THE AMERICAN Law Record,

1872---1873.

HERMAN M. MOOS, EDITOR.

Volume 1.

CINCINNATI:
BLOCH & CO., PRINTERS, 150 W. FOURTH STREET.
1873.

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THE

AMERICAN LAW RECORD.

VOL. 1. JULY, 1872. NO. 1.

SUPREME COURT UNITED STATES.

Wheeler *v.* Harris.

1. An appeal to the Circuit Court from a decree in the District Court for the payment of money, the Circuit Court affirmed the judgment of the District Court with costs to be taxed, from which affirmance the respondent took an appeal here. After the appeal here, another decree was rendered by the Circuit Court, in which, after reciting the former decree and taxation of costs, it was decreed in form that the appellee have judgment against the appellant for the amount decreed, together with costs, amounting to the sum of $5,444.

2. On motion to dismiss this last decree, on the ground of a former one pending in the same case: *Held*, that under the circumstances, the first decree was not a final decree; and that it was the first appeal and not the second which should be dismissed.

3. The court approves the practice of entering decrees in form before taking appeals to this court.

This was a motion by Mr. Donohue to dismiss an appeal from the Circuit Court for the southern district of New York on the ground that a prior appeal had been taken and was pending in the same suit:

The case was this: Harris on libel filed in the District Court at New York, obtained a decree for advances made to a vessel of the respondent. From that decree, the respondent appealed to the Circuit Court. The cause was there tried, and on the 19th of March, 1870, a decree made in these words:

"This cause coming on to be heard on the appeal herein taken by S. G. Wheeler, Jr., after hearing L. Bunnell, Esq., for the appellant, and Charles Donohue for the appellee, and due deliberation being had; it is now ordered, adjudged and decreed that the judgment herein be affirmed, with the costs to be taxed."

After more than ten days, the respondent appealed to the Supreme Court of the United States, giving a bond duly approved

and sufficient in form and in amount to operate as a stay of execution. The libellants, notwithstanding such appeal, having caused their costs in the Circuit Court to be taxed, issued execution. Thereupon, the respondent moved to set aside the execution, insisting:

1st. That no execution could regularly issue upon a mere order of affirmance.

2d. That the respondent had ten days after a judgment *in form* awarding to the libellants a recovery of some amount ascertained and settled by the terms of a final decree.

On the other hand, it was argued by the libellants, that *the order of affirmance* was the final judgment, within the meaning of the act of Congress limiting the time within which appeals may be taken (Act of September 24th, 1789, § 23, 1 Stat. at Large, 85; act of March 3d, 1803, § 2, 2 Id. 244); and that the appeal was therefore, too late; that such order of affirmance was frequently the only order made in the Circuit Court for New York, and that appeals had in many cases, as in Silsby v. Foote, been heard in the Supreme Court of the United States, when no other order or judgment of the Circuit Court appeared in the record; that Silsby v. Foote (20 Howard, 290), was a signal instance of this; that there an appeal in equity had been taken to the Supreme Court within ten days after the decision of the Circuit Court was announced and entered in the minutes, and before a decree was settled and entered; and that after such formal decree was made, another appeal was taken. But that on a motion to dismiss, the court declared that either appeal was regular, in view of the differing practice prevailing in different circuits; but, as it was not proper that there should be two appeals in the same case, they dismissed the latter and allowed the former to stand. The counsel for the libellants therefore insisted in the court below that the execution was regular. The circuit judge, in passing upon the motion to set aside the execution, said as follows:

"The 23d section of the act of 1789, and the 2d section of the act of 1803, are held to require the judge, on signing the citation, on appeal, to require security in a sum sufficient to cover the whole judgment, damages and costs, as well as the costs in error. (Catlett v. Brodie, 9 Wheaton, 553; Stafford v. Union Bank, 16 Howard, 135.) The inference is at least plausible, that until some actual award of damages and costs to a definite amount, the party appealing does not know, and the judge taking the security does not know what should be the amount of the bond, nor in what amount the sureties should justify; and that no judgment can be said to be rendered, and more especially no decree in admiralty can be said to be passed, until some actual award of recovery by the libellant is made.

If the case was not ripe for an appeal, then such appeal

would be dismissed, and it necessarily follows that it can have no influence on the present motion; that is to say, if it was premature and would be dismissed by the Supreme Court, then it can not stay the libellant's proceedings. If it was not premature, but will operate to give the Supreme Court jurisdiction, still, not having been taken within ten days after the entry of the order appealed from, it can not stay execution, unless I should hold that an appeal may be taken before the ten days begin to run, within which it must be taken. In view of the decision in Silsby v. Foote, I prefer to leave it to the Supreme Court to say whether the ten days begin to run so soon as the time arrives when an appeal may be taken; and whether, if the respondent waits until the actual entry of a decree which settles definitely all the details, his appeal, if taken within ten days thereafter, will stay execution.

Here, an execution has been issued when there is no judgment or decree awarding to the libellants a recovery, not awarding to them any execution or other means of giving effect to the decision of the court. I am informed that it has not been unusual in this circuit, to issue execution in cases in admiralty, when no other judgment than an order of affirmance has been made or entered, the proctor, for that purpose, taking the amount of damages to be collected from the decree in the District Court, and the costs of appeal from the taxation by the clerk. I think such a practice both loose and irregular, and I am not aware of any like practice anywhere. Even if an appeal to this court in a cause in admiralty were a mere appeal on which the proceedings below were reviewed, and nothing more, no execution should issue out of this court without an award of recovery. But, a cause in *admiralty* is removed into this court for a new trial, and the proceedings here are of a mixed nature. The question is not limited to the inquiry whether the District Court decided the case correctly on the merits, but whether, upon the case as made in this court, the libellant is entitled to recover, and, if so, how much. As to certain questions, the parties will be concluded, if the questions have not been raised in the court below; but, properly speaking, the inquiry here is not a question of affirmance or reversal, but a question of the right to a decree, upon the trial in this court. When no new proofs are presented in this court, and the conclusion is that the decree below was the proper decree upon the proofs, it has become usual to express that conclusion by calling it an "affirmance;" but I regard that as technically inaccurate. The proper decree here is, that the libellant recover, &c., or that the libel be dismissed, and the claimant or respondent recover his costs, when costs are awarded; and no execution should issue until some award of a recovery in this court has been made.

The circuit judge accordingly set the execution aside, thus

implying, of course, that the first appeal was premature." In consequence of this opinion, and the action of the court a decree was thus entered on the 27th day of May, 1871:

"A decree of affirmance having been entered herein on the 19th day of March, 1870, by which the decree of the District Court was in all things affirmed with costs to be taxed, which costs were taxed on the 21st day of April, 1870, at $640,61. Now on motion of the proctors for the appellees, it is ordered, adjudged and decreed, that the appellee have judgment against said S. G. Wheeler, appellant for the amount so decreed then, together with the costs so taxed, amounting with interest to the sum of $5,444 69, for which judgment is hereby entered against him, the said appellant, and that the appellees have execution therefor."

From this judgment a petition of appeal to this court was filed on the 7th day of June, 1871, and on the same day a citation issued.

The present motion, was made to dismiss this last appeal.

Mr. *Donohue*, in support of his motion:

Silsby v. Foote, has passed on this very question. Under that decision the first appeal is good, and the question whether it stays proceedings or not does not change this matter. In the present matter, therefore, the case is before the court, on the first appeal; and two appeals are not allowable in the same case on the same question.

The statute giving the party an appeal, gives the defeated party the right to appeal from the rendering or passing of the judgment or decree complained of. He has his choice, and when he takes it and his appeal is good his further right or appeal in that case is gone.

Both contingencies on which an appeal rest had occurred; when the first appeal was taken the judgment had passed and the decree had been rendered; all that remained to be done was to make up the amount, a merely clerical operation.

Messrs. *Goodrich* and *Wheeler*, contra, argued that in view of the whole case, if either appeal was to be dismissed it should be the first.

THE CHIEF JUSTICE.

It appears that on the 19th of March, 1870, upon an appeal taken from a decree of the District Court, it was decreed in the Circuit Court that the judgment of the District Court be affirmed, with costs to be taxed. From this decree of the Circuit Court an appeal was taken to this court, and is now on the docket. Subsequently, on the 27th of May, 1871, another decree in the same cause was rendered by the Circuit Court, in which, after reciting the former decree and taxation of costs, it was decreed that the appellees have judgment against the ap-

pellant for the amount decreed, together with costs, amounting to the sum of $5,444 99. From this decree an appeal was taken, and a bond for damages and costs given, on the 5th of June, and approved by the circuit judge on the 7th of June, 1871. It is this appeal which the appellee now moves to dismiss.

It is quite true that two appeals are not allowed in the same case on the same question. We must determine which one of the two should be dismissed. It may be that the first appeal was from a decree which might be taken as final, if the second decree had not been rendered. Rubber Company v. Goodyear, 6 Wallace, 155; Silsby v. Foote, 20 Howard, 290. But it is obvious that the circuit judge did not regard it as final, and it was certainly defective. The second decree was rendered, not by inadvertence, but in view of the rendition of the first decree, and, in order to settle the practice in the Circuit Court for the southern district of New York, that a decree of affirmance, without taxation of costs and without specifying the sum for which it is rendered, is not to be regarded as a final decree.

We think this the better practice, and therefore hold that the first appeal must be dismissed as irregular.

SUPREME COURT UNITED STATES.

United States *v.* Klein.

Rights of rebels in their property sold under "the captured and abandoned property act," considered. Title not divested unless in pursuance of a judgment rendered after due legal proceedings. The act of Congress of 12th July, 1870, known as the Drake amendment (inserted in the appropriation bill of that year), and which sought to regulate the effect of pardons in the Court of Claims, declared unconstitutional, null and void.

This was a motion by Mr. Ackerman, attorney general, in behalf of the United States, to remand an appeal from the Court of Claims which the government had taken in June, 1869, with a mandate, that the same be dismissed for want of jurisdiction as now required by law.

The case was thus: Congress, during the progress of the late rebellion, passed various laws to regulate the subject of forfeiture, confiscation or appropriation to public use, without compensation, of private property or land, whether real or personal of non-combatant enemies.

The first was the act of July 13th, 1861, (12 Stat. at Large 257). It made liable to seizure and forfeiture all property passing to and fro between the loyal and insurrectionary States, and the vessels and vehicles by which it should be attempted to be conveyed.

So an act of August 6th, 1861, Id. 319, subjected to seizure

and forfeiture all property of every kind, used or intended to be used in aiding, abetting or promoting the insurrection, or allowing or permitting it to be so used.

These statutes require judicial condemnation, to make the forfeiture complete.

A more general law and one upon which most of the seizures made during the rebellion was founded, is the act of July 17th, 1862, (Id. 589). It provides for the punishment of treason, and specifies its disqualifications and disabilities. In its 6th section, it provides that every person who shall be engaged in or be aiding the rebellion, and shall not cease and return to his allegiance within sixty days after proclamation made by the President of the United States, shall forfeit all his property, &c. The proclamation required by this act was issued by the President on the 25th day of July, 1862, (Id. 1266). *The sixty days expired September 23d*, 1862.

On the 12th of March, 1863, Congress passed another species of act; the one entitled, "An act to provide for the collection of abandoned property, &c, in insurrectionary districts within the United States." The statute authorized the secretary of the treasury, to appoint special agents to receive and collect all abandoned or captured property in any State or Territory in insurrection, "*Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other watercraft, and their furniture, forage, military supplies, or munitions of war."

The statute went on: Any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; *and on proof to the satisfaction of said court* of his ownership of said property, of his right to the proceeds thereof, and *that he has never given any aid or comfort to the present rebellion*, to receive the residue of such proceeds after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.

Some other acts amendatory of this one, or relating to the Court of Claims, required proof of the petitioner's loyalty during the rebellion, as a condition precedent to recovery.

By the already mentioned confiscation act of July 17th, 1862, the President was authorized by proclamation to extend to persons who had participated in rebellion, pardon and amnesty, with such exceptions, and at such times, and on such conditions as he should deem expedient for the public welfare.

And on the 8th of December, 1863, he did issue his proclama-

tion, reciting the act, and that certain persons who had been engaged in the rebellion desired to resume their allegiance and reinaugurate loyal State governments within and for their respective States. And thereupon proclaimed, that a full pardon should be thereby granted to them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened; and upon condition that every such person shall take and subscribe a prescribed oath of allegiance, and thenceforward keep and maintain said oath inviolate, &c.

Under this proclamation one Klein, who during the rebellion had voluntarily become the surety on the official bonds of certain officers of the rebel confederacy—and so given aid and comfort to it, took this oath of allegiance, and had kept the same inviolate.

He himself having died soon afterwards, his administrators filed a petition in the Court of Claims, setting forth his ownership of certain cotton which he had abandoned to the treasury agents of the United States, and which they had sold, putting the proceeds into the treasury of the United States, where they now were, and from which the petitioners sought to obtain them.

The Court of Claims on the 26th May, 1869, decided that Klein had been entitled to receive them, and decreed $125.300 to his estate. An appeal was taken by the United States, June 3d following, and filed in this court on the 11th December, of the same year.

Previously to this case of Klein's, the Court of Claims had had before it the case of one Padelford, quite like this one: for there also the claimant who had abandoned his cotton and now claimed its proceeds, having participated in the rebellion, had taken the amnesty oath. The Court of Claims held that the oath cured his participation in the rebellion, and so it gave him a decree for the proceeds of his cotton in the treasury The United States brought that case here by appeal; United States v. Padelford, 9 Wallace, 531; and the decree of the Court of Claims was affirmed; this court declaring that although Klein had participated in the rebellion, yet that he having been pardoned he was as innocent in law as though he had never participated, and that his property was purged of whatever offence he had committed, and relieved from any penalty that he might have incurred. The judgment of this court to the effect above mentioned, was publicly announced on the 30th, of April, 1870.

Soon after this—the bill making appropriations for the legislative, executive, and judicial expenses of the Government for the year, 1870-71, then pending in Congress—the following was introduced as a proviso to an appropriation of $100.000, in the 1st Section for the payment of judgments in the Court of Claims,

and with this proviso in it, the bill became a law July 12th, 1870, 16 Stat. at Large, 235.

Provided, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said Court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the Appellate Court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but the proof of loyalty required by the abandoned and captured property act, and by the sections of several acts quoted, shall be made by proof of the matters required, irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant, or any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.

And provided further, That whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the said act, approved 12th March, 1863, and the acts amendatory of the same, and such pardon shall recite in substance that such person took part in the late rebellion against the Government of the United States, or was guilty of any act of rebellion against, or disloyalty to, the United States; and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of, and protestation against, such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall

cease, and the court shall forthwith dismiss the suit of such claimant.

The motion already mentioned of the Attorney General, that the case be remanded to the Court of Claims with a mandate that the same be dismissed for want of jurisdiction, as *now* required by law, was, of course, founded on this enactment in the Appropriation Bill of July 12th, 1870.

