotemporaneous leading cases.

Where it has seemed best to condense a report, he has not abbreviated the matter so as to omit any thing important, or which in any manner forms an essential feature of the case, having generally done little more than omit mere dicta upon points not directly presented on the record. He has exerted himself, to the extent of his abilities, to render the LAW MAGAZINE, both for the quality and quantity of its contents, acceptable and useful to the profession, and in every way worthy of its support and approbation. He is conscious, nevertheless, that in so great a multiplicity of details, errors and deficiencies may exist, and that the faults of undue brevity in some cases, and prolixity in others, may not have been entirely avoided; but he ventures to hope that a candid profession will make all due allowances; and he takes the liberty to invite from all those who may feel interested in the diffusion of legal knowledge, the communication of friendly suggestions or criticisms relative to the object and execution of the work.

As to the mode in which this journal has been conducted since its commencement in January, 1853, the editor has no more to say. Professional men will draw their own inference as to its merits, not from what they may find in prefatory remarks, but from an examination and use of the volumes themselves. The work is devoid of all pretension, except to become useful to the practitioner by supplying him with an early record of important points as fixed by the latest authority; by furnishing select reports of recent decisions, or other serviceable matter; and it claims no praise for originality or profoundness of views, or for any very acute line of remark, either upon the cases or principles. It aims to give the profession a larger amount of available matter, at an earlier day, in a more convenient shape, and at less expense than could elsewhere be procured.

# THE MONTHLY LAW MAGAZINE

## FOR 1855.

THE first number (for January, 1855) of the next volume will be issued in a few weeks. In addition to more than the usual amount of interesting matter, it will contain a complete catalogue of all the Law Books, including the elementary works and reports, ever published in this country, with their prices. Those works which are deemed best will be indicated. The editor has been repeatedly requested to furnish such a list, and thinks the same will be found useful to subscribers. It may be added, that having facilities for purchasing books for cash at from 20 to 30 per cent. below the regular prices, he is willing to aid subscribers in buying either single volumes or whole libraries. In this manner subscribers could save on the purchase of only a couple of volumes, more than the price of this journal for a year. California subscribers may learn more of the facilities of the editor for purchasing books by inquiring of Hon. E. D. Sawyer, now of San Francisco, J. F. Williams, Esq., of Contra Costa county, and Chas. F. Lott, Esq., of Bidwell, for each of whom the editor, a few months since, obtained an extensive and well-selected law library, at a saving to them of several hundred dollars.

The editor hopes that all present subscribers will not only continue their own subscriptions, but, so far as they can consistently do so, will use their influence to induce others to subscribe also. The circulation, which is now large, we hope to increase for the next year. The great additional amount of matter will make the work increasingly useful. But as we have no desire to send the magazine to any that *do not* want it, we shall continue to forward it only to those who remit their subscriptions; for the terms of the work are so low that it should be supplied only to those paying in advance. Now is the time for subscribers to renew their subscriptions for the coming year. Money may be safely sent by mail, either in solvent bills or gold.

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LIVINGSTON'S
MONTHLY
LAW MAGAZINE.

VOL. II. DECEMBER, 1854. No. XII.

## CONDENSED REPORTS OF RECENT CASES.

LARCENY.—INDICTMENT FOR STEALING MONEY.—SALE OF LIQUORS.

Where a party was indicted for the larcenious taking of money, and it was proved on the trial that the person from whom the money was taken had acquired it by the sale of intoxicating liquors in violation of law—*Held*, that the indictment nevertheless lay.

[*Commonwealth* vs. *Michael Rourke*. Supreme Judicial Court of Mass., Cambridge. October Term, 1852.]

THE opinion of the court was delivered by

CUSHING, J.—The single question presented by the record here is, whether an indictment can be sustained for the larcenious taking of money, which the party from whom it is taken had obtained by the sale of intoxicating liquor, in violation of the law of the commonwealth?

It has been very ingeniously argued, by the defendant's counsel, that money so obtained is destitute of the rights of property, and being thus in a manner outlawed, is not entitled to legal protection, and is incapable of being the subject-matter of larceny: in a word, that it may be stolen with absolute impunity.

We might have supposed the question to be precluded by the provisions of statute, which enacts, that, in the prosecution of any offense committed in stealing, embezzling, destroying, injuring, fraudulently receiving, or concealing any money or other chattels, it shall be sufficient, and shall not be deemed a variance, if it be proved on the trial that, at the time when the offense was committed, either the actual or constructive possession, or the general or special property, in the whole or in any part of the money or chattels, was in the person alleged in the indictment to be the owner thereof. (Rev. St., ch. 133, s. 11.)

By force of this statute, certainly, whatever might be the rule at common law, the question of variance no longer depends exclusively on the proof of *property*, either general or special, of the thing stolen; for that is but one of the alternative conditions of this statute; the other being possession merely.

It is admitted in reply, that possession is *prima facie* evidence of property; and then it is argued that, as evidence, this may be rebutted

by proof of the actual facts, to wit, of property in some persons other than the one named in the indictment; and the case is put of possession by the servant, and proof of property in the master. But these are questions technical merely, of pleading or variance, not of principle.

We apprehend it would be no answer to an indictment for larceny properly drawn, to say that the object larceniously taken belonged to nobody, provided the thing were in its nature property (2 East, P. C., 606; 2 Russell, 6th Am. ed., 96); or that it belonged to some unknown owner (2 Russell, 6th Am. ed., 96); for even then, by force of the statute, and by common law too, it would be protected in the hands of the possessor.

But it is further contended, that such possessor must be a lawful possessor; nay, if he be proved owner against all the world, yet if the property were acquired by breach of law, the law will, in no respect, exert itself to aid the guilty party to retain the possession, or to regain it when lost.

This position is advanced on the strength of the case of *Gregg* vs. *Hyman* (4 Cush., 326), and other cases of the same class, in which it has been adjudged as a doctrine of the common law, that courts of justice will not afford their assistance for the enforcement of any contract based on a criminal or unlawful undertaking or act.

We fully recognize the soundness of this doctrine, supported as it is by obvious considerations of public policy and justice. But the inferences, deduced therefrom in argument, by no means follow. That same common law which, in its integrity and wisdom, refuses to lend itself to be the instrument, even indirectly, for the execution of a criminal contract, will as little condescend to throw its mantle over crime itself. The law punishes larceny, because it is larceny; and therefore one may be convicted of theft though he do but steal his own property (7. H. VI., 43 Coke's Inst., 110) from himself or his bailee. And the law punishes the larceny of property, not solely because of any rights of the proprietor, but also because of its own inherent legal rights as property; and therefore, even he who takes the stolen object from a thief whose hands have but just closed upon it, may himself be convicted therefor, in spite of the criminality of the possession of his immediate predecessor in crime.

This principle is coeval with the common law itself, as a collection of recorded opinions and rules; for we have to go back to the Year-Books to find its first judicial announcement.

The leading decision is the case of a so-called John-at-Stile, in 13 Edw. IV., 3 b., where it was held by the judges that if A stole the goods of B, and afterward C stole the same goods from A, in such case C is indictable both as to A and as to B. This decision was afterward affirmed *arguendo*, in 4 Hen. VII., 56.

The argument in the Year-Books, it is true, turns on the point of the property not being changed by the two successive larcenies; but the decision has a broader foundation than this mere technicality; for the case there finds that C is indictable as to B as well as A. And in the instance above cited, of one indicted for taking feloniously from his

own bailee, Staundeforde is careful to note that the property was charged as being in the bailer (P. C., 26), which proves the intent of the judges to hold the felonious taking punishable as such, regardless of the personal relation, of the question of property.

There is another English case involving the same principle, and which we cite because of its being specifically applicable to the present record. Game was larceniously taken from the person of a party who was unqualified, and who, by sundry statutes, was forbidden, not only to kill game, but even to have it in his possession; and the larcenious taker being indicted for taking this game, and it being set forth in the indictment as the property of the party, it was held that this was a sufficient legal possession for the purposes of the indictment, notwithstanding the possession was unlawfully acquired, and unlawfully continued. (Jones' case, 3 Burns' Just., D. & W., 487; 2 Russell, 6th Am. ed., 86.)

We do not say this doctrine is good law, merely because it was in principle so adjudged in the time of the Plantagenets and the Tudors; but we say it is good law, also, because it is reasonable and just; because every subsequent authority in England, such as Hale (1 Hale, Pl. C., 507, Am. ed.; East., 2 P. C., 654; Russell, 2 Cr., 6th Am. ed., 89), has adopted and approved of it, because it has been affirmed by modern judicial opinion in England (Wilkins' case, 2 Leach, 586); because it has already been recognized in the United States (*Ward* vs. *The People of New York*, 3 Hill, 396); and because it thus bears that genuine stamp of venerable time which consists not in the antiquity of date, for there may be old errors as well as new ones, but in having stood the test of the scrutiny of many successive ages.

We think it is well established at common law, therefore, that property, though unlawfully acquired, may nevertheless be the subject-matter of larceny; and we think the cases decided are broad enough to cover the present, or any similar form of unlawful acquisition.

So well persuaded are we of the reasonableness and expediency of this rule, that, if it were a question of the most novel impression, instead of being, as it is, older than most of our law-books, we should be disposed to decide in the same way, and thus make it to be the law.

It might be reasoned out as follows:

1. It is fundamental, in our own and in all other law of property, that the possession of one is good against all others, who can not show a better right of possession. It is the rule of strictly technical law, not less than of general theory. Thus, it has been expressly decided by this court, in a plea of land, that, as between two persons, each of whom entered without right, the older trespasser can maintain his possession by law as against the younger one, although he himself be subject to be ousted at will by the true tenant in fee. (*Hubbard* vs. *Little*, Berkshire September Term, 1852.) This illustration of the legal effect of actual possession of land is directly applicable to the present point, with the qualification only that possession of chattels, particularly money, would have still stronger arguments of legal convenience in its favor.

2. If, looking beyond the mere question of property, we pass to

considerations of public policy, this may be regarded in two points of view, one of convenience in the administration of justice, the other of higher ethical relation.

As to the former point, it is not easy to conceive any thing which would more seriously embarrass the public ministers of justice, and obstruct its administration, than if it were held that any element of illegality, in the acquisition of property, rendered it incapable of being the subject of larceny; and if, as a consequence, the necessity followed in every case to go into the inquiry how the party complaining acquired the property.

As to the latter point, if the question be put in the form most favorable to the argument, or the defendant here, it stands thus: Of the alternative moral and social evils, which is the greater—to deprive property, unlawfully acquired, of all protection as such, and thus to discourage unlawful acquisitions, but encourage larceny; or to punish and to discourage larceny, though at the possible risk of thus omitting, so far forth, to discourage unlawful acquisition? The balance of public policy, if we thus attempt to estimate the relative weight of alternative evils, requires, it seems to us, that the larceny should be punished. Each violation of law is to be dealt with by itself. The felonious taking has its appropriate and specific punishment; so also has the unlawful acquisition.

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PARTITION.—THE LATE COURT OF CHANCERY.—ITS POWERS.

[*Biddy* vs. *Cadwallader*. New York Supreme Court, Special Term, October 23, 1854. Before Hon. Justice ROOSEVELT.]