Messrs. *Bartley & Casey*, *P. Phillips*, *Carlisle McPherson*, and *T. D. Lincoln*, against the motion.

Chief Justice Chase delivered the Judgment of the court, of which we find in a journal entitled to credit, the following full summary:

By the Act 12th March, 1863, except as to property used in actual hostilities during the late civil war, and which are mentioned in its first section, no titles were divested, unless in pursuance of a judgment rendered after due legal proceedings.

During the war the Government acted on the humane maxims of the modern law of nations, which exempt private property of non-combatants from capture, as booty of war.

This spirit is illustrated in the act referred to, which while it makes provisions for the taking possession of property abandoned or captured, its sale, and the payment of the proceeds into the treasury does not divest absolutely the title of the original owners. Certainly such was the intention in respect to property of loyal owners. That the same intention prevailed in regard to property of owners, who, though then hostile, might subsequently become loyal, appears probable from the circumstance, that no provision is made for its confiscation; while there is no trace on the statute book of intention to divest ownership of private property not excepted from the effect of this act, otherwise than by proceedings for confiscation.

On these considerations it was held in the case of Padelford, that the possession of private property was not changed until actual seizure, that the seizure did not divest the title, and that the government constituted itself trustee for those who were entitled, or should thereafter be recognized as entitled.

By virtue of the act of 17th July, 1862, authorizing the President to offer pardon on such conditions as he might think advisable, and the proclamation of 8th December, 1863, which promised a restoration of all rights of property, except as to slaves, and on condition that the prescribed oath be taken and kept inviolate, as well as the proclamations of 26th March, 1864, 29th May, 1865, 7th September, 1867, and 4th July, 1868, the persons who had faithfully accepted the conditions offered, became entitled to the proceeds of their property thus paid into the treasury, on application within two years from the close of the war.

The repeal of the act of 12th July, 1862, authorizing the ex-

ecutive to offer pardon was on 21st January, 1867, after the war had closed—in no respect changes the national obligation, for it does not alter at all the operation of the pardon, or the obligation of Congress to give full effect to it, if necessary by legislation.

The act of 12th July, 1862, is to be regarded rather as a suggestion to the executive than as authority, the pardoning power is vested by the Constitution in the executive, and Congress can neither limit the effect of the pardon, nor exclude from its exercise any class of offenders.

The act of 12th July, 1870, regulating the effect of pardons Court of Claims is in conflict with these principles, it was introduced as a proviso to a clause in the general appropriation bill, and became a part of the act with perhaps little consideration in either House.

Its substance is that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, both in the Court of Claims and in this court.

The Legislature has undoubtedly the right to abolish the Court of Claims, or to limit its jurisdiction, or to make exceptions and regulations as to the right of appeal from its judgments, but the effect of this act is to prescribe a rule of decision to the judicial department of the Government.

The act is, therefore, an invasion of the powers conferred upon the judicial department; it also infringes the constitutional power of the executive in the granting of the pardon, which includes amnesty, and blots out the offense pardoned, and removes all the penal consequences.

SUPREME COURT UNITED STATES.

The Traders' National Bank, of Chicago, appellant, v. Geo. W. Campbell, assignee of Charles Hitchcock and E. M. Endicott.

1. Suit in chancery by assignee to recover proceeds of goods sold under judgment against bankrupt taken by confession when both parties knew of the insolvency.

   Such a judgment, though taken before the first day of June, 1867, but after the enactment of the bankrupt law, is an unlawful preference under the 35th section of that act.

2. The proceeds of the sale of the bankrupt's goods being in the hands of defendant, another person would had a like judgment and execution levied on the same goods, is not a necessary party to this suit, being without jurisdiction. Rule laid down as to necessary parties in chancery.

3. The proceeds of the sale being in the hands of the bank, though it had given the sheriff a certificate of deposit, the assignee was not obliged to move against the sheriff in the State court to pay over the money to him, but had his option to sue the bank which had directed the levy and sale, and held the proceeds in its vaults.

4. The defendant having money received as collections for the bankrupt, delivered it to the sheriff, who levied the defendant's execution on it and applied it in satisfaction of the same. This is a fraudulent preference, or taking by process under the act, and does not raise the question whether if defendant had retained the money it could be set off in this suit against the bankrupt's debt to defendant.

5. So taking a check from the bankrupt and crediting the amount of the check then on deposit, on the bankrupt's note the day before taking judgment, was a payment by way of preference and therefore void, and does not raise the question of set-off.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice MILLER delivered the opinion of the court.

The suit was brought in the District Court of the United States for the Northern District of Illinois, by Campbell, assignee in bankruptcy of Hitchcock & Endicott, against the Traders' National Bank, of Chicago, and Hotchkiss & Sons, to recover money received by them of the bankrupts by way of fraudulent preference.

Hitchcock & Endicott were, on the 13th day of July, declared bankrupts by the District Court, at the suit of their creditors, Doane & Co., commenced on the 25th day of June.

On the 28th day of May preceding this, the bank brought a suit against Hitchcock & Endicott, in which, on an allegation of fraud, a capias was issued for the arrest of Hitchcock. To avoid this arrest, the bankrupt firm gave the bank a demand note with warrant of attorney to confess judgment, and on the next day the bank entered a judgment for the debt less $325.20, the amount of the bankrupts' deposit account with the bank, on that day, which was endorsed on the note as a credit. Execution was immediately issued on this judgment and levied on the bankrupts' stock and goods.

On the 30th of May Hotchkiss & Sons obtained a judgment against the same parties for a much smaller debt, on which execution was also issued and levied on the same goods.

It is not asserted by counsel here that the defendant acquired any rights to the property levied on by its execution. It would be useless to do so, for the president of the bank acknowledged that he was aware of the insolvent condition of Hitchcock & Endicott, and had instituted his proceeding after taking the opinion of counsel, that the bankrupt law did not affect such cases until after the first day of June, the earliest time at which proceeding could be commenced under that law.

We are of opinion that the proviso to the fiftieth section of the

bankrupt act, which declares that no petition or other proceeding under it shall be commenced before the first day of June, 1867, is limited in its effect to such commencement, and that any act done after its approval, March 2d, 1867, in fraud of the purpose of the statute, was within its prohibitions.

We will consider the objections to the decree in favor of the plaintiff, in the order in which they are assigned in appellant's brief.

1. It is said that Hotchkiss & Sons were necessary parties, without whom the court could not proceed. They were not within the jurisdiction of the court, and, though made defendants by the bill, never appeared in the case, and it was dismissed as to them without prejudice.

Their interest, as asserted by appellant's counsel, was that they also had a judgment against the bankrupts, on which execution was levied, on the same property, and that, as it was sold under both executions, Hotchkiss & Sons have a right to be heard as to the validity of that sale.

In the case of Barney v. Baltimore, 6 Wall. 280, this court, after reviewing the former decisions on this subject, remarks that there is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case. But, if this can not be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interests in the subject matter of the suit, and in the relief sought, is so bound up with that of the other parties, that their legal presence as parties in the proceeding is an absolute necessity, without which the court can not proceed.

Hotchkiss & Sons manifestly belong to this second class, and not the third. The bank is sued for its own wrong in procuring judgment and selling the property, and for the proceeds now in its vaults. Hotchkiss & Sons may, or may not, be in the wrong in procuring their judgment and levy, but it is not alleged that they have received any of the money. If they are entitled to any of it, they will be at liberty to bring any suit they may be advised, after this suit is disposed of, against the assignee, or any one else, and their rights will not be precluded by the present decree; nor have they any such interest in the subject matter of this suit, that their presence is necessary to the protection of the bank. A complete decree can be made between the bank and the assignee without touching the rights of Hotchkiss & Sons, or embarrassing the bank in its relations to

them. The organization of the Federal courts has always required them to dispense with parties in chancery not within their jurisdiction, unless their presence was an absolute necessity, which it clearly is not in this case.

2. It is said that the assignee should have applied to the State court for an order on the sheriff to pay over the proceeds of the execution to him.

But it can not be maintained that the assignee, who is pursuing the assets of the bankrupt in the hands of third parties, is bound to resort to the State courts, because there is a litigation there pending. The language of the 14th section, that the assignee may prosecute and defend all suits pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, does not *oblige* him to seek a remedy in that way. The second section of the act declares that the Circuit Courts of the United States shall have concurrent jurisdiction with the District Courts of all suits, at law or in equity, which may or shall be brought by the assignee against any person claiming an adverse interest touching any property, or rights of property, of said bankrupt.

The decree in the present suit is founded on the idea that the bank, by means of its illegal and collusive proceedings in the State court, has received the proceeds of property which ought to have come to the assignee. He has a right to proceed against the bank directly in the Federal court for those proceeds, and is not obliged to resort to the State court, where the matter is substantially ended, for relief.

3. The third objection is, that the bank has not received from the sheriff any sum whatever in satisfaction of the judgment which is recovered against the bankrupts.

The facts of the case are simple and undisputed. The goods of the bankrupt were sold under the execution in favor of the bank, and the sheriff, after deducting the costs of the proceeding, deposited the remainder with the defendant. This suit being then pending, the defendant, instead of giving the sheriff a receipt for the amount as paid on the execution in his hands, gave him a certificate of deposit. This transparent device can deceive no one, and does not vary the legal character of the transaction. The sheriff, under the direction of the bank, levies upon and sells the property of the bankrupt, after the title has passed to the assignee, and in violation of the law. He deposits the proceeds of sale with the party whose agent he was in this illegal appropriation of the goods. The assignee electing to assert his right to the proceeds of the sale instead of the goods themselves, sues the party who caused the seizure and sale, and who has their proceeds in his possession. His right to recover under such circumstances can not well be doubted.

4. The fourth objection is that the decree rendered against

the bank is far too large a sum. This assignment of error has regard to certain sums coming to the hands of the defendant as bankers of Hitchcock & Endicott, and which they claim a right to retain by way of set-off. The amount of $943.20 was received on the 12th day of June, some days after their judgment had been recovered in the State court, and after the execution had been levied on the stock of the bankrupts' goods.

It was received as collections made by the bank, from drafts placed by the bankrupts in their hands in the ordinary course of business, and if they had retained it and appropriated it as a set-off against the debt of the bankrupt to them, an interesting question might have arisen as to their right to do so. But instead of doing this, they handed it over to the sheriff who levied on it as the property of the bankrupt, by virtue of the same execution under which he levied on and sold the goods. By the act of the bank it was thus placed in the same category with the goods, and instead of exercising their own right of set-off, by directing the sheriff to credit the execution with the sum received by them on the debt, they delivered it to him to be treated as the goods of the bankrupt and subjected by him to their illegal judgment.

This amount then must be treated in the same manner as the other money received by them from the sheriff on the sale of the goods.

There was in the bank on deposit to the credit of Hitchcock & Endicott on the day they gave the judgment note, the sum of $325.20. This sum was not computed or deducted when the note was given. On the next day, before the bank caused the judgment to be entered up, they credited this amount on the note, and took judgment for that much less. They now claim that this was what they had a right to do, and that it should remain a valid set-off. But this does not appear to have been really what was done. It appears that Hitchcock & Endicott gave the bank a check for the sum, and by virtue of that check it was endorsed on the note as a payment. Now as both the bank and bankrupts knew of the insolvency of the latter, this was a payment by way of preference and therefore void by the 35th section of the bankrupt act. In this case as in the other, if they had stood on their right of set-off, it might possibly have been available, but when they treat it as the bankrupts property, and endeavor to secure an illegal preference by getting the bankrupts to make a payment in the one case, and seizing it by execution in the other, when they knew of the insolvency, both appropriations are void.

We see no error in the decree which was rendered in the District Court and affirmed in the Circuit Court on appeal, and which is again affirmed by this court.—*Legal Gazette.*

U. S. SUPREME COURT.

The Schuylkill and Dauphin Improvement and Railroad Company et al. *v.* Samuel A. Munson et al.

1. A second survey without an order by the board of property amounts to nothing, as it is merely an unofficial act which can not give the warrantee any rights either against the State or any other claimant of the tract.
2. Lost records may be proved by secondary evidence, but their former existence and loss must first be established by competent proof.
3. A judge is not always bound, when there is only what is called a *scintilla* of evidence, to leave it to the jury.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Opinion by CLIFFORD, J.

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

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

Title to the premises in controversy is deraigned by the plaintiffs from one Benjamin Bonawitz, whose claim to the same is supposed to be established by the following documentary evidence of title, as more fully set forth in the bill of exceptions: (1) An application to the land office of the State, dated December 14th, 1829, made by him for sixty-six acres of unimproved land in Lower Mahantongo township, Schuylkill county, bounded as therein described. (2) Warrant from the State, of the same date, to the applicant for the land described in the application, as fully set forth in the record. (3) Return of survey made by a deputy surveyor of the county, June 1,

1829, in pursuance of the warrant, as duly returned to the land office, and accepted the fifth of March of the succeeding year, as follows, to-wit: Situate in Lower Mahantongo township, Schuylkill county, containing sixty-six acres and one hundred and three perches, and allowance of six per cent., returned this third day of March, 1830, in pursuance of a warrant dated the 14th of December 1829, to Benjamin Bonawitz. Superadded to the return is the following statement, that the lines and corners of the survey were made on the eighteenth of June, 1829, in pursuance of a warrant dated the seventeenth of March of that year, granted to the same person, a return on which was made but was rejected on account of the survey not answering the description of the warrant. (4) Sundry mesne conveyances from the warrantee and subsequent grantees of the land described in the warrant, to the plaintiffs.

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

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

Rebutting evidence was then introduced by the plaintiffs: (1) Certified copies of eighteen applications, dated July 1, 1793, to the land office, for four hundred acres each, the leading one being in the name of James Silliman, and one of the number being the application by Jacob Yeager given in evidence by the defendants, as follows: Jacob Yeager applies for four hundred acres of land adjoining land this day granted to William Witman, jr., in the county of Berks. (2) Certified copies of eighteen de-

scriptive warrants, issued upon those applications, including the warrant given to Jacob Yeager, introduced in evidence by the other party. (3) Also certified copies of eighteen surveys, including the Jacob Yeager tract, made by a deputy surveyor of Berks county, upon those warrants, corresponding with the descriptions set forth in the warrants, the certificate of the survey in question being fully set forth in the bill of exception. (4) Return and acceptance of those eighteen surveys, made by Henry Vanderslice, July 16, 1793, as appears in the list annexed to the return. They also introduced a certified copy of a caveat entered July 18, 1793, by John Kunckle and Aaron Bowen against granting the tracts either to the said Jacob Yeager or to any one of the other seventeen applicants under the warrants included in that list. (5) Certificate from the office of the surveyor general that no proceedings had ever been had upon the said caveat.