The facts in this case appear sufficiently in the opinion of the court, which was rendered by

ROOSEVELT, J.—The two sons and three daughters of the late Nicholas Gouverneur, the elder, were the owners, as tenants in common, of a block of ground in the Twelfth Ward of this city, bounded by Third and Fourth avenues, and Seventy-third and Seventy-fourth streets, which about nine years ago was sold under a decree in partition for the sum of $2,500, Mr. Bibby, who was the plaintiff in the suit, being the purchaser. Mrs. Tillotson, one of the heirs, having died, her surviving husband and six children were made parties to the suit in her stead. One of them, Miss Marie Louise Tillotson, who was a minor at the time, has since arrived at age, and now presents her petition, praying in effect that the sale, so far as she is concerned, may be set aside. Her interest, it appears, is one-thirtieth, subject to the life-estate of her father—in other words, about one-fiftieth in present value. It is conceded by the petitioner's counsel (Mr. O'Conor) that all the other parties to the partition suit are "precluded" from calling in question the regularity of the proceedings, they having accepted their respective share of the proceeds, and thus virtually ratified the sale. And the only question of much importance as it seems to me, is,

whether a decree of sale in partition could be made by the late court of chancery in a suit in which the bill prayed and prayed only for an actual partition, and alleged—not merely admitted—that a sale was not necessary. That court, however high its dignity, had no common-law power to transfer the title of real estate. It acted on the parties themselves, compelling them by injunction, on pain of commitment, to execute conveyances. Special statutes, therefore, in mortgage and partition cases, became necessary to remedy this inconvenience. The legislature accordingly, at an early period, among other provisions, passed an act declaring that the court of chancery should have the same power, upon petition or bill filed in that court, to decree partitions and sales, as was given to the common law courts in like cases. (2 R. S., 329.) Now as to the latter courts, the provision was, that tenants in common might apply by petition for a partition of the premises, and for a sale if it should appear that a partition could not be made without prejudice. It is contended, therefore, that unless the petition in the one case, and the bill in the other are prayed for, the court could not decree a sale, not even if, as in the present instance, the bill prayed, in the event of an actual partition being denied, for "such other relief as the nature and circumstances of the case should require." The proposition goes even further—it assumes not only that the objection might have been taken by way of defense in the regular course of the suit, but that if not taken, the decree still would be absolutely void. Under such a doctrine, so rigid and technical, a partition suit would indeed be a strait and narrow way, unfit entirely, in the hurry of American life, for any practical purposes. No prudent conveyancer would be willing to pass a title of which a partition sale constituted a necessary link. A single other suggestion however, as it seems to me, must effectually dispose of it. Suppose the other parties in answer to Mr. Bibby's bill, had said, "We admit the right to a partition, but we insist, notwithstanding the plaintiff's opinion to the contrary, that it can only be made justly and equitably by a sale and division of the proceeds." And suppose further, that on a reference to a master, as was the exact course in this instance, he had reported in accordance with the defendant's views, must the court, in such a case, in opposition moreover to the wishes of the defendants themselves, have dismissed the bill and compelled the plaintiff, at a most useless expense, to begin a fresh suit? It was an old well-recognized rule of the chancery, that whatever might be the specific prayer of a bill, the chancellor would always, under a general prayer, give such relief to all parties as the circumstances of the case, when fully developed, justly call for. The partition act was framed in reference to this rule —and the bill which it contemplated, although leading in some cases to a sale, was called simply "a bill for the partition of lands," the legislature, as it would seem, taking it for granted that, under a bill for a partition a sale might be decreed; and that, in truth, a sale and division of the proceeds was, as it is, but a mode of partition to be resorted to whenever a specific allotment turns out to be either impracticable, or, as in this case, seriously injurious. For whatever may be said of the improbability of the statement, that a block of five acres unimproved,

could not be subdivided without injury, such was the master's report—a report regularly made, and regularly, after hearing all parties, confirmed, and indisputably within the jurisdiction of the master to make and of the court to confirm. Besides, although the statute says that the court of chancery shall, "upon petition or bill," have the same power as the common law courts to decree a sale, it does not say that the power so given shall be exercised in the same manner, or that such bill or petition shall be precisely in the same, or even in the like form as the petitions prescribed for the common law courts. It assumes, but that is all it does assume, that the bill on which the decree is to be founded, will state facts sufficient to give jurisdiction, and those facts are a tenancy in common, and an immediate right to possession. In other words, it places the jurisdiction, and very properly, "upon the bill," and not upon the prayer of the bill—leaving the chancellor, as in other cases, to give such relief, whether it be by a sale or by a specific decision, as the interests of the parties, defendants as well as plaintiffs, may upon the hearing seem to him to warrant. The decree of sale, therefore, referred to in this petition, was as valid under the prayer for general relief, as if it had been specially asked for in the outset, instead of resulting, as it did, from a unanimous concurrence in the propriety of the master's suggestion. And although in the greatly altered value of the premises—a rise having taken place of more than one thousand per cent.—much seeming hardship may have attended the sale, yet no sufficient legal reason exists for disturbing its validity. Motion denied, without costs.

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### ATTACHING CREDITORS—PRIORITY OF.

[*John S. Parker* vs. *Smith and J. C. Bartlett.* New York Supreme Court, Special Term, October, 1854. Before Hon. Judge Roosevelt.]

The facts in this case appear sufficiently, in the opinion of the court, which was rendered by

Roosevelt, J.—This is a contest for priority between two sets of attaching creditors. The warrants were issued to the same county, but at different times; and certain property, pointed out by the junior creditor, was seized under the junior attachment, which had escaped the vigilance of the senior creditor. And the question is, Do attachments, like executions, bind all the debtor's property in the county from the time of issue, or from the time of actual levy? Under the old system, when attachments, except in the single instance of corporations, were issued for the equal benefit of all the creditors, they were directed to be levied, not on a portion, but on all the property of the debtor. Now, however, their object is the individual benefit, and their operation is confined to "so much of the property as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated, together with costs and expenses." If, then, the sheriff has no authority under the warrant, "to attach and safely keep" more than such an

amount, how can the warrant, unless by express provision of law, which is not pretended, create a lien on more? It seems to me to be consistent with neither the letter nor the spirit of the code, nor, indeed, with justice or wisdom, to allow a creditor of an absent party, for any sum, however small, to "keep" all the property of the debtor without designation, and however large, tied up "as a security for the satisfaction of such judgment as the plaintiff may, perhaps, never recover." In the case of *Richards* against *Vernum* (8 Howard, 79) the general term at Albany decided that even real estate, unless actually levied on or inventoried by the sheriff, was not bound by an attachment as against a subsequent creditor. Here the goods in dispute were not only not seized by, but were not known to, the sheriff; and even when subsequently pointed out to him, it was by the vigilance of the junior creditor. And so ambiguous, even then, was their apparent ownership, that the sheriff refused to levy without indemnity, and did levy finally at the instance, solely on the information, with the indemnity, and under the attachment, not of the senior, but of the junior creditors. There would seem, therefore, to be a peculiar claim, and perhaps a peculiar equity, in their favor. And if it be true, as is said in the old books, that the law, like the gospel, rewards the vigilant, they are clearly entitled to the fruits of their hazard and diligence.

An order must therefore be entered, directing the sheriff to pay over the proceeds of the goods in question to Messrs. Parker & Co.

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STATUTE OF LIMITATIONS.—SPECIAL ACTIONS.

**The cause of action arising from the taking possession of land by a railroad company, for the purpose of its construction, is within the general statute of limitations, though the form of the remedy is special.**

[*Foster* vs. *The Cumberland Railroad Co.* Pennsylvania Supreme Court. Not yet reported.]

The defendants in 1836 took possession of a part of the plaintiff's land, for the purpose of building a bridge over it, and did then build it. In 1848, this action (being in the usual form prescribed for the recovery of damages against corporations for land taken for their use) was brought by the plaintiff, to recover the damages which he supposes he has sustained. The principle question is, Does the statute of limitations apply?

Lowrie, J.—Statutes of limitations are mere definitions and limitations of the generality of that principle of the common law which is expressed in the maxim, *vigilantibus, non dormientibus, subveniunt leges;* and the courts can not administer such statutes according to their spirit, unless by regarding them as passed in aid of the common law, and therefore as furnishing a general rule for cases that are analogous, according to their subject-matter, to those expressed by the statute.

And so this subject is regarded; for the limitations are applied by analogy to actions in chancery, in admiralty (*The Mentor*, 1 Rob., 152; *The Rebecca*, 5 *ib.*, 96) to claims in bankruptcy, in insolvency, in the orphans' court, and to set-offs, though none of these are within the letter of the statute.

It is said to apply to a case of money collected by a public officer, even though the remedy on his official bond or recognizance should be adopted, for he might be sued in assumpsit. (9 State Rep., 120.) And we applied it very lately to a claim for mesne profits made in an action of ejectment. (*Lynch* vs. *Cox*.)

As a general rule, public officers, and also all persons and companies, making public works and improvements, are protected by much shorter limitations. So it is in England in such a case as this. (5 and 6 Vict., c. 97, s. 5.) And so it is here under the general railroad law of 1849, s. 14, and under the lateral railroad law of 1832, s. 10, if we may suppose that the word "penalties" means damages, which seems probable, since the infliction of penalties is not pertinent to acts done "in pursuance and by authority of" an act of assembly. (8 Barn. & C., 697.)

The case of the *Union Canal Co.* vs. *Woodside* (11 State Rep., 176) does not apply to this case, except so far as it declares this form of action to be in substance an action of trespass. The statute of limitations was not relied on there; but the presumption of payment was, and as matter of law that was decided in favor of the defendants.

The action of trespass would seem to be technically proper in such a case, if there were no special remedy provided; for the constitution makes the taking of the land unlawful, unless compensation is first paid or secured. But this act was done before this clause was inserted in the constitution; and therefore, without the special remedy, trespass on the case would seem to be the proper form of action. This is the common law remedy for all injuries not falling within the other usual remedies; and it is to the subject-matter of the action that the limitation applies; and therefore it continues to apply even when the form of the remedy is changed. It surely can make no difference whether the action is against one or many individuals, or against many who are united by an act of incorporation. The public sanction of their union does not render them objects of suspicion, or exclude them from the benefit of the general rules of law.

These views set aside all the other exceptions; for the plaintiff can not attach any thing, as incidental, to a claim that has no substance.

Judgment affirmed.

EVIDENCE.—JUDICIAL RECORDS.

Where a reward is offered for the detection and conviction of an offender, and a person is convicted, the record of the conviction is evidence in an action for the reward that the person convicted was the true offender.

[*The Borough of York* vs. *Forscht.* Pennsylvania Supreme Court. Not yet reported.]

This was an action for a reward of $1,000 offered by the burgesses of York for the detection and conviction of the person who set fire to a certain barn in the town of York. One Michael Fisher was detected and convicted, and the plaintiff claimed the reward. Judgment was rendered for him in the court below, and the defendant appealed.

LOWRIE, J.—The question arising in this case is whether the record of conviction is evidence of the fact that Michael Fisher was the person who burnt the barn.

It is not denied that the record proves a conviction as an act of the court, and thus makes out one condition upon which the reward depends; but it is insisted that it does not tend to prove in this proceeding that Michael Fisher is the guilty person, which is the other condition of the reward.

The court below held that the record of conviction was *prima facie* evidence of the guilt of Fisher for the purposes of this case, and this is in accordance with the case of *Mead* vs. *City of Boston*, 3 Cushing, 404.

It is certainly true, as a general rule, that a conviction in a criminal case is not evidence in a civil case, of the fact upon which it is founded. And the reasons usually given are, because it may have been produced by the testimony of the party interested in establishing the fact; because a contrary rule is wanting in mutuality, and because the parties and rules of proceeding in the two cases are different.