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

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

Neither party desiring to offer any further evidence the presiding justice proceeded to charge the jury.* Speaking of the warrant and survey introduced by the plaintiffs he told the jury that the court saw no defect in the plaintiffs' title under that warrant and survey, adding that the only claim which the

*Tried before Cadwalader, J., April 27, 1869.

defendants have set up is under warrants located several miles from the land in controversy by surveys returned and accepted, and to that instruction no exception was taken by the defendants. But the court also told the jury that "no subsequent official survey of the land under those warrants, without a warrant of survey or order of the board of property, was authorized." Therefore, said the justice, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiffs, and the jury followed that instruction, and the defendants excepted.

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

Much discussion of the first error assigned is unnecessary, as the defendants admit that the law is well settled in that State that a warrant, where it appears that a survey has been ordered upon it and made, returned, and accepted, is *functus officio*, and that no title under a second survey can be made unless such second survey was ordered by the board of property, which it is admitted is not directly proved in this case. Such an admission by the defendants is a very proper one, as the decisions of the State court which furnish the rule of decisions for this court in this case are very numerous and decisive to that effect.

Perhaps the leading case upon the subject is that of Deal v. McCormick, 3 S. & R. 346, in which Gibson, J. said, "the law is well settled that after a survey made and returned into office, a second survey without an order of the board of property is merely void." If the owner of a warrant be prejudiced by the fraud or mistake of the officer, the board of property, which is a board created by statute, will grant him relief, if no new right has attached itself to the land, but a new survey, even pursuant to an order of the board, will not affect an intervening claim: (Purdon's Digest, 9th ed., 619, pls. 7 and 8.)

Doubtless the official surveyor may correct his survey while the warrant remains in his hands, but his control over it ceases after his return has been made to the land office, and the decisions are direct that no second survey thereon without an order for that purpose is of any validity whatever, either against the State or any other claimant, or, as Justice Strong said, in the case of Hughes v. Stevens, 7 Wr. 292: A second survey without

an order for it amounts to nothing, as it is merely an unofficial act which can not give the warrantee any rights either against the State or any other claimant of the tract: (Drinkwater v. Halliday, 2 Yeates, 89; Porter v. Ferguson, 3 Ibid. 60; Vickroy v. Skelly, 14 S. & R. 377; Oyster v. Bellas, 2 Watts, 379; Bellas v. Cleaver, 4 Wright, 260; Gratz v. Beates, 9 Wright 197.)

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

It is clearly error in a court, said Taney, Ch. J., in U. S. v. Breitting, 20 How. 254, to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in the charge of the court, and if there be no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them in their deliberations: (Goodman v. Simonds, 20 Ibid. 359; Dubois v. Lord, 5 Watts, 49; Haines v. Sloaffer, 10 Barr, 363.)

When a prayer for instruction is presented to the court and there is no evidence in the case to support such a theory it ought always to be denied, and if it is given, under such circumstances, it is error, for the tendency may be and often is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue. Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party: (Ryder v. Wombwell, Law Rep., 4 Exch. 39; Law Rep., 2 Privy Council Appeals, 335.)

Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed: (Jewett v. Part, 13 C. B. 916: Toomey v. L. & B. Railway Co., 3 C. B., N. S. 150; Wheelton v. Hardisty, 8 Ell. & Bl. 266; Schuchardt v. Allens, 1 Wall. 369)

Very strong doubts are entertained whether the construction, of the language employed by the judge, assumed by the defendants, is the correct construction of the same, and the settled rule is, if the charge is merely ambiguous the party dissatisfied with it should have requested to have it made clear before the jury left the bar; that a party under such circumstances may not acquiesce in the correctness of the instruction by his silence and take his chance with the jury and then be allowed, if the verdict is against him, to claim the benefit of the ambiguity without having invited attention to the subject and given the court an opportunity to have made the correction to the jury.

Much weight is certainly due to the suggestions of the plaintiffs, that the judge did not withdraw the evidence from the jury, if any there was in the case, that the language only warrants the conclusion that he expressed his own opinion, as he had a right to do, if he thought it proper, and left the question to the determination of the jury.

Assume that to be the true construction of the language employed, and it is quite clear that the exception can not be sustained, but the court is not inclined to place the decision upon that ground, as it is even clearer that there was no evidence in the case which would have warranted the jury in finding that an order for a new survey was ever granted by the board of property, as required by law and the repeated decisions of the Supreme Court of the State.

Lost instruments may be proved by parol testimony where it is shown that the instrument once existed and is lost, and the proof of loss, where it is first shown that it once existed, may consist of evidence showing diligent and unsuccessful search and inquiry in the place where it was usually kept or in which it was most likely to be found, if the nature of the case admitted of such proof: (1 Greenl. Ev., 2d ed., sec. 558.)

Presumptions of law are frequently absolute and conclusive, as they determine the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. Such presumptions arise in respect to the intermediate proceedings in cases where lands are sold under licenses granted by courts to executors, administrators, guardians, and other officers, whether they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings.

Lapse of time, usually for the period of thirty years, affords a conclusive presumption in such cases, if the license and the official character of the party and the deed of conveyance are proved, that all the intermediate proceedings were correct. Were it otherwise great uncertainty of titles, and other public mischiefs, would ensue, but the rule that lapse of time accompanied by the acquiescence of parties adversely interested, does

not, in general, extend to records and public documents which are supposed always to remain in the custody of officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for by secondary evidence; (1 Greenl. Ev., 12th ed., sec. 20; Hathaway v. Clark, 5 Pick, 490; Brunswick v. McKean, 4 Greenl. R. 508.)

Surveys, it seems, were sometimes made in that State by deputy-surveyors in early times without going upon the land, by plotting the chart and marking the lines and corners in their offices, and those surveys are called "chamber surveys," but such surveys were forbidden by the act of the State Legislature of the eighth of April, 1785, which enacts that every survey hereafter to be returned into the land office upon any warrant issued after the passing of the act shall be made by actually going upon the land and measuring the same and marking the lines: (Purdon's Digest, 9th ed., pl. 65.)

Decided cases are referred to by the defendants where it is held that in controversies respecting titles under those surveys there arises a conclusive presumption, after the lapse of twenty-one years from the return of the survey into the land office, that the survey was regularly made upon the ground as returned and required by law: (Mock v. Astley, 13 S. & R, 382; Caul v. Spring, 2 Watts, 390; Norris v. Hamilton, 7 Watts, 911; Nieman v. Ward, 1 Watts & Serg. 68; Ornisty v. Thomson, 10 Casey, 462.)

Evidently the cases referred to must be regarded as establishing a rule of property in that State, but the court here is of the opinion that they are not applicable in this case, as the defect in the defendants' title arises from the fact that the new survey was made without any order to that effect ever having been granted by the board of property as required by law. Surveys made under those circumstances are simply void, as shown by the best considered cases upon the subject decided by the highest court of the State: (Deal v. McCormick, 3 S. & R. 346, Oyster v. Bellas, 2 Watts, 397, Cassiday v. Conway, 1 Casey, 240; Hughes v. Stevens, 7 Wr. 197.)

Attempt is made in this case to supply by presumption a matter absolutely necessary to give legality to the survey, and without which it is a nullity and amounts to nothing, but is held to be as worthless as if there had never been any warrant at all.

Viewed in that light, as it must be, it is clear that the case falls within the decision of the court in the case of Wilson v. Stoner, 9 S. & R. 39, which, indeed, is decisive of the controversy. It was there decided that a survey is not evidence without first showing an authority to make it, or proving that such authority existed and was afterwards lost. Possession in that case was proved for upwards of thirty years under a survey in

the handwriting of an assistant deputy surveyor, endorsed "copied for return," with a memorandum by him that there was authority to make it, but the court held that those circumstances could not be received as affording presumptive evidence from which the jury might draw the necessary conclusion, as matter of fact, that even if the existence of the location was admitted, some account of its loss would have to be given before secondary evidence of its contents could be received, as without that the survey would be inadmissible for want of a previous authority.

Unless it can be shown that the rule laid down in that case is not good law, it is quite clear that the second error assigned must also be overruled, as the defendants did not prove possession for any considerable time, or occupation of the premises, nor the making of any improvements upon the same, nor the payment of any taxes assessed upon the land. On the contrary, they proved nothing except the mere lapse of time, unaccompanied by evidence of possession, or of improvements, or the payment of taxes, or any other circumstance, as a ground of presumption to warrant the jury in finding that the board of property ever granted a new warrant of survey or made any order of a character to give legality to the title set up in their behalf, which is all that need be remarked to show that there is no error in the record.

Unquestionably lost records may be proved by secondary evidence, but their former existence and loss must first be established by competent proof, and it is clear that evidence merely showing that they do not exist is not sufficient to establish either of those requirements.

Judgment affirmed.

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

Nathan H. Sharpless, Esq., for plaintiffs in error.

Hon. Franklin B. Gowen, and *Hon. Geo. W. Woodward*, for defendants in error.

HAMILTON COUNTY DISTRICT COURT, OHIO.

April Term, 1872.

Fox vs. Reeder, et al.

In order to defeat the title of a *lis pendens* purchaser there must be not only *lites* pendentia, but also *lites* contestatio. There must be not only a suit in existence, but a suit vigorously prosecuted.

[This is probably the oldest case remaining undisposed of on the legal records of Hamilton County. It was commenced

in the old Superior Court, taken by appeal to the old Supreme Court, and finally arrived in this Court by inheritance. Fox brought suit to foreclose a mortgage given by Reeder. It appears from the pleadings that he assigned his claims to Stevenson, who is made defendant, and that Stevenson held as security another note and mortgage held by Reeder, that at the April Term, 1842, of the Supreme Court, sitting in this county, there was a decree finding the amount due in favor of Stevenson, and ordering a sale in sixty days if the money should not be paid, and also an order that upon payment Stevenson should surrender to Reeder the other note and mortgage which he held. At the expiration of sixty days an order of sale was issued, and was returned without sale by direction of the plaintiff's attorney. The case then slumbered for over twenty-one years, drifting along from term to term, without any step being taken in it. A few years ago it was ordered to be dismissed for want of prosecution, but was reinstated, and at the same time an order of sale issued and was recalled by order of Court. In 1868 a number of new parties were made on their own motion. From their answers and cross-petitions, and from the testimony at the hearing, it appears that in 1848, six years after the decree, Reeder sold the mortgaged premises in lots at public sale, that the purchasers went into possession and improved, and there were subsequent sales. The present owners come in and ask that no order of sale be issued and that their titles should be quieted.]

Force, J.—

In disposing of the case, only a single point will be considered. Stevenson moves for an order of sale. The supplemental parties pray that he shall be restrained and their title be quieted. It is claimed, on the one hand, that these parties are *lis pendens* purchasers, and acquire no rights which Stevenson is bound to respect; that he has been so dilatory in the prosecution that he can not claim the benefit of the rule of *lis pendens*.

The rule of *lis pendens* first appears in No. 12 of the ordinances of Lord Bacon for controlling the practice of the Court of Chancery in England, in which he uses the qualifying language: "*Pendente lite*, and while the suit is in full prosecution." The first decision involving the question now considered was made by Lord Clarendon, immediately after the civil war in England, and is cited by Lord Nottingham. In that case the bill was filed in 1640, the party died in 1648, the premises were purchased by a stranger in 1651. The suit was revived in 1662. Lord Clarendon held that the purchaser in 1651 took no title as against the parties to the suit. This case is criticised by Sugden in his book on vendors. He says it depended on special circumstances, that the plaintiff was an infant, that owing to the civil war the courts were interrupted, and finally that the purchaser

was not the purchaser by sale, but by devise, under a will, and he adds: "If that case should ever come to be considered again, it would probably turn on the question of laches." This seems to have been the opinion of Lord Nottingham, who decided the next case, Preston vs. Tubbin, 1 Vernon, 286, decided in 1682. The case says: "Where a man is to be effected by *lis pendens* there ought to be a close and continued prosecution, and in that case it was held that as the suit was originally by a son against his father, and the father died, the son became both plaintiff and defendant, and therefore was not guilty of laches." In Winchester vs. Parvin, 11 Vesey, 200, Sir William Grant comments on Lord Clarendon's case, and uses the language that *lis pendens* means a continued prosecution. In Kinsman vs. Kinsman, 1 Russell & Mylne, 617, Lord Eldon talks about this rule. In that case the suit had been brought to subject to a trust two pieces of land, owned by different persons. One of the owners buried his title deeds in an iron pot in the garden, and there being no registration laws in England, his title could not be got at, and his land could not be sold. So the whole charge fell on the other lot. Subsequently, the other party dug up his title papers and sold his land, there being no further prosecution of the suit. After this a supplemental bill was filed, bringing in these purchasers to subject their land to one-half the charge. In disposing of the case Lord Eldon gave, as he often did, various reasons and qualifications, making it difficult to define sharply the precise principle upon which he disposed of the case; but in the course of the opinion he does say positively that in order to defeat the title of a *lis pendens* purchaser there must be not only *lites pendentia*, but also *lites contestatio*. There must be not only a suit in existence, but a suit vigorously prosecuted.

Coming to the United States we find that in Murray vs. Ballou, 1 Johnson's Chancery Reports, 566, Chancellor Kent, in speaking of the doctrine of *lis pendens* says there must be a *lis pendens* duly prosecuted, and the Supreme Court of Pennsylvania in 37 Pa. State Reports uses the same language.

In a case in 1st Maryland Reports a bill was filed in 1817 to subject land to the payment of a trust, an answer was filed in 1819, and nothing else done until 1823, when a supplemental bill was filed making parties defendant persons who had purchased the land which was the subject matter of the suit. At the final hearing of this case the Chancellor said: "The rule of *lis pendens* can not be allowed to operate against the purchaser where there has been such a dilatory prosecution of the suit," and the cause was disposed of on the ground that the testimony showed the purchase was made with actual knowledge of the trust.

So in a case decided in Virginia in 1834, reported in 5 Leigh,

although it was disposed of on several grounds, the Judges held that *lis pendens*, to have the effect contended for, must be judiciously and diligently prosecuted. In Kentucky we find the case of Watson vs. Wilson, 2 Dana 406. The plaintiff in a chancery suit died, and in a little more than one year thereafter a stranger bought the land in controversy. Two years after that the suit was revived, prosecuted to decree, and the plaintiff bought at the sale under the decree, in a suit growing up between him and the one who purchased during its pendency. The Court went over very fully the whole matter of the doctrine of *lis pendens*, and said: "We are bound to say there was not such a prosecution of Wilson's suit as entitled him to the protection of the rule, and his decree and purchase under it can not be permitted to overreach and overrule the conveyance to Watson;" and so Watson, who purchased during the suit, was held to have a good title.

This ruling was followed in two cases reported in 6 B. Monroe, and was recognized as law as late as 1869, in a case reported in 6 Bush. 624. The question has also been considered in Ohio, in Trimble vs. Boothby, 14 O., 116. There was a lull in the prosecution of a case for twelve years. During this time a person who already had some equitable claim to the land in controversy, acquired the legal title, which was in dispute. The Court on final hearing said:

"To authorize the doctrine of *lis pendens* as to Kern's heirs, the prosecution of the suit must have been close and continuous."