None of these reasons apply to the present case; because this is not against the party convicted; because, as in penal actions, the expected reward does not affect the competency of the witness; because here there is mutuality, for the conviction is a necessary element of the case; and because, by the nature of the contract, the result of a case, to be instituted between other parties, is appealed to, and made a test of the relation of these parties to each other. The rule does not apply to this case because its reasons do not.

The proceeding in penal actions is a very direct analogy in support of the evidence. There, a reward is offered for the detection and conviction of offenders, and the right to it is established by the very proceeding that produces the conviction. Here the substance is the same, though the form of proceeding is necessarily different. The conviction is had in one proceeding, and the reward recovered in another; and this difference admits the defense in the latter case, that the conviction was obtained by fraud, mistake, or perjury; or, in other words, that the consideration has failed.

The present case may be stated thus: The burgesses of York are

a part of the public police. It is therefore the state, by one of its departments, that offers a reward for the detection and conviction of an unknown offender against its laws. The plaintiff below professes to have made the detection, and points out the offender. The state then takes up the matter, and proceeds in its own way to ascertain whether or not this is the real offender, and decides that he is. Surely the state, or the department immediately concerned, is bound to admit that the reward is earned.

Besides this, the very purpose of conviction, in its relation to the reward, is to ascertain the fact of detection, and for that purpose alone it is made a condition of the reward. To it the offer of the reward appeals, and by it the defendants below are bound, unless error be shown.

Judgment affirmed.

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AFFIDAVIT OF DEFENSE.—CONSTRUCTION OF WRITTEN PROMISE TO PAY SUMS NOT SPECIFIED.

Acts of assembly requiring specific affidavits of defense in certain cases where copies of the instrument sued on are filed, are constitutional.
A rule of court authorizing judgment for want of a specific affidavit of defense is, in such cases, legal and proper.
Where an affidavit by one of two several obligors stated, that the other gave his judgment note "in payment and satisfaction" of the debt, it was held not to disclose a defense to the action.
A written promise for the payment of such amount as may come into the hands of the promissor, is held to be an instrument in writing for the payment of money.

[*Bishop* vs. *Dr. Normandie.* Pennsylvania Supreme Court. Not yet reported.]

This was a writ of error sued out, for the purpose of testing the validity of a judgment entered by the court below against the plaintiff in error, for want of a sufficient affidavit of defense. The judgment was entered under the act relative to the court of common pleas of Berks county, passed April 21st, 1852, which is as follows:

Sec. 1. That in all actions hereafter instituted in the courts of common pleas of the counties of Berks and Tioga, on bills, notes, bonds, or other instruments of writing, for the payment of money on book accounts, in all actions and contracts for the loan or advance of money, whether the same be in writing or not, in all actions of *scire facias* on mortgages, judgments, and on liens of mechanics and material men under the act of seventeenth of March, one thousand eight hundred and thirty-six, and the various supplements thereto, it shall be lawful for the plaintiff at such time as the court may appoint, not less than twenty days after the return days of the said courts, on motion to enter judgment by default, a declaration or statement first having been filed under the standing rules of said courts, notwithstanding an appearance by attorney, unless the defendant shall previously have filed an affidavit of defense, stating therein the nature and character of the same; *Provided*, That in all such cases no judgment shall be entered by virtue of this act, unless the said plaintiff shall, within two weeks after the returning of the original process, file in the office of the prothonotary of the courts aforesaid, a copy of the instrument of writing, book en-

tries, record, or claim, except mortgages, on which action has been brought; and said courts shall have the same powers to make general rules and orders as are given to the district court for the city and county of Philadelphia by the act of the eleventh of March, one thousand eight hundred and thirty-six, entitled "An act supplementary to the act entitled 'An act to establish the district court for the city and county of Philadelphia,' the twenty-eighth day of March, one thousand eight hundred and thirty-five."

The plaintiffs below and defendants in error were trustees of "The Oceola Council," an unincorporated association of mechanics, of which Moore John was elected treasurer on the 26th September, 1848, for one year. He gave a note, with William Bishop as surety, in the following words:

"READING, *Oct.* 8*d*, 1848.

"Twelve months after date we, or either of us, promise to pay to the trustees of the Oceola Council, the amount of money placed in my hand, or sooner if called for, without defalcation, for value received.

(Signed) MOORE JOHN,
WILLIAM BISHOP."

The present suit was brought against William Bishop. A copy of the note was filed, accompanied by a *narr*, containing an accurate statement of the amount due. The defendant filed an affidavit of defense, in which he admitted the claim as stated by the plaintiff, and specified the amount of it as being $346 31, but also stated, that "in satisfaction and payment of said $346 31," the said Moore John, at the instance and request of the trustees, gave his said Moore John's judgment bond to said trustees, in trust for Oceola Council, for said sum; that judgment was entered thereon, and an execution attachment was issued.

The court below decided that the instrument sued upon was within the act of assembly; that the affidavit of defense was not sufficient; that the note being several, as well as joint, the defendant's assertion that the judgment bond was given by Moore John, "in payment and satisfaction," was not sufficient. If it was *accepted* in payment and satisfaction of the debt, that fact should have been set forth in the affidavit. Judgment was accordingly entered for the plaintiff, under the following rule of court:

*Rule of court adopted* 15*th July*, 1852.

"The court will meet, on adjournment, to hear motions for judgment by default, under the provisions of the first section of the act of assembly, passed April 21st, 1852, on the third Saturday succeeding the last day of each term, and on the succeeding Saturday, to hear arguments on rules to show cause why judgment should not be entered for want of sufficient affidavit of defense."

The plaintiff in error contended: 1st. That the act of assembly in question conflicted with the 6th section in the ninth article of the constitution of Pennsylvania, which declares, that "the trial by jury shall be as heretofore, and the right thereof remain inviolate." 2d. The

act confers no power to enter judgment for want of the affidavit, and the rule of court providing for judgment by default was beyond the power of the court to adopt. 3d. The facts set forth in the affidavit were sufficient. If proved to a jury, the court could not have withdrawn them. 4th. The instrument sued on was not within the act.

The opinion of the court was delivered by

LOWRIE, J.—We see no good reason for doubting that the contract declared upon here is an instrument in writing, "within the meaning of the act of assembly." The affidavit of defense is not sufficient, because all the facts stated in it, taken together, constitute no defense. It contains an allegation that a judgment had been given by Moore John in satisfaction of the claim against him and the defendant; but we can not regard the allegation of satisfaction as any thing more than an inference of the defendant, from the fact that the judgment was given, and certainly we can draw no such inference. The diligence of the plaintiffs to get their debt from the principal can not thus affect their rights as against the surety.

The other points raised by the assignments of error have been very often decided, and the law relating to them has long constituted part of the general practice of the state. It is a part of the education and customs of the court, the bar, and the country, and we should confer no benefit on the public by considering them open to doubt or discussion.

Judgment affirmed.

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### FRAUDULENT ISSUE OF STOCK.

[*The People ex rel. James E. Jenkins and John A. Condit* vs. *The Parker Vein Coal Company, Joseph Noble, and others.* New York Supreme Court, October, 1854. Not yet reported.]

MORRIS, J.—Motion by plaintiffs for mandamus, requiring the Parker Vein Coal Company and the other defendants (president and directors of said company) to permit Condit and Jenkins to transfer stock on the transfer books of said company; and also to permit transfers to be made on said books by all stockholders of said company who may require the same to be made according to the regulations of the company and the usual course of the business. The facts in the case, as established by the papers used by the parties, are as follows: The Parker Vein Coal Company is incorporated by the state of Maryland with a capital of not exceeding three millions of dollars, to be divided into shares of one hundred dollars each, being 30,000 shares. Prior to June, 1854, some of the officers of the company, who were legally authorized to issue certificates of stock and to transfer stock, fraudulently issued false certificates of stock to a large amount, so that prior to June, 1854, there had been issued, and was then, and is now, outstanding certificates of stock of over 150,000 shares, being over 120,000 certificates of shares of stock more than the act of the legislature authorized. These fraudulent issues of false certificates of stock, upon their face, are precisely similar to the genuine certificates. It is

therefore impossible by inspection to designate which are genuine and which are false. On the 12th of June last an injunction out of the supreme court was issued against the company, etc., forbidding the transfer of stock by the officers of the company, which injunction is still in force. The plaintiffs in this suit were not parties to that suit. It is argued by the parties to this application that this motion may also be deemed a motion to dissolve that injunction. The Parker Vein Coal Company have become insolvent, and an assignment of all their property and effects has been made for the benefit of all their creditors. The plaintiffs in this suit own and hold certificates of stock, which they have sold and desire to transfer, and are stock-brokers, and they require the power of transferring the stock of this company to facilitate their business operations. Certificates of stock are only evidence of the existence of stock and of its ownership. These false certificates are false witnesses—false pretenses; there is no truth in what they assert. This fraudulent issue of false certificates of stock can not increase the capital of the company, lessen the par value of the shares, or increase the number of shares. No act of the company, of its officers, directors, or stockholders, whether by agreement or fraud—can increase the capital of the company, decrease the nominal par value of the shares, or increase the number of shares; the legislature alone possesses such power. Therefore, there is not and can not be (short of an act of the legislature) any stock represented by these false certificates. To open the books for the transfer of stock would lead to the circulation and transfer of these 120,000 false certificates as genuine; would increase the difficulty of tracing the genuine certificates of stock; would change the evidence in relation to those certificates, and would additionally expose holders of stock and the community to injury. The evidence of the parties interested must be left where it stood when the frauds were discovered, until the courts by adjudication, or the legislature by enactment, dispose of the matter. For these reasons I deny the plaintiffs' motion. In arriving at this conclusion, I have not considered the question whether a mandamus would be a proper remedy were the merits of the question with the plaintiffs.

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### ON THE RIGHT OF INQUISITION UNDER AN ATTACHMENT.

[*Felix Argenti* vs. *John C. Fremont.* Twelfth District Court, California. Before Judge Norton, Sept. 26, 1854.]

A writ of attachment had been issued against the property of the defendant, and an order entered requiring him to appear to be examined on oath respecting his property. The judge, in discharging the order, says:

"The 128th section of the civil practice act provides for the examination before the court or a judge of any person having property of a defendant, against whom an attachment has been issued; and also provides that: 'The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examin-

ed on oath.' I think this section only contemplates an examination of the defendant at the time of, and as subsidiary to, an examination of a third person charged with having the defendant's property. The meaning might have been expressed with more precision, but I think it sufficiently clear from the language of the section itself, upon reading all its provisions. Besides, to give it any other construction would be at variance with the general policy of the law, and of our own statutes in relation to proceedings for the collection of debts. Generally a person's property is not seized until it has been decided by a judgment that he owes the debt, and when attachments are issued at the beginning of an action, they are intended only to secure property that might subsequently be placed beyond the reach of the creditor, and not as a foundation for the inquisition of the property already concealed. Even after a judgment, our statute does not authorize the examination of the judgment debtor, simply as such, until after an execution has been issued and returned unsatisfied. The examination authorized by section 239, before the return of the execution, is only in a special case, where a foundation for it is laid by affirmative proof that the debtor actually has property which he refuses to apply to the satisfaction of the judgment.

"The order issued in this case for a general examination of the defendant alone, under the attachment, must be discharged."

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### CONFESSION OF JUDGMENT.

[*Geo. Sturtevant* vs. *Wm. B. Cooke.* Twelfth District Court, California. Before Judge Norton, Sept., 1854.]