The text writers generally state as law the qualificatiou of *lis pendens* means a full and vigorous prosecution of the suit. Although we find very few actual decisions we do find as far back as Lord Bacon, and continuously down from 1682, the use by Judges of the language "*lis pendens*, or full and vigorous prosecution." This constant use of the qualification "full prosecution," or "continued prosecution," can not be taken as a mere repetition, without purpose. It does fairly import that the qualification is an essential part of the rule, and that it is law; that in order to make effectual the rule of *lis pendens* there must not only be a suit in existence, but a suit actively and duly prosecuted. But the mere *ipse dixit* of any Court, or of any number of Judges, however eminent, is not very satisfactory unless we discover a reason for their dictum.

We have, therefore, tried to penetrate to the core of the matter, and find the seed, the principle out of which grows this rule of *lis pendens*. Story, in his Equity Jurisprudence, says that this rule is based on the fiction of law, "that inasmuch as Courts are open everybody is supposed to be actually present, and to have actual notice of their proceedings." This is the reason also given by Lord Hardwick and others; but we think the better

reason is given by Chancellor Kent, and also by Lord Cranworth. They say it is a rule of public policy that when a plaintiff brings a party into Court to have his rights vindicated there he shall not be deprived of the benefit of the suit, and be compelled to bring other subsequent suits by any sale of the property in dispute made by the defendant while the suit is in progress. Otherwise all suits might be in vain.

Hence, the rule of *lis pendens* is an equitable rule for the protection of the plaintiff, but being an equitable rule for his benefit, it becomes at once subject to that other rule, that he who wants equity must do equity. Hence, while the rule for his benefit says, he shall not be harmed by what the defendant does while the suit is in prosecution, the qualification of the rule at the same time says he shall not harm *bona fide* purchasers by sleeping on his case. If it were true that a party might file a bill and then pigeon-hole his case and let it slumber for decades, and yet that innocent purchasers, for value without knowledge, should be defeated of their title, the rule of *lis pendens* instead of being an equitable protection would be only a trap and a snare.

In the case before us, a decree was entered in 1842, ordering a part of the premises to be sold if the debt were not paid within sixty days. The plaintiff issued an order of sale and returned it by his own direction, and then the case was allowed to sleep for nearly thirty years. Meanwhile the land was sold at public sale and has frequently changed hands since.

We hold that the owner of that decree, Stevenson, having been so dilatory, can not claim the benefit of the rule of *lis pendens*. The order of sale will not issue. The purchasers who are supplemental parties to this suit, will be quieted in their titles.

QUARTER SESSION, PHILADELPHIA.

Commonwealth ex rel, Dennis Shea et als. vs. William R. Leeds, Sheriff.

It is a conspiracy for two or more parties to act it concert in unlawful measures to enforce the Sunday Liquor Law. As by inducing a tavern-keeper to furnish beer on Sunday, by artifice or persuasion.

The mere admission of visitors into a tavern on Sunday is not an infraction of the Sunday Law, unless liquor is actually sold.

Opinion by PAXSON, J. May 4, 1872.

This case was heard upon habeas corpus. The relators, Dennis Shea, Frank N. Tully and Charles Hooltka, were charged with conspiracy by one G. A. Barthoulott. The latter keeps a drinking saloon, and it is alleged that the relators were engaged

with others in a series of prosecutions against liquor dealers for violation of what is known as the Sunday Liquor Law. The facts of this case, as they appeared at the hearing upon the writ of habeas corpus, were substantially as follows:

On Sunday, the 24 of March last, the relators, Shea and Tully, call at the house of the prosecutor. The front door, window and back entry were closed, but they obtained admission through a private entrance. There was no one in the bar room when they entered but the prosecutor and one of his boarders. They asked the prosecutor for beer. He refused them, saying, "I don't sell beer on Sunday." After some persuasion, and being told by Shea that a friend of his (the prosecutor) had told them if they would call there they could get some beer, the prosecutor gave Shea and Tully two glasses of beer, repeating, however, his former declarations, that he could not sell beer on Sunday. They then each took a piece of bread and wanted to pay for that; but this, also, was declined, and the prosecutor finally ordered them out of his place. Up to this point he did not know the relators.

On the 13th of April suit was commenced against Barthoulott, before Alderman Jennings, upon complaint of one David Evans, who styles himself the "Treasurer of the Tax payers' Union," to recover the penalty of $50 imposed by section 2 of Act of February 26th, 1855, upon all persons who shall "sell, trade or barter any spirituous or malt liquors, wine or cider, on the first day of the week, commonly called Sunday." At the hearing Shea and Tully were examined as witnesses. The alderman dismissed the case. It further appeared that, after the above suit was commenced before the alderman, the said Evans stated to Mrs. Barthoulott, that if her husband would pay him $52.50, the suit would be discontinued and no criminal prosecution commenced.

There was also evidence that this was but one of a large number of suits before the same alderman for alleged violation of the law referred to. All of these suits were commenced upon complaint of the aforesaid David Evans, upon information furnished by these relators. In some of them there was offers to settle upon payment of penalty, with costs, to Mr. Evans, and one at least of the defendants testified that he had so settled with Mr. Evans, the latter agreeing to abandon any criminal prosecution.

For the relators it was urged that they were engaged in a lawful object, to-wit., the enforcement of the Sunday Liquor Law. If this was in truth their object, it was certainly a lawful one, and worthy of all commendations. Assuming such to have been their purpose, did they resort to any unlawful means to accomplish it? If they did, and if they acted in concert in

the pursuance of a common design, there was a conspiracy. It was never intended that a man should violate the law in order to vindicate the law.

I am of the opinion that these relators, in their anxiety to procure evidence against Mr. Barthoulott, went a step too far. He was not engaged in any violation of law when they entered his place. They urged and persuaded him to furnish the beer; in fact they resorted to artifice and deception for that purpose. If any crime was committed, they were present, aiding and abetting.

It was urged in extenuation of the conduct of the relators that their action was entirely in accordance with the practice in the detective service, not only of the police, but in other departments of the Government. This is not my understanding of the detective service. I have never known an instance of detectives deliberately procuring a man to commit a crime in order to lodge information against him. Such informers have been infamous from the time of Titus Oates.

We can have no sympathy with the men who sell liquor on Sunday in defiance of law. That there is a class of persons who habitually and insolently defy the law is a reproach to all who are charged with the prosecution of such offences. It is the duty of every good citizen to aid in the suppression of this Sunday traffic. The evils which flow from it are beyond all computation in dollars, and are felt and seen by every citizen. And I have no hesitation in saying, that few persons are more deeply interested in enforcing this law than those who are legitimately engaged in the liquor business. There is nothing which has done more to arouse an antagonism to the whole system than the spectacle witnessed, every Sabbath, of drunken men reeling upon our streets.

I am aware of the difficulty of procuring testimony against this class of offenders. It is believed, however, that with proper vigilance on the part of the police, and a hearty co-operation on the part of all good citizens, the selling of liquor on Sunday can not be carried on to any great extent. Be this as it may, the resort to such means as the Commonwealth alleges were employed in this case is more than questionable. The law does not sanction it, and no solid moral reform will be promoted by it. It is quite possible that when the relators come to be heard in their defence, they may show an entirely different state of facts from those above stated. What I have said is based upon the facts as they now appear. The relators will have an ample opportunity of vindicating themselves before a jury, and for that purpose they are remanded.

AN ACT TO FURTHER THE ADMINISTRATION OF JUSTICE.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, in any suit or proceeding in a circuit court of the United States, being held by a Justice of the Supreme Court and the circuit judge or a district judge, or by the circuit judge and a district judge, there shall occur any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or the presiding judge shall prevail, and be considered the opinion of the court for the time being; but when a final judgment, decree, or order in such suit or proceeding shall be entered, if said judges shall certify, as it shall be their duty to do if such be the fact, that they differ in opinion as to any question which, under the act of Congress of April 29th, 1802, might have been reviewed by the Supreme Court on certificate of difference of opinion, then either party may remove said final judgment, decree, or order to the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas.

SEC. 2. That no judgment, decree, or order of a circiut or a district court of the United States, in any civil action at law or in equity, rendered after this act shall take effect, shall be reviewed by the Supreme Court of the United States on writ of error or appeal, unless the writ of error be sued out, or the appeal be taken, within two years after the entry of such judgment, decree, or order; and no judgment, decree, or order of the District Court, rendered after this act shall take effect, shall be reviewed by the circuit court of the United States upon like process or appeal, unless the process be sued out, or the appeal be taken, within one year after the entry of the judgment, decree, or order sought to be reviewed: *Provided,* That were a party entitled to prosecute a writ of error or to take an appeal is an infant, or *non compos mentis,* or imprisoned, such writ or error may be prosecuted, or such appeal may be taken, within the periods above designated after the entry of the judgment, decree, or order, exclusive of the term of such disability. The appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require.

Sec. 3. That the Supreme Court may at any time, in its discretion, and upon such terms as it may deem just, and where the defect has not injured and the amendment will not prejudice the defendant in error, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is

wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form where the defect has not prejudiced, and the amendment will not injure, the defendant in error; and the Circuit and District Courts of the United States shall possess the like power of amendment of all process returnable to or before them.

Sec. 4. That a bill of exceptions hereafter allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto; and all process issued from the courts of the United States shall bear teste from the day of such issue.

Sec. 5. That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the Circuit and District Courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however*, That nothing herein contained shall alter the rules of evidence under the laws of the United States and as practiced in the courts thereof.

Sec. 6. That in common law causes in the Circuit and District Courts of the United States, the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the courts of such State; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the State in relation to attachments and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by the laws of the State within which said circuit or district courts shall be held in like causes, or which shall be adopted by rules as aforesaid: *Provided*, That similar preliminary affidavits or proofs, and similar security as required by such laws, shall be first furnished by the party seeking such attachment or other remedy.

Sec. 7. That whenever notice is given of a motion for an injunction out of a circuit or district court of the United States, the court or the judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restrain-

ing the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

Sec. 8. That no indictment found and presented by a grand jury in any district or circuit or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Sec. 9. That in all criminal causes the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offences so charged: *Provided*, That such an attempt be itself a separate offence.

Sec. 10. That on an indictment against several, if the jury can not agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.

Sec. 11. That any party or person desiring to have any judgment, decree, or order of any district or circuit court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree, or order, or afterward with the permission of a justice or judge of the said appellate court.

Sec. 12. That in all criminals or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided*, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate or discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

Sec. 13. That when in any suit in equity, commenced in any court, of the United States, to enforce any legal or equitable lien against real or personal property within the district

where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found, or where such personal service is not practicable, such order shall be published in such manner as the court shall direct, and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such defendant had been served with process within the same district, but said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

SEC. 14. That when a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, has been confined in prison thirty days solely for nonpayment of such fine, or fine and cost, such convict may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of (State where oath is administered,) and that I have no property in any way conveyed or concealed, or in any way disposed of for my future use and benefit. So help me God." And thereupon such convict shall be discharged, the commissioner giving to the jailor or keeper of the jail a certificate setting forth the facts.

SEC. 15. That if at any time after such discharge of such convict it shall be made to appear that in taking the aforesaid oath he swore falsely, he may be indicted, convicted, and punished for perjury, and be liable to the penalties prescribed in section thirteen of an act entitled "An act more effectually to

provide for the punishment of certain crimes against the United States and for other purposes," approved March 3d, 1825.

SEC. 16. That the fees of the commissioner for the examination and certificate provided for in this act shall be five dollars per day for every day that he shall be engaged in such examination. Approved June 1st, 1872.

SUPREME COURT OF OHIO.

TO APPEAR IN THE 21 O. S. REPORTS.

ACTION.

Newell Wilcox vs. John McCoy. Error to the District Court of Van Wert County.

By the Court:

A petition stating that the defendant sold to the plaintiff a specified number of sheep, representing them to be sound, when they were not sound, but all or a part of them were affected by a disease known as the hoof rot; and that, relying on the defendant's representations as true, the plaintiff turned the sheep into his field with his other sheep, whereby they also became diseased and the pasture injured, does not state several causes of action, but only a single cause of action, with circumstances of special damage; and the averments showing special damage are not redundant or irrelevant matter. Judgment affirmed.

BILL OF EXCHANGE.

Forbes & King vs. Espy, Heidelbach & Co. Error to the Superior Court of Cincinnati.

MCILVAINE, J.—Held:

M., for the purpose of defrauding the General Government out of its revenues, assumed the name of "C.," and in that name purchased goods of W. D. & Co., in Canada, on credit, and smuggled them in the United States at Detroit. From Detroit he shipped them to C. H. & Co., Cincinnati, to be sold on commission; at the same time advising C. H. & Co. by letter, postmarked at Detroit, signed "C," and requesting them to remit the proceeds. C. H. & Co. having sold the goods purchased a bill of exchange from the defendants, bankers at Cincinnati, on their correspondent at New York, for the net amount of the proceeds of the goods, and having indorsed it, payable to "C or order" remitted the bill by mail to Detroit, addressed to "C," where M received it; and having indorsed it in blank, thus: "C." delivered it to W. D. & Co. in payment for the goods, from whom the plaintiffs received it in good faith, for full value and before dishonor. Afterward C. H. & Co., under the revenue laws of the United States were compelled to pay to the General Government the full value of the smuggled goods; and at their instance the bill was dis-

honored when presented to the drawee for payment. Neither W. D. & Co. nor C. H. & Co. had any knowledge of M. other than in the above transaction, nor that his name of "C" was assumed, nor of his fraudulent practices against the General Government. C. H. & Co. in their correspondence supposed that "C" was the true name of their correspondent. W. D. & Co. at the time they received the bill had no knowledge of the correspondence between C. H. & Co. and M.

In a suit on this bill by the holders against the drawers, held—That the defendants are estopped from denying that the legal title to the bill of exchange is in the plaintiffs, and from setting up as a defense against the plaintiffs the fraud practiced by M. upon C. H. & Co. Judgment below reversed, and judgment entered for plaintiffs and cause remanded, &c.

CONVEYANCE.

M. McGoven and wife v. Francis Knox. Error to the Superior Court of Cincinnati.

West, J. Held: 1. A conveyance of land to another than him by whom the consideration or some part thereof, it at the time paid or secured, vests in the latter an equitable estate *pro tanto*, by resulting trust.

2. Where a loan of money to a trustee holding the legal title, on his personal account, is in no manner induced or influenced by the conduct of the *cestui que trust*, the latter will not be stopped to assert his equitable estate against the creditor seeking to subject it. Judgment reversed and cause remanded.

Levi Jones vs. S. R. Timmons. Error to the District Court of Ross County. White, J.:

The defendant sold to the plaintiff a tract of land which he conveyed by deed, containing a covenant of warranty and a covenant against incumbrances. After the delivery of the deed the defendant refused to allow the plaintiff to enter into possession. On the subsequent voluntary abandonment of the premises by the defendant, the plaintiff went into possession and brought suit to recover the damages sustained by the use of the land while he was kept out of possession—Held:

1. That the defendant was estopped, by his deed, from questioning the right of the plaintiff to the possession, and that the latter was entitled to recover.