The defendant, who is of the firm of Cooke, Kenny & Co., had confessed judgment on two promissory notes, one for $1,000 and another for $4,000, and both to become due, for the purpose of securing the same with 12 per cent. per annum interest on the judgment. The plaintiff had sued out executions before the maturity of the notes, and the defendant moved the court that the execution be superseded and set aside on this ground, and also on the ground of irregularity. The court held that when judgment was confessed on a note to become due, in order to secure it, that the judgment creditor might at any time issue out an execution, on the ground that the judgment could be no security, unless the creditor might have his execution therefor. While the debt was maturing, the judgment debtor might become insolvent, and if the rule were otherwise as to issuing execution, the creditor might be deprived of all security which he took under the judgment. The court accordingly denied the defendant's motion, and gave the plaintiff leave to amend for the irregularity *nunc pro tunc*.

LEGISLATIVE GRANT.—CONSTITUTIONAL RIGHT.

A legislative grant of authority to a city by its generally received, though not its corporate name, is good.

The ordinance passed by the City Councils of Philadelphia, on the 16th day of February, 1854, authorizing a subscription of fifteen thousand shares in the North-Western Railroad Company, is not in violation of the provisions of the act of February 2, 1854, known as the Consolidation Act, nor in violation of the vested rights of the citizens of the then county of Philadelphia; nor is it contrary to their constitutional right to be exempt from taxation, except by their representatives.

*John S. Riddle* vs. *The City of Philadelphia and the North-Western Railroad Company.* Supreme Court of Pennsylvania.

The opinion was delivered by

KNOX, J.—This is a proceeding in equity, to test the validity of a subscription made by the city of Philadelphia to the capital stock of the North-Western Railroad Company.

On the 18th day of April, A. D. 1853, the general assembly authorized the city of Philadelphia to subscribe to the capital stock of the North-Western Railroad Company any number of shares not exceeding fifty thousand, and to borrow money to pay therefor, and to make provisions for the payment of the principal and interest of the money so borrowed, as in other cases of loans to said city.

Under this authority, the city councils, on the 16th of February, A. D. 1854, passed an ordinance providing for a subscription, upon certain conditions, of fifteen thousand shares of said stock; and on the 6th day of May, A. D. 1854, the conditions having been complied with, the mayor, on behalf the city, made the subscription, and paid the first installment of seventy-five thousand dollars.

The relator avers that this subscription was in violation of an act of the legislature approved February 2d, 1854, entitled, "A further supplement to an act to incorporate the city of Philadelphia," generally known as the Consolidation Act, which contained, in a proviso to its sixth section the following prohibition: "That no corporation hereby superseded, or whose estates may, by force of this act, be vested in the city of Philadelphia, or the present councils of the corporation of the mayor, alderman, and citizens of Philadelphia, shall, at any time after the passage of this act, contract any loan or debts, other than for the ordinary supplies, repairs, and payment of salaries."

It is conceded by the respondents that this provision, if in full force, would avoid the subscription; but it is alleged that the fifty-third section of the same act prevents its application to railroad subscriptions, which were authorized before the passage of the consolidation act. That section is in the following words:

"Nothing in this act contained shall be so construed as to relieve the said city of Philadelphia, as hereby extended, from any engagements or contract heretofore made by authority of the city councils to subscribe to the capital stock of any railroad company, under any law of this commonwealth; and all ordinances heretofore passed by the said city, or by any of the municipalities or districts hereby consol idated and in force at the time of the passage of this act, and whereby

subscriptions are authorized to be made to the stock of any such railroad company, shall be binding upon and carried out by said city municipalities and districts respectively until this act shall go into effect, and thereafter upon and by said city hereby extended and consolidated upon the performance of the conditions, if any, required by such ordinance or ordinances. And nothing in this act shall be so construed as to interfere in any manner with any laws authorizing subscriptions to be made by the city of Philadelphia to any railroad company passed prior to this act."

The present motion is for a preliminary injunction; but as the whole case turns upon the construction to be given to the above section, it is clear that the decision upon this motion will be decisive of the case.

It is argued by the counsel for the relator that the fifty-third section does not interfere with the prohibition contained in the sixth section against contracting "loans or debts," but that its effect is to give to the consolidated city power to subscribe to the stock of railroad companies under acts authorizing the old city so to subscribe. In support of this view, it is said that the corporate name of the old city was "the mayor, aldermen, and citizens of Philadelphia," and that the clause which is relied upon by the respondents to give or preserve the power to subscribe, names "the city of Philadelphia," which is the corporate name of the extended or consolidated city.

We have given to this question that careful consideration which its importance demands, and we are clearly of the opinion that the legislature, in the latter part of the fifty-third section, did reserve to the corporation, as it existed before the passage of the consolidation act, power to make subscriptions to the stock of railroad companies, where such power had theretofore been conferred by legislative enactment. That it was the old and not the new corporation that was to exercise the power, is evident from the fact that no laws had been passed authorizing subscriptions by the consolidated city; and besides, where the new corporation was to act, the section expresses it in language too plain to be mistaken, as in the commencement of the section, "nothing in this act contained shall be so construed as to relieve the said city of Philadelphia," *as hereby extended*, etc., etc.; and again, in the same section, "and thereafter upon and by said city, *hereby extended and consolidated*."

It is true that the corporate name of the city, before the consolidation act, was "the mayor, aldermen, and citizens of Philadelphia," but it is equally true that it was as well known by the name of "the city of Philadelphia," which appellation was generally used by the general assembly when legislating for the old corporation. The very act which authorized this subscription, and which was passed a year before the consolidation act, conferred the power to subscribe upon "the city of Philadelphia." A grant of power may be given to a corporation by a well-understood name, although it may vary from its corporate title.

We do not forget the well-settled rule that corporate authority "must be given in plain words, or by necessary implication," and we have no

disposition to prevent its application in full force to a case of a subscription by a municipal corporation to the stock of a railroad company, but we can not avoid the conclusion that this power is conferred in the most unmistakable manner.

The power to subscribe is given in terms by the act of April, 1853, and the section referred to in the consolidation act prevents any construction from being placed upon it which would in any manner interfere with the power thus given. We are not free to disobey this legislative mandate.

It is further argued upon behalf of the relator that the ordinance authorizing this subscription is void.

1st. "That it is in violation of the vested rights of the citizens of the then county of Philadelphia."

2d. "That it is in violation of their political right, to be exempted from taxation except by their representatives."

We do not perceive the force of these objections. The terms and conditions upon which the different municipalities and districts were consolidated, were clearly within the scope of legislative authority, and were determined by the representatives alike of the city and county. Without restrictions the power to create debts would have remained in the various corporations up to the time the consolidation act was to take effect, and we have already shown that the restriction in the sixth section has no application to the case before us. The act of 24th April, 1854, expressive of the intent of the legislature, as to the time and manner in which the estates, income, and property of the old corporations should become vested in the consolidated city, is in no respect inconsistent with the power to make this subscription. A power given in express words can not be repealed by so remote an inference as can be drawn from this act, and more particularly is this so where the explanatory act was passed after the power was exercised.

It is suggested that the act authorizing this subscription did not become a law until after the passage of the consolidated bill; but there is nothing upon the record to support this suggestion, and hence it is unnecessary to determine the effect of the payment or non-payment of the tax upon the bill.

It may be proper to add, that this motion is resisted as well by the city of Philadelphia, as at present organized, as by the North-Western Railroad Company, and it is suggested by the city solicitor, that even if the subscription by the late corporation was illegal, that its ratification by the present city government would validate it; but as we are of opinion that the first subscription was good, it needs no ratification to give it validity.

And now, October 17, 1854, upon due consideration, it is decreed that the motion for a preliminary injunction be refused.

## RULES OF PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK,

*As established at a General Session of the Judges, at the Capitol, in the city of Albany, on the first Wednesday of August, 1854, in pursuance of § 470 of the Code of Procedure.*

THE 470th section of the Code of Procedure for the state of New York is as follows:

§ 470. The judges of the supreme court, of the superior court of the city of New York, and of the court of common pleas for the city and county of New York, shall meet in general session at the Capitol in the city of Albany, on the first Wednesday in August, one thousand eight hundred and fifty-two, and every two years thereafter, and at such sessions shall revise their general rules, and make such amendments thereto, and such further rules not inconsistent with this code, as may be necessary to carry it into full effect. The rules so made shall govern the supreme court, the superior court of the city of New York, the court of common pleas for the city and county of New York, and the county courts, so far as the same may be applicable.

On the first Wednesday of August, 1854, pursuant to this section, the justices of the supreme court, and the judges of the superior court of the city of New York, and of the court of common pleas of the city and county of New York, met in general session, at the Capitol in the city of Albany, for the purpose of revising their general rules, and making such amendments thereto, and such further rules as might be deemed necessary.

Several alterations were made in the existing rules, some of which are important.

The 13th Rule has been amended by adding to it a requirement, that the counsel shall stand while examining a witness, and that the testimony, if taken down in writing, shall be written by some person other than the examining counsel. The object of this amendment is the saving of time in the trial of causes at the circuits. Much time may be saved by having the testimony taken down by the associate counsel, or by a clerk of the examining counsel. By so doing, the examining counsel can devote his whole time and thoughts to the examination of the witness. While his associate is writing down the answer, he can be considering the question next to be asked. If he is required to take down the answer himself, he must necessarily take time to deliberate as to the next question after the answer is written down, and at least one third of the time occupied by the trial is thus unnecessarily consumed. There has been great reason to complain of the length of time occupied in the examination of witnesses at the circuit, in some parts of the state. It is well known that in some of the other states of the Union, as well as in England and France, causes are tried in much less time than in this state; generally in one half, and sometimes in one third of the time consumed here. This great difference in the consumption of time is mainly owing to the fact, that, in

the other states and countries named, counsel stand during the examination, and do not take notes of the testimony. The amendment adopted is, therefore, a conformity of our practice, in this respect, to that of the countries and states alluded to; and it is believed it will relieve the profession of unnecessary labor, and expedite the transaction of public business.

Rules 20 and 21, as heretofore existing, have been abolished, for the reason that they have been regarded as unnecessary, if not actually in conflict with the provisions of the code. Where both parties have the right to notice and bring an action to trial, there can be no good reason for imposing on the plaintiff the necessity of stipulating and paying costs, if he has inadvertently neglected to notice for trial, as required by the 20th Rule, nor for subjecting him to a notice to dismiss his complaint, as provided for by the 21st Rule.

In place of these rules thus abolished, new rules have been substituted. Rule 20 has been adopted for the purpose of preventing applications for orders to extend the time to answer or demur, where the object is delay merely. Rule 21 is adopted in pursuance of § 255 of the code, which requires the court, by its rules, to prescribe how issues of fact must be tried where the trial is not by jury.

The amendment to Rule 24 is designed to supply a defect heretofore existing, as to the practice in settling exceptions.

By the amendment to the 29th Rule, the word "certified" is omitted, by which the appellant is no longer subjected to the expense of procuring from the clerk a certified copy of the judgment roll. A copy of the judgment roll, though not certified, will now be sufficient.

The amendment to Rule 31 prohibits an extended discussion on a mere question of fact. The practice is thus conformed to that of the court of appeals, as established by the 10th Rule of that court.

The object of inserting the word "affidavit" in the second line of the 41st Rule, was that affidavits, used on motions and elsewhere, should be numbered and marked like other papers, there having been a doubt expressed whether they had before been included in the term "depositions" previously used.

The first amendment to the 53d Rule confines its application to cases formerly of equity jurisdiction. In other cases it is thought no such restrictions should be imposed upon the discretion of the officer appointing a guardian *ad litem*. The other amendment to Rule 53 provides for the mode of appointing a next friend of a married woman.

Rule 67 is abolished as being unnecessary; the general practice being applicable, no special provision is required.

The other amendments need no explanation.

## RULES OF THE NEW YORK SUPREME COURT.

*In General Session of the Judges of the Supreme Court, of the Superior Court of the city of New York, and of the Court of Common Pleas for the city and county of New York, at the Capitol in the city of Albany, August 2, 1854. (Code 1852, § 470.)*

Ordered that the following Rules shall commence and take effect on the first day of October, 1854:

**RULE 1.**

*Time of examination of attorneys.*

Applicants for admission to practice as attorneys and counselors of this court, who are entitled to examination, shall be examined in open court; the examination to commence on the first day of each general term.

**RULE 2.**

*Evidence required—Of age and citizenship—Of moral character.*

To entitle an applicant to an examination, he must prove to the court:

1. That he is a citizen of the United States, and that he is twenty-one years of age, and a resident of the district in which he applies, which proof may be made by his own affidavit of the fact.

2. The evidence of good moral character shall be the certificate of a reputable counselor of this court, or of some other reputable person known to the court; but such certificate shall not be deemed conclusive evidence, and the court must be satisfied on the point, after a full examination and inquiry.

**RULE 3.**

*Where papers are to be filed in suits commenced in this court.*

Papers shall be filed in the office of the clerk of the county specified in the complaint as the place of trial. And in case the place of trial is changed for the reason that the proper county is not specified, the papers on file at the time of the order making such change shall be transferred to the county specified in such order; and all other papers in the cause shall be filed in the county so specified.

**RULE 4.**

*Books to be kept by clerks.*

The several clerks of this court shall keep in their respectice offices, in addition to the "judgment book," required to be kept by § 279 of the code of procedure, such other books, properly indexed, as may be necessary to enter the title of civil actions and special proceedings, and the steps taken therein; to enter the minutes of the court; docket judgments; enter orders and all other necessary matters and proceedings and such other books as the courts of the respective districts, at a general term, may direct.

**RULE 5.**

*Attorney's name and residence to be indorsed on process or papers served.*

On process or papers to be served, the attorney, besides subscribing or indorsing his name, shall add thereto his place of residence: and if he shall neglect so to do, papers may be served on him through the mail, by directing them according to the best information that can conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

**RULE 6.**

*Notice to return process, etc.—Attachment.*

At any time after the day when it is the duty of the sheriff, or other officer, to return, deliver, or file any process, undertaking, order, or other paper, by the provisions of the code of procedure, any party entitled to have such act done may serve on the officer a notice to return, deliver, or file such process, undertaking, order, or other paper, as the case may be, within ten days; or show cause at a special term to be designated in said notice, why an attachment should not issue against him.

**RULE 7.**

*Notice of appearance or retainer deemed an actual appearance.*

Service of notice of an appearance or retainer generally, by an attorney for the defendant, shall in all cases be deemed an appearance. And the plaintiff, on filing such notice at any time thereafter, may have the appearance of the defendant entered, as of the time when such notice was served.

**RULE 8.**

*Books, papers, and documents—production and discovery thereof.*

Applications may be made, in the manner provided by law, to compel the production and discovery of books, papers, and documents relating to the merits of any civil action pending in this court, or of any defense in such action, in the following cases:

1. By the plaintiff to compel the discovery of books, papers, or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

2. The plaintiff may be compelled to make the like discovery of books, papers, or documents, when the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

**RULE 9.**

*How application for to be made.*

The petition for such discovery shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers, and documents, whereof discovery is sought, are not in the possession, nor under the control of the party applying therefor, and that the party making such affidavit is advised

by his counsel, and verily believes, that the discovery of the books, papers, or documents mentioned in such partition, is necessary to enable him to draw his complaint, answer, demurrer, or reply, or to prepare for trial, as the case may be.

**RULE 10.**

*The order for discovery to direct how it is to be made—And time within which made, and deposit to continue.*

The order granting the discovery shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or, by requiring him to produce and deposit the same with the clerk of the county in which the trial is to be had, unless otherwise directed in the order. The order shall also specify the time within which the discovery is to be made. And when papers are required to be deposited, the order shall specify the time that the deposit shall continue.

**RULE 11.**

*Order to be a stay, and time extended.*

The order directing the discovery of books, papers, or documents, shall operate as a stay of all other proceedings in the cause, until such order shall have been complied with or vacated; and the party obtaining such order, after the same shall be complied with or vacated, shall have the like time to prepare his complaint, answer, reply, or demurrer, to which he was entitled at the making of the order. But the justice, in granting the order, may limit its effect by declaring how far it shall operate as a stay of proceedings.

**RULE 12.**

*Inquests when to be taken.*

Inquests may be taken in actions out of their order on the calendar in cases in which they were heretofore allowed at the opening of the court, on any day after the first day of the court, provided the intention to take an inquest is expressed in the notice of trial, and a sufficient affidavit of merits shall not have been filed and served.

**RULE 13.**

*Counsel at the trial.*

On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the cause, and during such examination, the examining counsel shall stand, and the testimony, if taken down in writing, shall be written by some person other than the examining counsel, unless the justice who holds the court shall otherwise order.

**RULE 14.**

*Counsel at general or special term.*

At the hearing of causes at a general or special term, not more than

one counsel shall be heard, on each side, and then not more than two hours each, except when the court shall otherwise order.

**RULE 15.**

*Making and setting a case.*

Whenever it shall be intended to move for a review upon the evidence appearing on the trial, when the cause is tried by the court or referee or to set aside a nonsuit, dismissal of the complaint or verdict (except for irregularity, surprise, or upon the minutes of the judge), a case shall be prepared by the party intending to make the motion, and a copy thereof shall be served on the opposite party, within ten days after the trial, or notice of the judgment, as the case may be, who may, within ten days thereafter, prepare amendments thereto, and serve a copy on the party who prepared the case, who may then, within four days thereafter, serve the opposite party with a notice to appear within a convenient time, before the justice or referee who tried the cause, to have the case and amendments settled. The justice or referee shall thereupon correct and settle the case, as he shall deem to consist with the truth of the facts. The time for settling the case must be specified in the notice, and it shall not be less than four, nor more than twenty days after service of such notice. The lines of the case shall be so numbered that each copy shall correspond.

Cases reserved for argument and special verdict shall be settled in the same manner.

**RULE 16.**

*When the right to make a case waived, and when case considered as settled.*

If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made and the parties shall omit, within the several times above limited, the one party to propose amendments and the other to notify an appearance before the justice or referee, they shall respectively be deemed, the former to have agreed to the case as proposed and the latter to have agreed to the amendments as proposed.

**RULE 17.**

*Exceptions or case, within what time to be filed.*

Where a party makes a case or exceptions, he shall procure the same to be filed, within ten days after the same shall be settled, or it shall be deemed abandoned.

**RULE 18.**

*Mode of turning a case into special verdict or exceptions.*

When a party shall be entitled to turn a case into a special verdict, or exceptions, he shall have thirty days after notice of the decision thereon, to prepare and serve such special verdict or exceptions. The party upon whom the same shall be served, shall have twenty days to prepare and serve amendments; and in case such amendments shall not be agreed to, the same shall be settled by one of the justices of the

court, on a notice to be given within ten days after service of such amendments.

**RULE 19.**

*When to be done.*

In case such special verdict or exceptions shall not be served within the said thirty days, the prevailing party shall be at liberty to proceed as though no special verdict or exceptions had been taken. And in case no amendment shall be proposed and served within the twenty days allowed for that purpose, the special verdict or exceptions shall be deemed assented to, as proposed and served.

**RULE 20.**

*Order extending time to answer, how obtained.*

No order extending the time to answer or demur to a complaint shall be granted, unless the party applying for such order shall present to the justice or judge to whom the application shall be made, an affidavit of merits, or an affidavit of the attorney or counsel retained to defend the action, that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defense, upon the merits, to the cause of action set forth in the complaint, or to some part thereof.

**RULE 21.**

*Trial of issues of fact by the court.*

Issues of fact to be tried by the court may be tried at the circuit or special term.

**RULE 22.**

*Plaintiff may submit to a nonsuit before referees.*

On a hearing before referees, the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited, or his complaint be dismissed in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision. In which case the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

**RULE 23.**

*Plaintiff can not submit to a nonsuit after jury have gone from the bar.*

It shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict; and the plaintiff shall have no right to submit to a nonsuit after the jury have gone from the bar to consider of their verdict.

**RULE 24.**

*Exceptions not to contain irrelevant matter.*

Exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the justice, upon settlement, to strike out all the evidence and other matters which shall not have been necessarily inserted. They shall be settled in like manner as cases, and upon like notice.

**RULE 25.**

*Notice to be given of motions and questions for argument—Judgment by default on motions, when.*

All questions for argument, and all motions, shall be brought before the court on a notice or order to show cause, and if the opposite party shall not appear to oppose, the party making the motion or obtaining the order shall be entitled to the rule or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the court shall otherwise direct.

And when the motion is for irregularity, the notice or order shall specify the irregularity complained of.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to a complaint for a divorce.

**RULE 26.**

*On taking a rule by default, counsel to indorse his name on the proof of notice.*

When a rule is obtained either at a general or special term, by default, the counsel obtaining the same shall indorse his name as counsel on the paper containing the proof of notice; and the clerk, in entering the rule, shall specify the name of such counsel.

**RULE 27.**

*Enumerated motions—Non-enumerated motions.*

Enumerated motions are, motions arising on special verdict, issues of law, cases, appeals from an inferior court, and appeals by virtue of § 348 of the code.

Non-enumerated motions include all other questions submitted to the court, and shall be heard at special term, except when otherwise directed by law.

**RULE 28.**

*Enumerated motions to be noticed for first day of term—What papers to be furnished—And by whom—Cases reserved.*

Enumerated motions shall be noticed for the first day of term by either party.

The papers to be furnished on such motions shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, or of such parts only as relate to the question raised by the demurrer; a copy of the special verdict, return, or other papers on which the question arises; and the party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon trial of issues of law, at least eight days before the time the matter may be noticed for argument. If the party whose duty it is to furnish the papers, shall neglect to do so, the opposite party shall be entitled to move, on affidavit and notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor; provided, however, that in mortgage and partition cases, where the plaintiff's rights are not contested, no copies of pleadings need be furnished to the court.

The papers shall be furnished by the plaintiff, when the question arises on a special verdict, and by the party demurring, in cases of demurrer, and in all other cases by the party making the motion.

In cases reserved by the court for argument, in pursuance of §§ 264, 265 of the code, no case need be prepared in writing, unless by the direction of the justice who tried the cause. And the party on whose motion the case is reserved shall furnish the papers for argument.