EVIDENCE.

George M. Moots vs. the State of Ohio. Motion for writ of error to Logan Common Pleas.

By the Court—

Where a witness truly made the entries in a freight book of a railroad company, on the day the entries purport to have been made, in the regular course of business, including an entry of a particular shipment in question, the freight book is admissible in evidence, with the oath of the witness showing these facts, although at the time of testifying he has no recollection of the particular shipment or of any thing of the date of the entry, and although his

memory is not refreshed by the book, and he knows nothing of the matter except as he sees it in the book. Motion overruled.

EMBEZZLEMEMT.

The State of Ohio vs. John H. Morton. On bill of exceptions taken under the statute, in the Court of Common Pleas of Logan County.

By the Court—Held:

Section XV of the act of April 12, 1858, "to establish the independent treasury of the State of Ohio," defining what shall be deemed in law an embezzlement of public money (S. & C., 1610,) applies to township treasurers.

INSURANCE.

The Ætna Insurance Company vs. William F. Church. Error to the Superior Court of Cincinnati. Day, J. Held:

1. As a general rule all profits which are made by an agent in the course of the business of the principal belong to the latter, but mere gratuities, which are received by the agent for incidental benefits derived by them from services rendered by the agent for his principal, where neither the principal nor agent had any claim for the amount so received, are not properly such profits, and can not be recovered of the agent by the principal.

2. Where a contract made by an agent for his principal for the services of another party in the business of the principal, provided that, as part compensation for such services, the party so employed should receive a specified per cent. of the amount paid by the principal for the services of the agent so making such contract for such percentage was the contract of the principal and not of the agent.

3. Where such contract stipulated for a definite salary "for the first year" of the service of the party so employed, and "annually thereafter," in addition thereto, a specified percentage in the amount paid to the agent making the contract; Held, that such percentage does not accrue to the party so employed until after the expiration of the "first year," and no recovery therefor can be had under the first year's service. Judgment of the Superior Court modified accordingly.

IMPROVEMENTS—LIABILITY OF MUNICIPAL CORPORATION.

The City of Cincinnati vs. Groves J. Penny. Error to the Superior Court of Cincinnati.

McIlvaine, J.—Held:

1. As a general rule, a municipal corporation is not liable for injuries to buildings on lots abutting upon streets and alleys, resulting from the improvement of such streets or alleys, or from their appropriation to a public use, provided its officers and agents in making such improvement or appropriation act within the scope of their authority, and without negligence or malice.

2. If, however, it be shown that the municipal authorities, before the construction of such buildings, had so improved or appropriated the street or alley to public uses, as to indicate fairly and reasonably that no future change

or other use would be required by the city or village, and the abutting proprietor, relying upon such corporate acts as a final decision as to the wants of the public, improve his lot in a manner suitable to the established use, and afterwards his improvements are injured by a change, or by the appropriation of the street or alley to other uses, the corporation will be liable for damages resulting therefrom.

3. But if the nature and extent of the improvements and uses of the street or alley have not been so indicated or defined by the city or village, abutting proprietors must, at their own peril, improve their lots with reference to such future uses or changes in the streets as may be made and adopted by the city or village while acting within the scope of its municipal authority.

4. Under the laws of this State sewerage is one of the legitimate uses to which the public streets and alleys of the city of Cincinnati may be appropriated by its municipal authorities. Judgment reversed and cause remanded.

LIABILITY OF STREET RAILROADS.

The Passenger Railroad Company vs. Isaac Young. Error to the Superior Court of Cincinnati.

WHITE, J.:

The defendant below was a corporation engaged in operating a street railroad. The plaintiff below and his wife having taken seats in one of the defendant's cars as passengers, were, by the orders of the conductor in charge of the car, wrongfully and by force ejected therefrom, whereby they were injured. Held:

1. That the corporation by placing the conductor in his position invested him with the implied authority of determining who ought to be admitted and who excluded from the car, and for the wrongful exercise of this authority by the conductor the corporation is liable.

2. A master is responsible, civilly, for the acts of his servant done in course of his employment; and, when a person is injured thereby, the motive or intention of the servant in doing the act, will not operate to discharge the master from liability.

3. Under the act of March 22, 1849, "to amend the act relating to juries" (S. and C. St. 757), whenever a necessity arises for summoning talesmen, it is the duty of the Court, on application of either party, to issue a *venire* containing the names of persons to serve as jurors, and, if one writ fails to secure the requisite number, to issue other writs, on like application, until a sufficient number of jurors is obtained to fill the panel; and when a proper application is overruled and the party compelled to submit his case to jurors selected by the Sheriff, it is error for which the judgment will be reversed.

4. When the Court ordered the Sheriff to summon talesmen to which the defendant objected, and immediately and before the Sheriff had taken any steps under the order, applied for a venue under the statute—

Held: That the application did not come too late.

Judgment reversed and cause remanded.

MANDAMUS.

The State of Ohio *ex rel.* William Garnes vs. John W. McCann. Application for *mandamus.*

DAY, J.—Held:

Where under the thirty-first section of the act of 1853, "to provide for the organization, supervision, and maintenance of common schools," as amended in 1864, the proper Boards of Education constructed a joint district for the education of colored children out of two contiguous districts for the education of white children, and provided a school for colored children in the joint district equal in every respect to those for white children in the other districts, and which schools for each class of children were equally commodious: Held, that the act authorizing such classification, on the basis of color, does not contravene the Constitution of the State, nor the Fourteenth Amendment of the Constitution of the United States, and that colored children residing in either of the districts for white children, are not, as of right, entitled to admission into the schools for white children. *Mandamus* refused.

MORTGAGE—DOWER.

The State Bank of Ohio vs. Otho Hinton and wife, *et al.* Appeal from the Common Pleas of Delaware County. Reserved in the District Court.

WEST, J.—Held:

1. The doctrine is well settled that a widow, who, during coverture, joined her husband in a mortgage of realty, whereof he had inheritable seizin, is dowable in equity of the surplus moneys arising from a judicial sale under a decree of foreclosure against her thereon, which may remain after satisfying the mortgage debt and the proper costs of foreclosure; but she is dowable of the surplus only, and not of the entire proceeds, to be satisfied out of the surplus; her right being extinguished by the sale to the extent that the proceeds are appropriated to the satisfaction of the mortgage.

2. Where a husband, with whom his wife joined in a mortgage of realty, in which she had an inchoate right of dower, disposes of his equity of redemption therein by deed in which she does not join, and dies after a judicial sale of the mortgage premises under a decree of foreclosure against them, she is dowable of the surplus moneys resulting therefrom after satisfying the mortgage debt and costs to the extent that her right can be equitably discharged from the portion of such surplus, which shall not previous to its assertion have passed by final decree from the chancellor's control; but if the equity of redemption be held by several, to some of whom shall have been distributed their respective portions of the surplus on final decree, without objection interposed, or assertion of right by her, they will not by required to refund, nor will contribution be enforced against the interests of others which shall not have been so distributed.

Decree accordingly and cause remanded.

Supreme Court of Ohio.

OCCUPANCY.

Mitchell & Rowland vs. Anne J. Pendleton. Error to the Superior Court of Cincinnati.

By the Court—Held:

Where a parcel of land is occupied by a person not the owner, in such manner and under such circumstances that a contract to pay rent can not, in law, be implied, rent for such occupancy can not be recovered in the absence of an express contract to pay it. Judgment reversed.

PARDON.

Hosea W. Libby vs. Felix Nicola. Appeal. Reserved in the District Court of Cuyahoga County.

WHITE, J.

A person who has been convicted and sentenced to the penitentiary for manslaughter, and against whom a judgment has been rendered for the costs of prosecution, obtains from the Governor a pardon, in which, after reciting the sentence of imprisonment, but making no reference to the judgment for costs, the Governor declares that a general pardon is granted to such person "from the sentence aforesaid." Held: That such pardon does not operate to release the judgment for costs. Injunction dissolved and petition dismissed.

PETITION IN ERROR.

Jeremiah Darling vs. William S. Taylor. Motion for leave to file petition in error overruled on the ground that the record does not show the filing of a motion for a new trial or the signing of a bill of exceptions at the term when the final decree was entered.

RAILROAD COMPANY.

The Pittsburg, Fort Wayne and Chicago Railway Company vs. John Maurer. Error to the Court of Common Pleas of Richland County, reserved in the District Court.

MCILVAINE, J.—Held:

1. A corporation owning and operating a railroad which crosses a common highway, is under no obligation to remove from the highway obstructions placed on the crossing by a stranger, if the material constituting the obstructions is neither the property, nor under the care and control of the corporation, although the existence of the obstructions is brought to the knowledge of its agents.

2. Nor does such obligation exist, although the person so placing the obstructions be a brakesman on the defendant's road, and the material constituting the obstructions be waste manure from the stock cars of the company, if the brakesman so placed the manure for his own use, without the authority of the company, and at the same time, was not acting within the scope of his employment and duty as brakesman. Such a case does not fall within the purview of either the thirteenth or eighteenth section of the act of February 8, 1853. [Swan & C., 310 and 311.]

3. The right of a railroad company to enjoy the use of its road at the crossing of a common highway, and the right of the traveling public to use the highway are co-ordinate and equal. Reasonable care and prudence must be exercised by each, in the use of the crossing, so as not to interfere unnecessarily with the other.

4. By the provisions of the thirty-third section of the act of May 1, 1854, (S. and C. 279,) the duty of restoring a highway diverted in the construction of a railroad, to "such a condition as not to impair its former usefulness," is imposed upon the corporation, and it is liable for injuries resulting from its neglect to do so. But when such highway has been fully restored to such condition, the corporation is under no obligation to keep the same in repair.

5. If, however, after such highway has been fully restored, the railroad company wrongfully encroaches upon the highway, or impairs its usefulness, it will be held liable for damages resulting from such wrongful encroachment or impairment. Judgment reversed.

RELIEF OF THE POOR.

Board of Directors of the Infirmary of Marion County vs. Trustees of Westfield Township, Morrow County. Error to the Court of Common Pleas of Morrow County, reserved in the District Court.

DAY, J.—Held:

Under the statutes in relation to the relief of the poor, as they existed prior to their revision in 1865, the Trustees of a township in one county, who have afforded temporary relief to a non-resident pauper, have no right of action against the Board of Directors of the Infirmary of another county, where the pauper had a legal settlement, for the support so furnished; but under the statute, they may maintain such action against the Trustees of the township where the pauper has such settlement. Judgment reversed and cause remanded.

TAXING CORPORATIONS.

John Sebastian, treasurer, &c., vs. The Covington and Cincinnati Bridge Company. Error to the Common Pleas of Hamilton County. Reserved in the District Court.

WEST J.—Held:

1. The general tax law of April 13, 1852, (S. & C. 1439) authorizes corporations previously created by special enactments, to surrender all franchises by which the general taxing power of the State is in any manner restrained or controlled, and to submit themselves thereto.

2. The seventh clause of the act of March 9, 1849, "to confirm the charter of the Covington and Cincinnati Bridge Company, incorporated by an act of the General Assembly of Kentucky," &c., (47, O. S. L., 269), which requires that "one-half the capital stock of the company actually paid in, shall, as soon as the company commences taking tolls, be placed upon the duplicates of the Treasurer of Hamilton County for taxation for all purposes," is a franchise in the nature of a compact between the State of Ohio and the bridge company

that can not be abandoned, surrendered or modified without the concurrence of the contracting parties.

3. The President of the Covington and Cincinnati Bridge Company can not make a valid surrender of its franchises in the absence of authority therefor given to him by the corporation. The exercise of such power is not one of his ordinary functions.

4. The Covington and Cincinnati Bridge Company, not having authorized it, an offer by its President to surrender its franchises contained in the *seventh* clause of its charter, and to make return of its property for taxation under the existing general law, imposed no obligation on the Auditor of Hamilton County to accept and act upon it officially.

5. The compact in the *seventh* clause of the Covington and Cincinnati Bridge Company's charter not having been waived nor surrendered by it, the assessment of a ratable tax by the Auditor of Hamilton County, after the company commenced taking toll, on one-half of its capital stock actually paid in, is valid. Judgment reversed and cause remanded.

TAXATION.

The Pomeroy Salt Company et al. vs. Alban Davis, Treasurer, &c. Error to the District Court of Meigs county. McIlvaine, J., held:

1. An unincorporated company, though not strictly a co-partnership, owning personal property in this State, is subject to taxation thereon, in the name of such company, under the provisions of the fourth section of the tax law of 1859, as amended on the 8th day of April, 1865, S. and S. 756, which requires the personal property "of every company, firm, body politic corporate," to be listed for taxation, "by the President or principal accounting officer, partner or agent thereof."

2. That an incorporated company, organized under the laws of this State, or of a sister State, may become a member of such incorporated company if the sole business of the latter is auxiliary to the business for which the former was organized.

3. In such case, the incorporated company, if located in this State, is relieved from the duty imposed by the 16th section of said act of 1859, S. & C. 1,446, of listing its interest in such unincorporated company, by virtue of the 9th clause of the 3d section, which provides "no person shall be required to include in his statement, as a part of the personal property, money, credits, investments in bonds, stock, joint stock companies or otherwise, which he is required to list, any share or portion of the capital stock or *property* of any company or corporations which is required to list or return its capital stock or property for taxation in this State."

4. The personal property of such incorporated company should be listed in the tax district where its principal business office is located and in which its managing agent resides.

5. Boats and barges are the subject of joint ownership, and may become the property of joint companies, whether incorporated or unincorporated. And when so owned, and used in whole or in part in navigable waters within or

bounding upon this State, should be taxed in the district where the company's principal office is located, and in which its managing agent resides. Judgment affirmed.

2. Parol evidence was neither admissible to show that at the time of the delivery of the deed the defendant reserved the right of possession, nor the right of cutting trees growing on the premises.

Judgment of the District Court reversed and that of the Common Pleas affirmed.

DIGEST OF RECENT DECISIONS.

ACCOUNT STATED.

1. Errors corrected.—Since he who asks equity must do equity, where plaintiff, after an account stated between him and defendant, asks to have the same opened, and to surcharge it by reason of errors committed against his interest, he can not object to the correction of other errors therein committed against the defendant.—*Grace v. Newbre, Supreme Court of Wis., June term*, 1871.

2. Amendment: Mistake.—Where the original answer denied that there had been an account stated between the parties, an amendment which alleged, in substance, that if the transactions between them amounted to the stating of an account, then such account, by reason of certain mistakes, was stated at too large an amount against defendant—*held*, not inconsistent with the original denial.—*Id.*

3. Error: Prejudice.—The original answer having alleged errors to defendant's prejudice, in partnership accounts between the parties, as kept in the books of the firm, and it having been shown at the trial that the account stated between the parties was made up of the accounts in said books, it seems that defendant should have been permitted, without amending his answer, to surcharge or falsify the account. If otherwise, the amendment should have been allowed.—*Id.*

4. Amendment verified: Presumption.—If the proposed amendment was not verified, but was not objected to on that ground, this court must presume that, had it been allowed, the amended answer would have been verified at once; such being understood to be the practice at the circuit, where an amendment is allowed at the trial without continuing the cause.—*Id.*

AFFIDAVIT.

Rule applied.—The order of this court in a cause brought up on appeal from the decision of a motion, recites that it had been shown that the return already made therein by the clerk of the court below was "defective in not returning to this court the affidavit of the respondent read on the hearing of the motion;" and it requires said clerk to make immediate return of the affidavit "on file below, read and used on the hearing of the motion." Thereupon said clerk certified and returned "in pursuance of the order" (a copy of which is annexed to such return), "a certain affidavit therein referred to, as the same was filed in his office" on a specified day, which was after the

decision of said motion ; and he further certified that "the affidavit referred to in the annexed order" did not come into his possession until the day specified. *Held.*

(1) That the affidavit contained in such supplementary return is a part of the record in the cause.

(2) That the return is sufficient *prima facie* proof that such affidavit was read and used at the hearing of the motion.—Orton v. Noonan et al. (On rehearing.) *Supreme Court of Wis., June term*, 1871.

ACKNOWLEDGMENT OF DEED BY A FEME COVERT.

Of its sufficiency.—A certificate of acknowledgment of a deed executed on the twenty-ninth of August, 1856, and purporting to have been made by husband and wife, stated: "This day personally appeared before me Julia Quigg, whose name appears to the foregoing conveyance, and who, by good authority to me given, is the identical person therein named, and acknowledged that she had acknowledged said deed freely, and of her own accord, without any compulsion of her said husband, and all after having been by me examined separate and apart, and the contents of said deed having been by me fully explained to her:" Held, the certificate was insufficient to pass the dower right of the wife, as it did not show she was personally known to the officer, or that she relinquished her dower according to the statute : *Becker et al. v. Quigg, to appear in 4th Vol. Ill. Reports.*

ATTACHMENT.

Actions Ex Contractu and Ex Delicto.—In an action to recover the value of certain wheat, the petition, which asked an attachment, alleged that the plaintiff deposited the wheat for storage with defendants under special contract, the defendants agreeing to deliver the wheat to plaintiff on demand; and further alleged, that plaintiff "demanded the wheat of defendants; that they had before such demand sold and shipped the same without authority; that they could not and did not deliver the same to plaintiff, and refused to pay him therefor." Held, that the action was founded on contract, and not on tort, and that it was, therefore, not necessary that the petition should have been presented to some judge for allowance of amount in value of property to be attached as provided by section 3177 of the Revision.—*McGinn v. Butler et al, to appear in 31st Iowa.*

ASSIGNMENT.

Of Judgment Without Recourse.—The assignor of a judgment, a part of which has been paid, but of which fact he has no knowledge at the time of his sale and assignment, is not liable to the assignee or person purchasing the judgment, for the amount so paid, when the assignment or transfer is only of his right, title, and interest in the judgment, and that without recourse:—*Scofield v. Moore, et ux, to appear in 31st Iowa Reports.*

Rule Applied.—Judgment, a part of which had been paid, and no record of such payment made, assigned in the following form: "For value received we hereby sell and assign all our right, title and interest in this judgment to M. without recourse on us." Held, no fraud being shown, that the assignors were not liable to the assignee for the amount which had been paid on the judgment.—Id.

ACTS OF CONGRESS.

Construction: Authority of Federal and State Courts.—In construing an act of Congress, its force and effect, the Supreme Court of the United States is the highest and most authoritative tribunal known to our laws, and its decisions in that regard must override those of the Supreme Court of a State on the same subject:—*McGoon et al v. Shirk, to appear in 4th vol. Ills. Reports.*

ACTION.

Draft: No funds.—Where M. delivered a note and mortgage to W. as security for future advances by W, and afterwards drew upon him (not having any funds in his hands), W. had a right of action immediately to recover the amounts paid on such drafts, in the absence of any agreement to the contrary, although the note and mortgage were not due.—*Wolf et al v. McGavock., Supreme Court of Wis., June term*, 1871.

2. Conversion: Consent.—Where the second mortgagee of chattels takes and sells them with the consent of the first mortgagee, the latter can not maintain an action against him as for a conversion, although such consent was given under a false impression as to the respective rights of the parties to the proceeds of such sale, or as to the views of the second mortgagee on that subject, such false impression not having been created by fraud on his part.—*Anderson et al v. Case et al., Supreme Court of Wis., June term*, 1871.

3. Distinction.—The distinction between an action *ex delicto* and one *ex contractu* is not merely formal but substantial, in that an execution goes against the body in the former, and only against property in the latter.—*Id.*

Erroneous instructions.—A judgment for plaintiff in an action for a conversion will therefore be reversed for erroneous instructions, although the record shows that he would have been entitled to a judgment for the same amount in an action for money had and received.—*Id.*

BAILMENT.

Warehousemen: Destruction by fire.—Where a consignor deposits certain wheat for storage with warehousemen, under the agreement that they will re-deliver it to him on demand, and they, without authority, sell and ship the wheat, and thereafter a demand is made for the wheat, it is no defense, in an action by the consignor to recover the value of the wheat, that the warehouse of defendants, was, subsequent to the demand, destroyed by fire consuming all its contents among which was wheat of a like quality as that stored by plaintiff and with which they could have replaced it.—*McGinn v. Butler, to appear in* 31*st Iowa.*

Digest of Recent Decisions.

CONTRACTS.

1. Specifically payable in gold: Application of the legal tender act.—In an action upon a contract payable in gold and silver, entered into prior to the passage of the legal tender act of February 25, 1862, it has been held, that under that act, damages may be properly assessed and judgment rendered, so as to give full effect to the intention of the parties as to the medium of payment, and where it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly.—*McGoon et al. v. Shirk, to appear in 4th Vol. Ill. Reports.*

2. Express contracts to pay in coined dollars can only be satisfied by the payment of coined dollars. They are not "debts" which may be satisfied by the tender of United States notes.—*Id.*

3. In the application of this rule, no distinction is made as to the time when such contracts may have been entered into.—*Id.*

4. So when a promissory note was payable, in terms, in American gold, such note having been executed subsequent to the passage of the legal tender act, on an application of the maker, who had given a deed of trust to secure the note, to a court of equity, to be relieved from making payment in gold, and to compel the holder to receive legal tender notes in discharge thereof, the relief sought was denied, on the ground the note could only be satisfied by the payment of gold, according to the contract.—*Id.*

CRIMINAL LAW.

The possession of stolen property soon after the theft was committed, is *prima facie* evidence that the property was stolen by the person in whose possession it was found—that fact, of itself, in the absence of evidence rebutting the presumption of guilt arising therefrom, will authorize a conviction.—*Comfort v. The People of the State of Illinois, to appear in 4th Vol. Ill. Reports.*

CONTRACT OF SALE.

Misrepresentations which will vitiate.—The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations: *Slaughter v. Gerson, Supreme Court of United States*, 1872.

CHANCERY.

Removal of incumbrance on the application of the debtor—A party who has placed an incumbrance upon his property, as by a deed of trust, may come into a court of equity to obtain the removal of the incumbrance, by compelling the creditor to accept payment of the debt upon the terms and in the manner the debtor is entitled to discharge the same, according to the proper legal construction of their contract.—*McGoon et al v. Shirk, to appear in 4th Vol. Ill. Reports.*

COMPROMISE.

Agreement to take a less sum than is due, in satisfaction of a debt—A mere executory verbal agreement, without consideration, by the holder of a promissory note, to accept from the maker a less sum than is due thereon, will constitute no defense to a suit on the note. Even the payment of a less sum of money than the real debt, would be no satisfaction of a larger sum, without a release by deed.—*Titsworth v. Hyde et al, to appear in 4th Vol. Ill. Reports.*

CORPORATION MUNICIPAL.

1. **Burlington City: repeal of charter.**—The amendment to the charter of the city of Burlington (acts 4th General Assembly, ch. 49) empowering the city to grant or refuse licenses to insurance companies, was not repealed by section 38, chapter 138, acts twelfth General Assembly, regulating the taxation to be imposed upon such companies.—City of Burlington v. Putnam Ins. Co., to appear in 31st Iowa.

2. **Exercise of license power.**—While it may be conceded that a power to license will not, under the guise thereof, authorize a city to impose taxation for revenue, yet the discretion of the city authorities in the imposition of license will not be interfered with unless an abuse of such discretion is clearly shown.—Id.

3. **Graduation of rates of license: Insurance Companies.**—A city possessing the power to license insurance companies may properly graduate the amount thereof in proportion to the income of the different companies.—Id.

4. **Method of imposing licenses.**—The objection, that the rate imposed was by resolution of the city council instead of by ordinance, is not tenable, when it appears that such resolution was authorized by a prior ordinance which declared that there should "be levied and collected on every license granted" such sum as the city council by resolution might from time to time declare.—Id.

5. **Detachment of territory from city.**—Territory within the limits of a city should not be severed therefrom, in a proceeding under sections 1048 *et seq.* of the Revision, on the ground that it receives no benefits from the municipal improvements, and is not needed for present municipal purposes,

if it is manifest, from the facts, in the case, that it will soon be required, for such purposes in the extension and growth of the city in that direction.—Mosier et al. v. The City of Des Moines, to appear in 31st Iowa.

DOWER.

Degree of proof required on issue of non seizin.—On petition for dower, against parties in possession who claimed title through *mesne* conveyances from the husband of the petitioner, it was *held*, that under the issue of *non seizin*, the demandant in dower is not required to make strict proof of a regular paper title, it being sufficient if she produced such evidence as would raise a fair presumption of the seizing of her husband; such presumption, however, is subject to being rebutted by proof of a better and paramount title derived from other source than the husband.—Becker et al. v. Quigg, to appear in 4th Vol. Ill. Reports.

DAMAGES, MEASURE OF.

Fences.—Where adjacent owners made an agreement respecting the planting and rearing of a partition hedge, by the terms of which one was to furnish the plants and the other was to perform the labor of cultivating it until it was sufficiently grown to answer the purpose of a fence, it was *held*, that the measure of damages for non-performance on the part of the latter was the value of the labor and services which he undertook to perform in rearing the hedge and not the value of it when grown into a fence.—Gantz v. Clark, to appear in 31st Iowa.

EVIDENCE.

1. **Dying declarations: Advancement.**—Dying declarations of the ancestor are not admissible against the heir for the purpose of showing an advancement. Such declarations are admissible only in such cases of homicide where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration.—*Middleton et al. vs Middleton et al., to appear in 31st Iowa.*

2. **Advancement.**—But where it is claimed that an advancement was made to an heir by the sale of a farm to him by the ancestor, the declarations of the ancestor, made at about the time of the sale, to the effect that the heir had fully paid him for the farm, are admissible on the part of the heir.—*Id*

3. **Onus probandi: Instruction: Error without prejudice.**—While the burden of proof is upon the party claiming it, to show that an advancement was made, the evidence need not be conclusive. The fact may be sufficiently established by a *preponderance* of testimony.—*Id*

4. The giving of an erroneous instruction which under the testimony could have worked no prejudice to the party complaining will not be regarded as reversible error.—*Id*

5. **Where adverse party is executor: Husband and wife.**—Section 3982 of the Revision, which prohibits a party from testifying where the adverse

party is the executor of a deceased person, does not disqualify the wife of the claimant, and she is competent to give evidence sustaining his claim against the estate. (Shafer vs. Dean, 29 Iowa, 144.)—*Wendeling vs. Besser to appear in 31st Iowa.*

6. Impeachment on matters of opinion.—An expert, who testifies as to matters of opinion, may be impeached by showing that he has affirmed a different opinion on a former occasion.—*Miller vs. Insurance Company, to appear in 31st Iowa.*

EVIDENCE.

Form of denial of payment.—The question was asked plaintiff on trial: "Has he (defendant) repaid you any portion of the claim?" Answer—Not one cent. *Held* that this denial is a full one, and the verdict of the jury on the question of non-payment must close the controversy. A payment to the plaintiff's sister, by his direction was a payment to the plaintiff. If the defendant supposed that the plaintiff was not making a bona fide denial of any legal payment, he should have exposed him by a cross-examination.—Dibbe v. Dibbe, Supreme Court of N. Y. March term, 1872.

Res gestae.—Upon the trial of a party under an indictment for the larceny of a watch, it was proven that the prisoner, being in possession of the watch a short time after it was stolen, met a pawnbroker away from the place of business of the latter, and proposed to pledge the watch as security for a loan of money. Thereupon the parties went together to the pawnbroker's shop, when the prisoner received the money and placed the watch in pledge: *Held*, it was competent for the prisoner to prove all that was said by him, when he first approached the pawnbroker, in connection with the subject, and as to the manner in which he obtained the watch—not only as a part of the *res gestae*, but as a part of the conversation—to be given such weight by the jury, as from all the evidence in the case, it might seem entitled.—*Comfort v. The People of the State of Illinois, to appear in 4th Vol. Ill. Reports.*

EQUITY.

Reformation of deed: statute of limitations.—Where in conveying to the vendee, a portion of real estate, the deed, in consequence of a mistake in the measurement of the land, describes it as of a greater width than it actually is, a court of equity will grant relief to the grantor by correcting the mistake; and this right of the grantor to relief will not be barred by the statute of limitations or lapse of time, where he has remained in possession of the portion included by mistake.—Hutson v. Fumas et al., to appear in 31st Iowa.

EXECUTION DOCKET.

1. **What it may properly contain.**—In the book which clerks of the circuit courts are required to keep, for the purpose of entering therein the returns of the sheriffs or coroners, of all executions, it is proper that the column for the entry of the return should be preceded by columns for th

names of the parties, the kind of process, date of execution, when returnable, and amount of debt and cost.—Becker et al. v. Quigg, to appear in 4th Vol. Ills. Report.

2. **When admissible in evidence.**—Where an execution has been lost, and it becomes necessary to prove that it was issued, a transcript from the execution docket is admissible as tending to prove that fact, and the entries preliminary to the return, and which are necessary to an understanding of the last entry, constitute evidence to be considered, with all the other evidence on the subject.—Id.

3. **Variance between the judgment and execution docket.**—Where a party claimed title to land through a sale thereof under execution, and, the execution being lost, proof that it was issued was attempted to be made by producing a transcript from the execution docket, a variance between the amount of the judgment on which the execution was issued, and the amount of the debt as entered in the execution docket, of fifty-three cents, was regarded as a mere clerical error, which would not vitiate or destroy the title, or be taken advantage of collaterally.—Id.

FENCES.