**RULE 29.**

*Enumerated motions noticed for a general term—Appeals—What papers to be furnished, and by whom—Case agreed upon according to § 372 of the code.*

When an appeal is noticed for a general term, in cases embraced in chapter 3 of title 11 of the code, and of § 348 of the code, the appellant shall furnish the papers for the court, which consist of a copy of the judgment roll, together with a case, stating the time of the commencement of the suit, and of the service of the respective pleadings, the names of the original parties in full, the change of parties, if any has taken place, pending the suit; and a very brief history of the proceedings in the cause; and containing an abstract of the pleadings, not exceeding one sixth of the number of folios contained in the original pleadings respectively, to which shall be added the reasons of the court below for its judgment, if the same can be procured. At the commencement of the argument the appellant shall furnish a printed copy of the papers to each of the judges, together with a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and he shall also deliver to the attorney of the adverse party, at or before noticing the said appeal for trial, three printed copies of the said papers. And at the commencement of the argument, each party shall serve upon his adversary a printed copy of his points and authorities on which he intends to rely. In case the appellant neglects so to furnish to the adverse party the said number of copies of the papers, the latter shall be entitled to move, on affidavit and notice of motion, for the earliest practicable day in term for hearing non-enumerated motions, that the cause be stricken from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

When a case is agreed upon by the parties according to § 372 of the code, the plaintiff shall furnish the necessary papers for argument, duly printed, as in cases of appeal.

**RULE 30.**

*Cases, points, and other papers to be printed, and how—Folio, how numbered and printed.*

The cases and points, and all other papers furnished to this court at a general term in calendar causes, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half

inches wide. The folio numbering from the commencement to the end of the papers, shall be printed on the outer margin of the page.

**RULE 31.**

*Statement of facts, with reference to folios on points.*

In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall briefly state, upon his printed points, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found; and the court will not hear an extended discussion on a mere question of fact.

**RULE 32.**

*Non-enumerated motions to be noticed for the first day of the term by a notice, with copies of papers—If for a later day, excuse to be shown.*

Non-enumerated motions, except in the first district, shall be noticed for the first day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made; and the notice shall not be for a later day, unless sufficient cause be shown (and contained in the affidavits served) for not giving notice for the first day.

**RULE 33.**

*Days in general term for non-enumerated motions—Motions in criminal cases.*

Non-enumerated motions made in term time, at a general term, will be heard on the first day, and Thursday of the first week, and Friday of the second week of the term, immediately after the opening of the court on that day.

Motions in criminal cases may be heard on any day in term.

**RULE 34.**

*Notes of issue at general term to be filed four days before term—Calendar for general term.*

Notes of issue for the general term shall be filed four days before the commencement of the court at which the causes may be noticed. The clerk shall prepare a calendar for the general term, and cause the same to be printed for each of the justices holding the court. Appeals shall be placed on the calendar according to the date of the service of the notice of appeal; and other cases as of the time when the question to be reviewed arose.

**RULE 35.**

*Time for complying with orders.*

In all cases where a motion shall be granted on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith, shall have twenty days for that purpose, unless otherwise directed in the order. But where costs to be taxed are to be paid, the party shall have fifteen days to comply with the rule after the costs shall have been taxed on notice, unless otherwise ordered.

**RULE 36.**

*Mode of stating the advice of counsel in an affidavit.*

Whenever it shall be necessary, in any affidavit, to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel.

**RULE 37.**

*Agreements relative to proceedings in a cause must be in writing, or be entered.*

No private agreement, or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

**RULE 38.**

*Orders on petitions need not recite contents thereof.*

Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition where no complaint is filed, may, at the request of any party interested, be enrolled and docketed as other judgments.

**RULE 39.**

*Motions in actions pending may be by petition or affidavit, or by both.*

Motions in actions, made after the commencement thereof, may be founded upon petition duly verified, or by affidavit, or by both, at the election of the party making such motions, except when otherwise provided by law.

**RULE 40.**

*Motions to strike out irrelevant and redundant matter, and to make pleading more definite.*

Motions to strike out of any pleading, matter alleged to be irrelevant or redundant, and motions to correct a pleading, on the ground of its being "so indefinite and uncertain, that the precise nature of the charge or defense is not apparent," must be noticed before demurring or answering the pleading, and within twenty days from the service thereof.

**RULE 41.**

*Folios to be numbered and marked—Pleadings to be legibly written.*

The attorney, or other officer of the court, who draws any pleading, deposition, affidavit, case, bill of exceptions, or report, or enters any judgment exceeding two folios in length, shall distinctly number and mark each folio in the margin thereof; and all copies, either for the

parties or the court, shall be numbered or marked in the margin, so as to conform to the original draft or entry, and to each other. And all the pleadings and other proceedings, and copies thereof, shall be fairly and legibly written, and if not so written, the clerks shall not file such as may be offered to them for that purpose.

**RULE 42.**

*Cases on certiorari to remove interlocutory proceedings, to be heard at a special term, or take preference at a general term.*

Every case on certiorari to remove interlocutory proceedings of subordinate courts, tribunals, or magistrates, may be brought to a hearing by either party, at any special term, upon the usual notice of argument; or if placed upon the calendar at a general term, every such case shall be entitled to preference on the morning of any day during the first week of term.

**RULE 43.**

*On return to mandamus or prohibition, rule may be entered to plead, etc. —Consequence of default.*

The return to a writ of mandamus or of prohibition, where such return shall be adopted by the party, having been filed, a rule may be entered requiring the relator to demur or plead thereto in twenty days after notice of said rule, or to move at the next special term thereafter for such rule as he may require; and in case of default, on filing an affidavit showing such default, a rule may be entered dismissing such writ, and all subsequent proceedings, with costs.

**RULE 44.**

*Order to stay, with a view to change venue when granted—Effect of— When to be revoked—Notice of revocation to be given.*

No order to stay proceedings for the purpose of moving to change the place of trial shall be granted, unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practical day after issue joined. Such order shall not stay the plaintiff from taking any step, except giving notice and subpœnaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer, granting the order, an affidavit showing such facts as will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial, the officer shall revoke the order to stay proceedings; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

**RULE 45.**

*Affidavits concerning change of venue.*

In addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action or the defense, or both of them arose; and those facts will be taken into consideration by the court in fixing the place for trial.

**RULE 46.**

*Reference to compute amount due on mortgage—In case of infants and absent defendants, proof to be taken—Application for judgment to be at a special term—Proof to be made of filing notice of* lis pendens.

If, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order referring it to the clerk, or to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in the general answer by his guardian, or if any of the defendants are absentees. the order of reference shall also direct the person to whom it is referred, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

Where no answer is put in by the defendant, within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial, as to all the defendants, may apply for judgment at any special term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar. The plaintiff, in such case, when he moves for judgment, must show by affidavit, or otherwise, whether any of the defendants, who have not appeared, are absentees, and if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. And in all foreclosure cases, the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, as required by § 132 of the code of procedure.

**RULE 47.**

*Judgment for sale of mortgaged premises—And for the disposing of proceeds of sale.*

In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far at least as the same can be ascertained from the mortgage, shall be inserted. And, unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff, for principal, interest, and costs, and which may be sold separately, without material

injury to the parties interested, be sold by, or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale he pay to the plaintiff, or his attorney, the amount of his debt, interest, and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale; and that the purchaser at such sale be let into possession of the premises on production of the deed. In case of a surplus arising from the sale of mortgaged premises, under any such judgment, the sheriff or referee shall retain such surplus, subject to the order of the court, unless directions are given in the judgment for the disposition of such surplus.

In the city of New York the sheriff or referee shall deposit such surplus with the chamberlain of the city, or, when so directed by the court, with the clerk of the court, within five days after such surplus shall have been received and shall be ascertainable.

**RULE 48.**

*How claimant is to apply for surplus money—Reference may be ordered.*

On filing the report of the sale, any party to the suit, or any person not a party, who had a lien on the mortgaged premises at the time of the sale, either by judgment or decree, upon filing with the clerk where the report of sale is filed, a notice stating that he is entitled to such surplus moneys, or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain and report the amount due to him, or to any other person which is a lien, upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. Every party who appeared in the cause, or who shall have filed such notice with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant, at his place of residence as stated in the notice of his claim.

**RULE 49.**

*Mortgage must be recorded before deed executed.—Clerk to enter in minute the filing of mortgage.*

Whenever a sheriff or referee sells mortgaged premises, under a decree or order or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage in the office of the clerk, unless such mortgage has been duly proved or acknowledged, so as to entitle the same to be recorded; in

which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded at full length in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and if filed with the clerk, he shall enter in the minutes the filing of such mortgage, and the time of filing. But this rule shall not extend to any case where the mortgage appears, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

**RULE 50.**

*Sheriff to sell in parcels, unless otherwise ordered.*

Where mortgaged premises, or other real estate, directed to be sold, consist of several distinct lots or parcels, which can be sold separately without diminishing the value thereof on such sale, it shall be the duty of the sheriff, or other person conducting the sale, to sell the same in separate lots or parcels, unless otherwise specially directed by the court. But if the sheriff or other person is satisfied the property will produce a greater price if sold together than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.

**RULE 51.**

*How notice of sale to be published in New York and other cities—In other places.*

Where lands in the city of New York are sold under a decree, order, or judgment of any court, they shall be sold at public vendue, at the Merchants' Exchange, between twelve o'clock at noon, and three in the afternoon, unless otherwise specially directed. The notice of the sale of lands, lying in any of the cities of this state, in which a daily paper is printed, except where a different notice is required by law, or by the order of the court, shall be published in one or more of the daily papers of that city, for three weeks immediately previous to the time of sale, at least twice in each week. When lands in any other part of the state are directed to be sold at auction, notice of the sale shall be given for the same time, and in the same manner as is required by law on sales of real estate by sheriffs on execution.

**RULE 52.**

*Officers of the court to act as guardian* ad litem.

It shall be the duty of every attorney, or officer of this court, to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable.

**RULE 53.**

*Who may be guardians* ad litem.

No person shall be appointed guardian *ad litem*, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or an attorney or other officer of this court who is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defense of the suit. This rule shall not apply to actions for the recovery of money only, or of specific, real or personal property, as specified in § 253 of the code. A next friend for a married woman may be appointed in the same manner as a guardian *ad litem*, upon the application of an infant.

**RULE 54.**

*Guardian not to receive funds of his ward without security.*

No guardian *ad litem*, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court, to the guardian, out of the fund, or recovered by the infant in the suit. Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to such infant, sold under a decree, judgment, or order of the court, until the guardian has given such further security for the faithful discharge of his trust as the court may direct.

**RULE 55.**

*Security to be given by general guardian.*

The security to be given by the general guardian of an infant shall be a bond in a penalty of double the amount of the personal estate of his ward and of the gross amount or value of the rents and profits of the real estate during his minority, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bonds over and above all debts; or instead of personal security, the guardian may give security by way of mortgage on unincumbered real property of the value of the penalty of his own bond only. But the court, in its discretion, may vary the security where, from special circumstances, it may be found for the interest of the infant; and may direct the principal of the estate, or any part thereof, to be invested in public stocks or with the New York Life Insurance and Trust Company, or on bond and mortgage, for the benefit of the infant, and that the interest or income thereof, only, be received by the guardian.

**RULE 56.**

*Proceeds of real estate not to be paid to general guardian, except on real security.*

No moneys arising from the sale of the real estate of an infant, on a mortgage or partition sale, or under any decree, judgment, or order of court, shall be paid over to his general guardian, except so much thereof, or of the interest or income from time to time, as may be necessary for his support or maintenance; unless such guardian has previously given sufficient security on unincumbered real estate, to account to the infant for the same, in the usual form.

**RULE 57.**

*How a general guardian may be appointed.*

For the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation, and value of the infant's estate.

**RULE 58.**

*Court may inspect and examine infant—And ascertain value of property.*

Upon presenting the petition, the court shall by inspection or otherwise ascertain the age of the infant, and if of the age of fourteen years or upward, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

**RULE 59.**

*Security to be given by special guardian.*

The security required on a sale of the real estate of an infant shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond, over and above all debts; or a similar bond of the guardian only, secured by a mortgage on unincumbered real estate of the value of the penalty of such bond.