1. **Notice.**—Notice of the meeting of the fence viewers to assign to each of adjacent owners his share of partition fence to be built, need not be in writing. Verbal notice is sufficient.—Gantz vs. Clark, to appear in 31st Iowa.

2. **Record of decision.**—A failure to have recorded with the township clerk the assignment or division of such respective shares will not affect the rights of either party in respect to building the share assigned to the other on his failure so to do, and the recovery of double damages therefor as provided by the statute.—Id

INSURANCE.

1. **Notice to Agent.**—Notice to an agent of a life insurance company having authority to solicit, make out and forward applications for insurance, to deliver to the assured policies when returned, and to collect and transmit premiums, will operate as notice to the company, and it will be bound by acts then done by him in respect to the business he is transacting.—*Miller v. The Mutual Benefit Life Insurance Co., to appear in* 31*st. Iowa.*

2. **Estoppel: False Statement.**—An untrue or fraudulent statement on the part of the applicant, of a fact material to the risk, will not prevent a recovery against the company if it or its agent, authorized as above stated, was informed of and knew the truth in regard to such fact when it received the application and premium and issued the policy.—Id.

3. **Matters of Warranty and Representation.**—Matters of warranty constitute a part of the contract, and it is necessary that they should be exactly and literally complied with; but matters of representation are but collateral to the contract, and it is sufficient if they are substantially complied with.

The distinction between warranties and representations pointed out by Day, Ch. J.—Id.

4. Warranties will not be created nor extended by construction. They must arise from the fair interpretation and clear intendment of the language used.—Id.

5. **Nature of Application.**—The application is, in itself, merely collateral to the contract of insurance, and its statements are to be classified and construed as representations, unless, by force of a reference in the policy, they are converted into warranties, and the purpose is clearly manifest, from the papers thus connected, that the whole shall form one entire contract.—Id.

6. In order to constitute words of reference, contained in an application, into a warranty, they must be such as, in legal effect, make it a part of the policy. —Id.

7. **Rule Applied.**—In the present case, which was an action on a policy based on an application for insurance on the life of another, there were five separate papers connected with the application, viz.: one headed "particulars required from persons proposing to effect insurance on lives in this company;" another, "questions to be answered by the physician of the party applying for insurance;" another, "questions to be answered by the friend of the party applying for insurance;" another, "questions to be answered by the agent, if the applicant is not previously known to him;" and, lastly, one headed, "declaration to be made and signed by the person proposing to make insurance on the life of another." The policy contained the following reference: "It is understood and agreed by the assured to be the true intent and meaning hereof, that, if the declaration made by or for the assured, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void." *Held*, that the statements contained in the *declaration* could alone be regarded as warranties, and that the statements of the person on whose life the insurance was effected were to be regarded as mere representations.—Id.

8. **Materiality of Representations: Province of Jury.**—While it is within the proper province of the jury to determine whether the statements made in an application for insurance are substantially, or, in every material respect true, it is not their province to determine the materiality of alleged misstatements contained in such application.—Id.

9. **Evidence: Medical Testimony as to Cause of Death.**—The opinion of a physician is competent evidence as to the cause of death of a person whose life is insured; but the weight of such opinion is a question for the jury.—Id.

10. **Fraud: Statements to be Considered.**—In determining the question of fraud regarding representations in respect to the health and habits of the person on whose life insurance was sought to be effected, not only the answers or statements of such person, but those of his physician and of his friend should be considered by the jury.—Id.

11. Intemperance.—Where a policy of life insurance was sought to be avoided on the ground that the death of the party, on whose life insurance was effected, was caused by intemperance, an instruction which charged that if the death of such person was only *contributed* to by the intemperate use of liquor, then the defense in that respect was not made out, was held not erroneous.—Id.

12. Construction of Policy.—A policy of insurance will be strictly construed against the company.—Id.

INSTRUCTION.

Presumption of application.—An instruction will not be held inapplicable when evidence making it applicable would have been admissible under the issues raised by the pleadings, and it does not appear that such evidence was not introduced.—*Gantz v. Clark, to appear in 31st Iowa.*

INTERNAL REVENUE DECISIONS.

The following decisions and instructions have been given, during the months of April and May, in the Internal Revenue and Treasury Departments.

Reduction in the capital of an Insurance company in consequence of losses in not a closing out of old stock and realization of loss, but a depreciation of value which can not be allowed in return of income.—*April* 5-72. *Letter of B. J. Sweet, acting commissioner, to Robert N. McLarren, Assessor 2d District, St. Paul, Minn.*

The following instructions in reference to the branding or marking of imported distilled spirits are hereby issued for the future guidance of officers of the customs, and will be deemed and held by them to supersede all former regulations on the same subject, so far as they conflict therewith:

1. Upon the landing of distilled spirits in casks upon the wharf, and the due examination thereof by the gauger, each cask shall be marked by him or under his supervision, so as to show the name of the port, date of importation, rate of proof, and number of gallons contained therein.

2. A record of these facts shall be made by the gauger who marks the casks, in a book to be furnished him by the surveyor or other supervising officer for that purpose, the record to be made at the time of marking, and the books, when full, to be placed on file in the custom house, for reference whenever necessary.

3. Distilled spirits imported in cases, or otherwise than in casks, as they can not in that condition be examined or tested on the wharf, will not be subject to marking under these instructions.—*April* 30, 1872, *Letter of acting secretary, W. A. Richardson, to C. A. Arthur, collector, New York.*

Improper cancellation of stamps.—It is not allowable for manufacturers of tobacco and cigars to cancel stamps by simply writing the initials of their name upon the stamps. And in regard to dating the stamps as a part of the cancellation, it is not allowable to use figures to indicate the month.—*May* 1,

1872, *Letter of acting commissioner B. J. Sweet to Alexander Fulton, Supervisor. Baltimore, Md.*

JURY AND VERDICT.

1. **Latent defects: affidavits.**—Where a jury agree in advance to be bound by a verdict arrived at by each marking down a separate amount and dividing the aggregate thereof by twelve, the verdict will be held invalid, and set aside.—*Fuller v. The Chicago & N. W. R. R. C., to appear in* 31*st Iowa.*

2. Affidavits of members of the jury are, in such case, admissible to show the manner in which the verdict was arrived at.—*Id.*

3. **Verdict void in part.**—Where a verdict arrived at in the manner above indicated is only void in part, the valid portion will be permitted to stand on the defendant's entering a remittitur as to the excess.—*Id.*

JUDGMENT.

1. **Against a part of several defendants: in actions ex contractu.**—The act of 1869, authorizing a judgment to be rendered against one or more of several defendants in certain cases, only applies to suits on written contracts when the execution of the instrument sued on has been put in issue by plea. —*Garretson, impl., etc., v. Strawn, to appear in 4th Vol. Ill. Reports.*

2. And a plea of coverture by one of the defendants does not put in issue the execution of the instrument, within the meaning of that statute.—*Id.*

3. **Former Adjudication: Defenses: Fraud.**—It may be pleaded as a defense in an action upon a domestic as well as upon a foreign judgment, that fraud was used in obtaining it.—*Whetstone v. Whetstone, to appear in* 31*st Iowa.*

4. It was accordingly held, where a prior decree of the district court of another county, between the same parties, was interposed as a bar in an action of divorce, that the decree might be assailed in that action, and its force as a former adjudication avoided, by showing that it was fraudulently obtained.—*Id.*

JURISDICTION.

1. **Fraud in obtaining.**—If a person residing in one jurisdiction, be induced under false pretences or representations, to come into another, for the purpose of there getting service upon him, the jurisdiction thus acquired will be held to have been fraudulently obtained.—*Dunlap & Co. v. Cody, to appear in* 31*st Iowa.*

2. **Defense; Judgment.**—Such fraud in obtaining jurisdiction of the person of defendant will vitiate the judgment.—*Id.*

3. In a case of this kind it is not incumbent on the defendant to appear before the jurisdiction where the action was commenced and set up the facts showing the fraud; but he may, having failed to appear in the original action, plead them in a subsequent action on the judgment, commenced in the jurisdiction where he resides.—*Id.*

4. Acts in fraudum legis.—It seems a judgment may be impeached for fraud when obtained in *evasion* of the courts of the place where it is sought to be enforced.—*Id.*

LIMITATIONS, STATUTE OF.

1. Operation on obligation of sureties.—When the relation of principal and sureties between persons whose names are signed to a promissory note or written obligations does not appear from the instrument itself, but depends for its establishment upon parol testimony, and the instrument has been merged in a judgment rendered thereon, and that satisfied of record, the right of action at law by the surety against the principal will be treated as founded upon an unwritten contract, and, under our statute, barred in five years.—*Lamb et al. v. Withrow, to appear in* 31*st Iowa.*

2. Semble, that the same rule would apply if the note or instrument were not merged in judgment, and the surety was seeking in an action at law to recover for the amount of the note paid by him, or to be subrogated to the rights of the payee.—*Id.*

3. Running account.—Where one person boards or provides for another continuously, this will constitute a continuous, open current account within the meaning of the statute of limitations (Rev. § 2,743), providing that where there is a continuous, open current account the cause of action shall be deemed to have accrued from the date of the last item.—*Wendeling v. Besser, to appear in* 31*st Iowa.*

LOST EXECUTION.

1. Proof of search therefor—ex parte affidavits.—Upon trial of an application for assignment of dower, in behalf of a widow whose husband derived title to the premises as purchaser at a sale thereof under execution, which was alleged to have been lost, and could not be found, it was *held*, the *ex parte* affidavits of the clerk of the court from which the execution was issued, and of the widow and administratrix of the sheriff who made the sale, were not admissible in evidence to prove that proper search had been made for the lost execution, with the view to lay the foundation for secondary evidence. The persons making such affidavits were competent witnesses, and should have been called to testify before the court in respect to the fact sought to be proven.—*Becker et al., v. Quigg, to appear in 4th Vol. Illinois Reports.*

2. The rule which, from necessity, allowed a party to a suit, when he was not a competent witness, to make an *ex parte* affidavit as to the loss of a paper, so as to admit secondary evidence of its contents, has no application to third persons who are competent to testify, and where there is no statute authorising their *ex parte* affidavits to be used for that purpose.—*Id.*

MARITIME LAW.

Marine Insurance.—The admiralty and maritime jurisdiction of the United States in not limited by the statutes or judicial prohibitions of England.

First. The *locus*, or territory, of maritime jurisdiction, where *torts* must be committed, and where business must be transacted in order to be maritime in their character, extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide.

Secondly. As to *contracts*, the true criterion, whether they are within the admiralty and maritime jurisdiction, is their nature and subject-matter, as whether they are maritime contracts, having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made.

In view of these principles it was held that the contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction though not within the exclusive jurisdiction of the United States courts.

The case of *Delovio v. Boit*, 2 *Gallison*, 398, *affirmed.*

Practice.—Held, that this court has jurisdiction, under the act of 1802, of a certificate of division of opinion between the associate justice of the supreme court and the circuit judge, together holding the circuit court, as well as between either of said judges and the district judge.

The New England Mut. Marine Ins. Co., App's, *v.* Thomas Dunham. Supreme Court of the United States. December Term, 1870. Decision rendered March 27, 1871.

MEASUREMENT OF DISTANCE.

Covenant not to carry on trade within a specified distance.—The defendant covenanted with the plaintiff not to carry on the business of a publican within a mile of plaintiff's premises. He afterwards carried on the business within half a mile, if the distance were measured in a straight line, "as the crow flies," but not within half a mile, if the distance were measured by the nearest mode of practicable access.

Held (by Martin and Channell, B. B., Cleasby, B., dissenting), that there had been a breach of the covenant. Mouflet v. Cole.

Law Reports, Com. Law Series Pt. 3, March No. page 70, Exch. Cham. Rep.

MILITARY AND NAVAL CLAIMS.

THE following is a digest of decisions relating to military and naval claims, made by the Court of Claims and published in the 5th column of its reports. The digest is from the *American Jurist.*

1. A quartermaster in the regular Army was dismissed the service by order of the President. The President afterward revoked the order, the vacancy occasioned by such dismissal having been filled before the revocation, and the number of quartermasters being limited by law: Held, that the quartermaster could not recover pay between the date of the order of dismissal and its revocation, another having been paid meanwhile. (Montgomery v. United States, 5 C. Cl. 93).

2. Disbursing officer of high character, who carried money in the way such officers generally carry it on similar occasions, and lost it, amid circumstances

utterly free from suspicion, and who was most diligent in seeking to recover it, held entitled to decree relieving him from responsibility under act of May 9, 1866. (Whittlesey v. United States, 5 C. Cl. 453).

3. Degree of care and diligence requisite in such cases considered, and rule applied as between any prudent man and his agent. (Malone v. United States, 5 C. Cl. 486).

4. A soldier who, having deserted from the Army, returns and surrenders himself as a deserter, is returned to duty without trial, on condition he made good the time lost by his desertion, which he does, and then receives an honorable discharge, does not forfeit his bounty, and is entitled to recover the same as though he had not deserted. (Kelly v. United States, 5 C. Cl. 477).

NEGLIGENCE.

Contributory negligence.—This action was brought to recover damages sustained by the plaintiff, by the hasty starting of a street car, from which she was getting off. The judge below charged "that if the plaintiff held on the railing after she slipped her foot upon the ground and the car started, she thus incurred the injury and can not recover." *Held*, that this was incorrect as a legal proposition, and no error can be assigned, that the jury disregarded it. If a lady, with one foot placed on the ground, holds on the iron railing of the car, while she is placing the other foot there, is thrown down by the hasty starting of the car, and does not instantly let go her hold of the railing, it is for the jury to say, whether she was guilty of contributory negligence under the circumstances. Judgment below, in favor of plaintiff affirmed. *Wood* v. *The Central Park, North and East River R. R. Co.—Supreme Court of N. Y., March term* 1872.

NEW TRIAL.

Verdict against the evidence.—In this case, the court, considering there was evidence sufficient to warrant the finding of the jury, refuse to disturb their verdict on the ground that the evidence was insufficient to sustain it.—*T. P. & W. R. R. Co. v. Eartburn, to appear in 4th Vol. Illinois Reports.*

OFFICIAL BOND.

County Judge.—A county judge is authorized to receive money paid by an executor upon claims filed and allowed against the estate; and for his failure to pay the same over to the party or parties entitled, he and his sureties on his official bond will be liable therefor.—*Wright & Co. v. Harris, et al., to appear in 31st Iowa.*

Filling Blanks.—Where sureties sign the official bond of their principal, leaving certain blanks as to amount, date, etc., which they expect him to properly fill, and which he does fill accordingly, they are estopped from claiming that their liability is affected thereby.—*Id.*

PARENT AND CHILD.