**RULE 60.**

*Petition for appointment of special guardian.*

An infant, by his general guardian, if he has any, and if there is none, by his next friend, may present a petition, stating the age and

residence of the infant, the situation and value of his real and personal estate, the situation, value and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary or proper; and praying that a guardian may be appointed to sell the same. The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given; and the petition shall be accompanied by affidavits of disinterested persons, or other proofs verifying the material facts and circumstances alleged in the petition. And if the infant is of the age of fourteen he shall join in the application.

**RULE 61.**

*Reference to ascertain the truth of the facts stated in the petition—Referee to ascertain value of dower.*

If it satisfactorily appears that there is reasonable ground for the application, an order may be entered appointing a guardian for the purposes of the application, on his executing and filing with the clerk, the requisite security, approved of as to its form and manner of execution by a justice of this court or a county judge, signified by his approbation indorsed thereon, and directing a reference to ascertain the truth of the facts stated in the petition, and whether a sale of the premises, or any and what part thereof, would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the property proposed to be sold; and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the infant is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions. And if there is any person entitled to dower in the premises, who is willing to join in the sale, also to ascertain the value of her life estate in the premises, on the principle of life annuities. But no proceedings shall be had upon such reference until the guardian produces a certificate of the clerk, that the requisite security has been duly proved or acknowledged, and filed agreeably to the order of the court; and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report.

**RULE 62.**

*If the proceeds of sale exceed* $500 *they must be brought into court—One bill of costs only allowed.*

If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof from time to time as may be necessary for the suppport and maintenance of the infant, without the order of the court. If the infant's interest in the property does not exceed one thousand dollars, the whole costs,

including disbursements, shall not exceed twenty-five dollars. And where several infants are interested in the same premises, as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

**RULE 63.**

*Fees on executing commission of lunacy—Committee may pay costs taxed, not exceeding* $50.

On the execution of a commission of lunacy, etc., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to the same allowance which is made by law to commissioners, to make partition, or admeasure dower. And for drawing the inquisition, and process, and serving notices, when no attorney is employed, they shall have the fees to which an attorney would be entitled for the same services. The committee of a lunatic, idiot, or drunkard, may pay to the petitioner, (on whose application the commission was issued), or to his attorney, the costs and expenses of the application, and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk in whose office the appointment of such committee is entered; provided the whole amount of such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same out of the estate in his hands, without a special order of the court directing such payment.

**RULE 64.**

*Action for divorce or separation—Averments in complaint for divorce.*

When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer, the court (to which application is made for judgment) shall order a reference to take proof of all the material facts charged in the complaint.

And when the action is for a divorce, on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff—that five years have not elapsed since the discovery of the fact, that such adultery had been committed—and that the plaintiff has not voluntarily cohabited with the defendant since such discovery—and also, where at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed—that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff; and the complaint containing such averments be verified by the oath of the plaintiff, in the manner pre-

scribed by the 157th section of the code, judgment shall not be rendered for the relief demanded, until the plaintiff's affidavit be produced, stating the above facts.

**RULE 65.**

*Order of reference, how obtained.*

To obtain an order of reference, if the complaint seeks to annul a marriage on the ground that the party was under the age of legal consent, an affidavit must be produced, showing that the parties thereto have not freely cohabited for any time, as husband and wife, after the plaintiff had obtained the age of consent. If the complaint seeks to annul the marriage on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show by affidavit that there has been no voluntary cohabitation between the parties as man and wife; and if it seeks to annul a marriage on the ground that the plaintiff was a lunatic, an affidavit must be produced, showing that the lunacy still continues; or the plaintiff must show by his affidavit that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

**RULE 66.**

*Plaintiff may be examined in certain cases.*

On a reference to take proof of the facts charged in a complaint for separation, or limited divorce, the examination of the plaintiff on oath may be taken, as to any cruel or inhuman treatment alleged in the complaint which took place when no witnesses were present who are competent to testify to the facts on such reference.

**RULE 67.**

*Adultery of plaintiff may be set up in answer.*

The defendant in the answer may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and the issue thereon shall be tried at the same time and in the same manner as other issues of fact in the cause.

**RULE 68.**

*Objections to legitimacy of children, to be stated in bill.*

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation, that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If a reference is ordered, proofs shall be taken upon the question of legitimacy, as well as upon the other matters stated in the complaint; and if an issue is awarded, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

**RULE 69.**

*Settling issues, manner of.*

In cases where the trial of issues of fact is not provided for in § 253 of the code, if either party shall desire a trial by jury, such party shall,

within ten days after issues joined, give notice of a special motion to settle the issues, and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in § 72 of the code of procedure.

### RULE 70.

*No sentence of nullity or decree for divorce by default—Copies of pleadings and testimony not to be furnished for publication.*

No sentence or decree of nullity declaring void a marriage contract, or decree for a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. And every such cause shall be heard after the trial of the issue, or upon the coming in of the proofs, at a special term of the court; but where no person appears on the part of the defendants, the details of the evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of this court, with whom the proceedings in an adultery cause are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party, or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

### RULE 71.

*Sureties to justify in all cases—All bonds, etc., to be proved or acknowledged.*

Whenever a justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or if the security offered is by way of mortgage on real estate, to require proof of the value of such estate; and he shall in his certificate or report state the value of such real estate, or that each person offered as security is worth the requisite amount over and above all debts and responsibilities he owes or has incurred. And all bonds and undertakings, and other securities in writing, shall be duly proved, or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

### RULE 72.

*All lands held in common to be embraced in one suit.*

Where several tracts or parcels of land lying within this state are owned by the same persons in common, no separate action for the partition of a part thereof only shall be brought without the consent of all the parties interested therein; and if brought without such consent, the share of the plaintiff may be charged with the whole costs of the proceeding. And when infants are interested, the petition shall state whether or not the parties own any other lands in common.

**RULE 73.**

*Reference as to title where there is no defense.*

Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the bill or petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

**RULE 74.**

*Directions in order of reference where sale is necessary—Referee, if requested, to report incumbrances on the whole of premises.*

Where the whole premises of which partition is sought, are so circumstanced that a partition thereof can not be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality, or where any lot, or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled is so circumstanced, the plaintiff, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the next preceding rule, may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred, to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition can not be made; and that if he arrives at the conclusion that the sale of the whole premises or of any lot or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case, that he also ascertain and report whether any creditor not a party to the suit, has a specific lien, by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. He shall also, if requested by the parties who appear before him on such reference, ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the

parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale.

**RULE 75.**

*How gross sum, in payment of life estate, to be ascertained.*

Whenever a party, as a tenant for life, or by the courtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum during the probable life of such person, according to the Portsmouth or Northampton tables.

**RULE 76.**

*Receiver's powers and duties—Not allowed costs in certain cases—May sell bad debts at auction.*

Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands, and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money, but he shall not sell any real estate of the debtor, without the special order of the court, until after a judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

**RULE 77.**

*Appeals from surrogates regulated—What the petition shall state—In matters of account the particular items to be stated—Answer in the nature of a cross-appeal—Order to answer petition of appeal—Guardian* ad litem *may be appointed—Order to deliver copy of petition of appeal—Papers to be furnished by appellant on hearing.*

On appeal to this court from the order, sentence, or decree of a sur-

rogate's court, the party appealing shall file a petition of appeal, addressed to this court, with the clerk of the county in which the order, sentence, or decree appealed from was made, within fifteen days after the appeal is entered in the court below, or the appeal shall be considered as waived; and any party interested in the proceedings in the court below may thereupon apply to this court *ex parte* to dismiss the appeal with costs. The petition of appeal shall briefly state the general nature of the proceedings, and of the sentence, order, or decree appealed from, and shall specify the part or parts thereof complained of as erroneous; except where the whole sentence, order, or decree is alleged to be erroneous, in which case it shall be sufficient to state that the same and every part thereof is erroneous. And where the appeal is from a sentence or decree, on the settlement of the accounts of an executor, administrator, or guardian, if the appellant wishes to review the decision as to the allowance or rejection of any particular items of the account, such items shall be specified in the petition of appeal, or the allowance or disallowance of any such items shall not be considered a sufficient ground for reversing or modifying the sentence or decree appealed from. The respondent, in his answer to the petition of appeal in such cases, may also specify any items in the account as to which he supposes the sentence or decree is erroneous, as against him, and in favor of the appellant. And upon the hearing of the parties upon such appeal, the sentence or decree may be modified as to any such items, in the same manner as if a cross-appeal had been brought by such respondent. The appellant may have an order of course that the respondent in the petition of appeal answer the same within twenty days after the service of a copy of the petition of appeal and notice of the order, or that the appellant be heard *ex parte*. And where the respondent is an adult, upon filing an affidavit of such service upon the attorney of the respondent, if he has appeared either in this court or in the court below, by an attorney of this court, or upon the surrogate, if he has not appeared by such attorney, and that no answer to the petition of appeal has been received, the appellant may have an order of course that the appeal be heard *ex parte* as against such respondent. Where the respondent is a minor, if he does not procure a guardian *ad litem* upon the appeal to be appointed within twenty days after the filing of the petition of appeal, the appellant may apply to a justice of this court *ex parte* for the appointment of such guardian. And if the minor has appeared by his guardian *ad litem* in this court, the appellant may have an order of course that the guardian *ad litem* of the respondent answer the petition of appeal within twenty days after service of a copy thereof and notice of the order, or that an attachment issue against such guardian. When a petition of appeal is filed, if it has not been served on the adverse party, the respondent may have an order of course that the appellant deliver a copy of the petition of appeal to the attorney, or to the guardian *ad litem* of the respondent, within ten days after the service of notice of such order, or that the appeal be dismissed; and if the same is not delivered within the time limited by such order, the respondent, upon due notice to the adverse party, may apply at a spe-

cial term to dismiss the appeal with costs. Upon the hearing of any such appeal as is referred to in this rule, it shall be the duty of the appellant to furnish the court with a copy of the petition of appeal and of the answer thereto, if an answer has been received, and a copy of the proceedings below, including a copy of the appeal as entered.

If the party, conceiving himself aggrieved by the decision of a surrogate, neglects to enter an appeal from that decision within the time limited by the statute for appealing, the appellate court can not relieve him from the consequences of his neglect. *Bronson* vs. *Ward*, 3 Paige's Rep., 189.

The petition of appeal should name the persons intended to be made respondents in the appeal, and should pray that they may answer the same. *Kellett* vs. *Ruthbun*, 4 Paige, 102.

An application to dismiss an appeal for not procuring a transcript to be returned and filed within the time prescribed by the second clause of this rule, will not be granted *ex parte;* but notice of the application must be given to the appellant's solicitor. *Vredenburgh* vs. *Calf*, 7 Paige, 419.

Where the omission of the appellant to file his petition of appeal, or to procure the transcript of the proceedings before the surrogate, is sufficiently accounted for, the appellate court will retain the appeal. *Halsey* vs. *Van Amringe*, 4 Paige, 279.

Upon an appeal from a sentence or decree of a surrogate, directing the payment of money, if the decree is affirmed on appeal, the chancellor may retain the cause, and will permit the respondents to take out execution in this court on the decree of affirmance. *Shultz* vs. *Pulver*, 3 Paige, 182.

Upon an appeal to the chancellor from the sentence or decree of a surrogate, the proceedings in the court of chancery, after the petition of appeal has been filed, must be entitled in the appeal cause, as between the appellant and those who are made respondents by the prayer of the petition of appeal. *Gardner* vs. *Gardner*, 5 Paige, 170.

Where a party to the proceedings before the surrogate, whose interests are in any way affected by the appeal, is not made a party to the petition of appeal, he may apply to dismiss the appeal, so far as it affects his rights or stays the proceedings before the surrogate to his injury. 5 Paige, 170.

Upon an appeal from an order or decree of a surrogate, all the parties to the proceedings before the surrogate, who are interested in sustaining the decree or order appealed from, should be made parties to the petition of appeal. *Gilchrist* vs. *Rea*, 9 Paige, 66. Rules of 1849, No. 82.

### RULE 78.

*Where moneys brought into court shall be deposited.*

All moneys brought into court by order of this, or any other court, shall be paid to the county treasurer of the county in which the action is triable, unless the court shall otherwise direct. And all bonds, mortgages, and other securities upon real estate heretofore required to be taken in the name of the clerk of the court of appeals, shall, except as otherwise provided by law, be taken to the treasurer of the county where such fund belongs, or such other county treasurer as this court shall direct. And all moneys received by the county treasurer, under and by virtue of any law vesting him with the funds or securities belonging to any of the suitors in any court of this state, shall be deposited by the said county treasurer, in his name of office, in the New York Life Insurance and Trust Company, or in such bank or trust company as the court for the district shall from time to time direct as a deposit bank, unless the order or judgment under which such moneys are brought into court shall direct such moneys to be deposited in some other bank or company.

**RULE 79.**

*In what manner accounts of county treasurer shall be kept—He is to make an annual report—Reference to examine his accounts.*

The accounts of the county treasurers with respect to moneys or securities received by them under the foregoing rule, or by virtue of any order of any court of this state with the banks and other companies in which moneys are directed to be deposited, shall be kept in such manner that in the cash-books of the banks and other companies, and in the bank-books of the said treasurers, it shall appear in what particular suit, or on what account the several items of money, credited or charged, were deposited or paid out. The said county treasurer shall, at the first general term of this court for the district in which such treasurer resides in each year, make a report to said court, containing a statement of his accounts and of the funds and securities under his control on the first day of January—which statement shall show the amount in his hands, uninvested, and the times when received, and the suit or matter in which the same was paid in, constituting the balance in deposit in banks and other companies; and also all stocks, bonds, and mortgages, and other investments for the benefit of suitors or otherwise. The court to which such report shall be made shall cause the same to be examined by some suitable and proper person, to be appointed by them. The person so appointed shall forthwith proceed to examine the account and statement, with the accounts in banks and in other companies, and with the accounts and securities in the office of such treasurer. He shall have the power to summon witnesses before him, if necessary, to be examined with respect to such accounts. He shall report whether such accounts have been correctly kept, and are truly stated; and shall, on or before the first day of the next ensuing general term, in such district, deliver to the court of such district, by which he shall be appointed, or one of the justices thereof, his report upon the matters so referred.

**RULE 80.**

*Form of orders for moneys to be paid out of court—Accounts of moneys deposited with the Trust Company how kept—Account to be sent annually to the court—Orders to draw money from the Trust Company to be countersigned.*

Orders upon the banks or other companies for the payment of moneys out of court, shall be made payable to the order of the person entitled thereto, or of his attorney duly authorized, and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. When moneys are deposited in the New York Life Insurance and Trust Company to the credit of the county treasurer, the entry of such deposit, both in the books of the company and in the accounts of the county treasurer with the company, shall contain a short reference to the title of the cause or matter in which such deposit is directed to be made, and specifying also the time for which the interest or accumulation on such deposit is to commence, where it does not commence from the date of such deposit. The secretary of the company shall

transmit to the justices holding the first general term, for the first district, in January in each year, a statement of the accounts of the said county treasurer; and to the justices holding the first general term, in the other districts, a statement of the accounts of the county treasurer in each district; showing the amounts standing to his credit on the first day of January, including the interest or accumulation on the sums deposited to the credit of each cause or matter. In every draft upon the Trust Company by the county treasurer, for moneys deposited with the said company, or for the interest or accumulation on such moneys, the title of the cause or matter on account of which the draft is made, and the date of the order authorizing such draft, shall be stated; and the draft shall be made payable to the order of the person or persons entitled to the money, or of his or their attorney who is named in the order of the court authorizing such draft. And to authorize the payee or indorsee of such draft to receive the money thereon from the Trust Company, the same shall be accompanied by a certified copy of the order of the court authorizing such draft, countersigned by the justice by whom such order was made. But where periodical payments are directed to be made out of a fund deposited with such company, the delivery to the secretary of the company of one copy of the order authorizing the several payments, shall be sufficient to authorize the payment of subsequent drafts in pursuance of such order.

**RULE 81.**

*Additional allowances to be applied for to the court trying the cause or giving the judgment.*

Applications for an additional allowance, under the provisions of the 308th section of the code of procedure, can only be made to the court before which the trial is had or the judgment rendered.

**RULE 82.**

*After an order has been refused or granted upon terms, no subsequent application to another justice on the same state of facts.*

If any application for an order be made to any justice of this court, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other justice; and if, upon such subsequent application, any order made, it shall be revoked.

**RULE 83.**

*Bail to justify in county where defendant was arrested or the bail reside.*

Whenever bail are required to justify, they shall justify within the county where the defendant shall have been arrested, or where the bail reside.

**RULE 84.**

*Form of affidavit on serving summons, etc., when not done by the sheriff.*

Where the service of the summons, and of the complaint, or notice, if any, accompanying the same, shall be made by any other person

than the sheriff, it shall be necessary for such person to state in his affidavit of service when, and at what particular place he served the same, and that he knew the person served to be the person mentioned and described in the summons and defendant therein, and also to state in his affidavit whether he left with the defendant such copy, as well as delivered it to him.

**RULE 85.**

*Judgment on failure to answer may be applied for at special term or circuit—Reference or writ of inquiry to be executed in the county where the action is triable.*

When the plaintiff in the action is entitled to judgment, upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any special term in the district embracing the county in which the action is triable, or in an adjoining county; such application may also be made at a circuit court in the county in which the action is triable. But when a reference, or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable.

**RULE 86.**

*Separate accounts, defenses, etc., how stated.*

In all cases of more than one distinct cause of action, defense, counter-claim, or reply, the same shall not only be separately stated, but plainly numbered.

**RULE 87.**

*Justices' return, how amended.*

On appeals from a justice's judgment, where the county court has not jurisdiction, by reason of relationship, etc., a notice of motion for an order to compel the justice to amend his return may be given in twenty days after the date of the certificate of the county judge, and not after that time.

**RULE 88.**

*Affidavit for arrest, when to be filed.*

The sheriff shall file with the clerk the affidavits on which an arrest is made, within ten days after the arrest.

**RULE 89.**

*Course of proceedings in actions commenced before 1st of July, 1848. The like in cases not provided for by statute or these rules—Time when these rules take effect.*

All actions depending on the first day of July, 1848, may be conducted according to the rules of the supreme court adopted in July, 1847, so far as the same are applicable.

In cases where no provision is made by statute, or by these rules, the proceedings shall be according to the customary practice as it has heretofore existed in the court of chancery and supreme court, in cases not provided for by statute, or the written rules of the court.

These rules shall take effect on the first day of October, 1854.

ANNUITY TABLE.

A table corresponding with the Northampton tables referred to in the 75th Rule, showing the value of an annuity of one dollar, at six per cent. on a single life, at any age from one year to ninety-four inclusive.

| Age. | No. of years purchase the annuity is worth. | Age. | No. of years purchase the annuity is worth. | Age. | No. of years purchase the annuity is worth. | Age. | No. of years purchase the annuity is worth. |
|---|---|---|---|---|---|---|---|
| 1 | 10·107 | 25 | 12·063 | 49 | 9·563 | 73 | 4·781 |
| 2 | 11·724 | 26 | 11·992 | 50 | 9·417 | 74 | 4·565 |
| 3 | 12·348 | 27 | 11·917 | 51 | 9·273 | 75 | 4·354 |
| 4 | 12·769 | 28 | 11·841 | 52 | 9·129 | 76 | 4·154 |
| 5 | 12·962 | 29 | 11.763 | 53 | 8·990 | 77 | 3·952 |
| 6 | 13·156 | 30 | 11·682 | 54 | 8·897 | 78 | 3·742 |
| 7 | 13·275 | 31 | 11·598 | 55 | 8·670 | 79 | 3·514 |
| 8 | 13·337 | 32 | 11·512 | 56 | 8·509 | 80 | 3·281 |
| 9 | 13·335 | 33 | 11·423 | 57 | 8·348 | 81 | 3·156 |
| 10 | 13·285 | 34 | 11·331 | 58 | 8·178 | 82 | 2·926 |
| 11 | 13·212 | 35 | 11·236 | 59 | 7·999 | 83 | 2·718 |
| 12 | 13·130 | 36 | 11·137 | 60 | 7·820 | 84 | 2·551 |
| 13 | 13·044 | 37 | 11·035 | 61 | 7·637 | 85 | 2·402 |
| 14 | 12·953 | 38 | 10·929 | 62 | 7·449 | 86 | 2·266 |
| 15 | 12·857 | 39 | 10·819 | 63 | 7·258 | 87 | 2·133 |
| 16 | 12·755 | 40 | 10·705 | 64 | 7·052 | 88 | 2·031 |
| 17 | 12·655 | 41 | 10·589 | 65 | 6·841 | 89 | 1·882 |
| 18 | 12·562 | 42 | 10.473 | 66 | 6·625 | 90 | 1·689 |
| 19 | 12·477 | 43 | 10·356 | 67 | 6·405 | 91 | 1·422 |
| 20 | 12·393 | 44 | 10·235 | 68 | 6·179 | 92 | 1·186 |
| 21 | 12·329 | 45 | 10·110 | 69 | 5·949 | 93 | 806 |
| 22 | 12·265 | 46 | 9·980 | 70 | 5·716 | 94 | 518 |
| 23 | 12·200 | 47 | 9·846 | 71 | 5·479 | | |
| 24 | 12·132 | 48 | 9·707 | 72 | 5·241 | | |

*Rule for Computing the Value of the Life Estate or Annuity.*

Calculate the interest at six per cent. for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

*Examples.*

Suppose a widow's age is 37, and she is entitled to dower in real estate worth $350·75. One third of this is $116·91⅓. Interest on $116·91, one year at six per cent. (as fixed by 76th Rule), is $7·01. The number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years, and $\frac{3}{10}\frac{1}{0}\frac{1}{0}$ parts of a year, which, multiplied by 7·01, the income for one year, gives $77·35 and a fraction, as the gross value of her right of dower.

Suppose a man, whose age is 50, is tenant by courtesy in the whole of an estate worth $9,000. The annual interest on the sum, at six per cent. is $540·00. The number of years' purchase which an annuity of one dollar is worth, at the age of 50, as per table, is 9 $\frac{4}{1}\frac{1}{0}\frac{7}{0}\frac{5}{0}$ parts of a year, which, multiplied by $540, the value of one year, gives $5,085·18 as the gross value of his life estate in the premises, or the proceeds thereof.

*Note.*—The values on this table are calculated on the supposition that the annuities are payable yearly; if payable half yearly, one fifth of a year's purchase should be added to those values.

For the rule to compute the present value of an inchoate or contingent right of dower, vide *Jackson* vs. *Edwards*, 7 Paige, 408; McKean's Pr. L. Tables, 25, § 4; Hendry's Ann. Tables, 87, Prob., 4.