1. **Master and servant: when the rights and duties of these relations cease.**—A parent has no right or legal interest in the services of his child after the latter has attained his majority, although the child, after reaching that age, may still live with the parent and give him the avails of his labor, as a mere voluntary contribution, and there is a reasonable expectation that he will continue to do so.—*Mercer v. Jackson, to appear in 4th Vol. Ill. Reports.*

2. So the parent can not, under such circumstances, upon the alleged ground of an injury to the relations of master and servant, and parent and child, recover for injuries received by his son who has reached his majority, by reason of the negligence of a third person. It is essential to the right of action of the parent for injury to the child, that he should have a right and legal interest in the service of the latter.—*Id.*

3. Nor is the parent legally liable to pay the expenses attending the sickness of his child, incurred after the latter has become of age, or his funeral expenses in case of his death. And if the parent choose, voluntarily to pay such expenses, that will not give him a right of action for their recovery against a third person through whose negligence the sickness and death of the party were occasioned.—*Id.*

4. **Construction of the pauper act.**—Under the pauper act, requiring children to support their infirm and indigent parents, a right of action does not accrue to the parent himself to enforce the requirements of the act, nor to obtain redress from a third person through whose negligence the child is injured so as to be unable to give such support. The purpose of that act was to indemnify the public against the maintenance of paupers, and the only remedy given is in favor of the county court for the use of the poor of the county.—*Id.*

PATENT.

Partnership: Trust.—Where the application for a patent by partners was rejected, and subsequently one of the partners applied for and obtained in his own name a patent for the same invention, it was held, that the rejection of the first application and the subsequent proceeding in the name of the individual partner did not destroy the joint interest of the other partner either in the invention or the patent issued therefor.—*Vetter v. Lentzinger, to appear in 31st Iowa.*

Combination employing water.—A combination of devices, employing the co operative use of water as an inseperable constituent of a method indicated, for the production of a specific result, is patentable.—*Smith et al., v. Fraser et al., Circuit Court of the United States, West District of Pennsylvania.*

PERJURY.

What must be shown.—To convict of the crime of perjury, under section 13 of the act of Congress of March 3, 1825, it must be shown by evidence that the defendant was sworn; that he was sworn in a case, matter, hearing or other

proceeding, where an oath or affirmation is required to be taken or administered under or by any law or laws of the United States, and that he "Knowingly and willingly" swore to that which was false.—*The United States v. Nathan Coons.* Bond's circuit and District Court Reports for the Southern District of Ohio. Vol. 1.

Authority to administer oath.—Under an indictment for this offense, the prosecution must establish, by proof, that the oath was administered to the defendant by the person named in the indictment; that such person had authority to administer the oath, and that the defendant swore, with a wicked and corrupt intent, willfully false in regard to the matters alleged in the indictment to be untrue. Ib.

How disproved.—The statements of a defendant, which are made the basis of a charge of perjury, must be disproved by two witnesses, or one witness and corroborating circumstances. Ib.

Discrepancy fatal.—Any discrepancy between what the defendant swore to, and what is set out in the indictment as having been sworn to by him, is fatal. Ib.

PRACTICE.

1. Rule of District Court.—Where a rule of the district court provided that if the appellant, in an appeal from a judgment of a justice of the peace, failed to pay the docket fee by noon of the second day of the term, the appellee might pay such fee and have the case docketed and the judgment affirmed, it was *held*, where the case was docketed by the clerk without requiring the fee from either party, that the rule had no just application, and that the appellee was not entitled to have the judgment affirmed on motion.—*Squires v. Millet, to appear in* 31*st Iowa.*

2. New trial: Courts.—An order overruling a motion for a new trial, claimed to have been made in vacation, will be upheld unless it affirmatively appears from the record that it was so made, and that the party complaining did not consent thereto.—*Gantz v. Clark, to appear in* 31*st Iowa.*

3. Error.—Error in the rulings and actions of the trial court must be affirmatively shown or they will not be disturbed on appeal.—Id.

4. Demurrer.—Where a demurrer to an answer is overruled, and judgment rendered against the plaintiff thereon upon his failure to plead over or prosecute his suit, he will not after appeal, be allowed to withdraw his demurrer and proceed to trial on the merits.—*Dunlap v. Cody, to appear in* 31*st Iowa.*

PRACTICE IN THE SUPERIOR COURT OF CHICAGO.

Trial of causes out of their order.—The thirty-seventh rule of the Superior Court of Chicago, allowing cases *ex contractu*, upon certain conditions, to be tried out of their regular order upon the docket, "unless it shall be made to appear to the court, by affidavit of facts in detail, that the defense is made in good faith," means something more than that the defendant shall, in good

faith, make such defence as will simply put the plaintiff upon proof of his case.—*Titsworth v. Hyde et al., to appear in 4th Vol. Ill. Reports.*

2. So where the facts stated in the affidavit of the defendant showed that he really had no legal defense to the suit, the affidavit was held insufficient under the rule.—*Id.*

3. **Of the legality of such rule.**—On the objection that this rule is in contravention of the ninth section of the practice act, which requires civil causes to be docketed in the order in which they shall be commenced, etc., it was considered that the case of Wallbaum v. Hasken, 49 Ill., 315, settled the question in favor of the power of court to adopt the rule.—*Id.*

PROMISSORY NOTE.

Prevailing Rule when one party gives promissory note for the debt of another.—It seems to be the prevailing rule in this country, that, where a party holden for a debt which the creditor accepts in payment, it is payment of money to the use of the principal debtor and the amount may be recovered as money paid.—*Wright v. Lawton*, 37 *Conn.*, 167.

Renewal of accommodation note without the knowledge of party benefited.—But where the plaintiff made two promissory notes for the accommodation of the defendant, both payable to a third party to whom the defendant was to deliver them, the defendant agreeing to save the plaintiff harmless thereon, and the holder afterward negotiated the notes to A., who obtained judgment against the plaintiff on one of the notes, after which the plaintiff gave A., a new note for the amount of the judgment and of the remaining note, A., discharging the judgment and surrendering the note, the new note being indorsed by a third party who was wholly irresponsible, the plaintiff also being irresponsible, and the defendant having no knowledge of the transaction; it was *held*, that the plaintiff could not recover of the defendant, in an action for money paid, the amount for which he had given his note. The new note given by the plaintiff was regarded as substantially only a renewal of his original notes and not a payment of them.—*Id.*

RESPONDEAT SUPERIOR.

1. **Liability for negligence of a contractor.**—The owner of a building employed a carpenter to do carpenter work and a mason to do mason work thereon, and while one of the men employed by the mason, in the performance of his duties in the line of his employment, was ascending a ladder which had been erected by the carpenter, the ladder gave way by reason of its defective construction, and the man fell to the ground, receiving injuries from which he died: *Held*, in an action against the owner, by the father of the person injured, to recover damages for his death, alleged to have been occasioned by the negligence of the carpenter in the construction of the ladder, there was no cause of action shown, it not appearing it was the duty of the carpenter, in the course of his employment as such, to build this ladder for the masons to use, or that he was specifically employed by the owner to build it.—*Mercer v. Jackson, to appear in 4th Vol. Ill. Reports.*

2. Although the carpenter may have made the ladder for the "purpose of enabling all the men working on the building to climb up the different parts thereof," still, it not appearing it was any part of his employment as a carpenter to make ladders for any body but himself, the owner could not be held liable for injury resulting to the masons from their defective construction. If the mason chose to employ the carpenter to make ladders for him, or to use those made by the carpenter for the common use of all, he should look to the carpenter for damages for defects, not to the owner of the building. —*Id.*

SALE AND DELIVERY.

When title does not pass.—Cloths in progress of manufacture were purchased by the plaintiff of a manufacturing corporation and left to be finished, subject to a right to take them away at his pleasure. *Held*, that no title to these cloths passed to the plaintiff as against creditors. *Hall v. Guylor*, 37 *Conn.* 550.

When original sale was considered completed.—Several weeks after the sale the cloths in question were by order of the plaintiff placed on board a steamboat to be conveyed to the city of New York. Before the steamboat left, the president of the company, without authority from the plaintiff ordered them to be carried back to the mill, and they were so returned, and immediately after were attached by creditors of the corporation, and were held under attachment, until, soon after, the corporation went into insolvency. *Held*, that the original sale was completed and made valid by the subsequen delivery on board the boat, and that the rights of the plaintiff could not be affected by the acts of the company in retaking the goods. Ib.

BANKRUPTCY DECISIONS.

From the National Bankrupt Reg., Vol. 6, No. 4.

UNITED STATES CIRCUIT COURT—W. D. MICHIGAN.

When a secured debt will sustain a petition.—A debt wholly or in part secured, either by levy under an execution, by pledge of personal property or mortgage upon real estate, will sustain a petition for an adjudication of bankruptcy. The better practice is, when the debt is *fully* secured, to waive the security in the petition, but this is not necessary to its support.—*In re Stansell.*

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

When assignee can not be restrained from prosecuting suits in State Court.—A petition was filed by a creditor to restrain the assignee in bankruptcy from prosecuting a certain action of law in the supreme court of New York state to recover the payment of money made contrary to the provisions of the thirty-ninth section of the bankrupt act, claiming to recover back the

amount so paid. *Held*, that said act is the law of the state courts as well as of the national tribunals, and if by virtue of that act the state court has no jurisdiction in the action brought against the petitioners, it will so decide upon proper plea and that no reason appears to compel the assignee to resort to the national tribunals instead of those of the state.—*In re The Central Bank.*

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

None but petitioning creditors may apply for orders.—The application of creditors other than the petitioning creditor in a bankruptcy proceeding for an order annulling the adjudication on the ground that there was an agreement of compromise preceding the commencement of bankruptcy proceedings to which agreement the petitioning creditor was a party, must be denied.

Outside creditors have no right to resist adjudication.—The proceeding by a petitioning creditor to force his debtor into bankruptcy is a proceeding *inter partes* like an ordinary action at law or suit in equity, and until the adjudication is had, they are the only parties. No outside creditor has a right to resist the adjudication or to ask that it be annulled.

Want of notice to a bankrupt is a formal objection well taken.—Want of notice to a bankrupt is a formal objection well taken—as the bankrupt has an interest in the continuance of proceedings which may result in his discharge. If assignments of policies of insurance belonging to a bankrupt prior to his adjudication, are valid, they can be maintained as against the assignee, to be appointed in bankruptcy proceedings, and if they are not legal and binding, they should not be made so as against non-assenting creditors by the dismissal of proceedings after the expiration of the time allowed to dissenting creditors to commence proceedings in order to avoid a preference has elapsed.—*In re L. Bush.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Power of register over assignee.—The register in charge has power to order an assignee to furnish him with all necessary information as to funds in his hands.

When third meeting need not be called by register.—A third meeting of creditors—not being a final meeting—should not be called except for cause shown, and if the register be satisfied that no such cause exists, he is justified in refusing to grant the order for such a meeting.

Register's power to audit assignee's accounts at a second meeting.—A register has power so to audit and pass the accounts of an assignee at a second meeting called only under the twenty-seventh section of the act, as to bind the creditors, even though no notice had been given under the twenty-eighth section or otherwise, that such accounting would be had, and though such accounts be not filed until the hour of the meeting. If the creditors omit to attend such meeting or fail to object to such accounts, it is the duty of the register to direct their payment.

The provision in section twenty-eight, for auditing and passing the accounts of the assignee at the meeting for the final dividend, can not be regarded as in any manner implying that such accounts of the assignee as are presented at the second general meeting of creditors shall not then be audited and passed by the register.

Objections to a proof of debt, when demanded, must be certified to the District Judge.—When written objections to a proof of debt are filed with the register and testimony is taken thereon, it is his duty, if requested by either party, to certify the same to the district judge for decision, even though no proof whatever be offered tending to invalidate the debt so proved.

When register need not audit accounts at second meeting.—When the register gave notice at the second meeting of creditors called only under the twenty-seventh section of the act, that the accounts of the assignee filed at such meeting would not be audited or passed at such meeting, as no notice of such auditing or passing had been given to creditors, and as the amounts had not been on file ten days, as required by the twenty-eighth section of the act,

Held, on an application by the assignee to the district judge to compel the register to order the payment of such accounts, that the register was right in refusing to make such order.—*In re Clark & Bininger.*

When transfers valid as against the assignee.—It is not "out of the usual and ordinary course of business," for a corporation engaged in manufacture and which owns mortgages yet to become due, and desires to realize money thereon for use in its regular business, to sell such mortgages for their cash value. Hence a transfer made under such a state of circumstances will be adjudged valid as against the assignee in bankruptcy.—*Judson, Assignee, v. Kelty et al.*

UNITED STATES DISTRICT COURT—NEW JERSEY.

Debtor's real estate transferred and re-conveyed to his wife.—A debtor made a transfer of real estate to his brother-in-law, who on the same day re-conveyed the property to the wife of the debtor.

Held, That the transfer took place at the time of the actual execution and delivery of the deeds, and not at their date, and was therefore within the six months limited by the act.

An exemplified copy of an examination of the debtor, taken under the laws of the state of New York, under supplemental proceedings upon a judgment, was offered for the purpose of proving admissions of the debtor.

Held, That under the act of congress approved May twenty-sixth, seventeen hundred and ninety, such copy was proper evidence, such examination being "judicial proceedings" within the meaning of said act.—*In re C. J. Rooney.*

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

An injunction does not extend beyond the adjudication.—An injunction granted under section forty of the bankrupt act does not extend beyond the adjudication. Hence any proceedings to punish parties for contempt in violating an injunction after adjudication, must be dismissed with cost.—*In re S. J. Moses.*

Legal Items.

THE Iowa senate has passed the liquor bill, a measure even more stringent than the Ohio law.

CHARLES E. LEX, a leading and esteemed member of the Philadelphia Bar, died, May 16, 1872, of heart disease.

THE impeachment of Judge Cardozo of New York being a foregone conclusion, that gentleman forwarded to the secretary of state his resignation as justice of the supreme court.

THE legislature of Ohio has just passed a bill compelling life insurance companies of other States, doing business in Ohio, to file with the auditer of the state a waiver of the right to transfer causes from the State to the United States Court.

THE State of Iowa has abolished capital punishment. All crimes heretofore punishable with death shall, hereafter, be punished by imprisonment for life at hard labor in the State penitentiary, and the governor shall grant no pardons, except on recommendation of the general assembly.

A late review of criminal statistics published in Brussels, gives some startling figures regarding the immigration to this country of German criminals. It states that during the year 1871 there were pardoned out of German penitentiaries, on condition of emigrating to the United States, twenty murderers, eight forgers, eight incendiaries, three burglars, three shoplifters, and several others convicted of various crimes.

THE Republic of Switzerland has been agitating the question of the abolition of capital punishment; and it has been finally brought before the people in the form of an amendment to the Constitution of the State. The amendment was voted upon and rejected. Two other amendments—one abolishing imprisonment for debt and another excluding the Jesuits from Swiss territory—failed also to receive the requisite popular approval.

ON the 4th of May 1872, George G. Barnard, justice of the supreme court of New York, was impeached by the assembly for mal and corrupt conduct in office, on the resolution of a majority of the judiciary committee. The minority resolution was to impeach him for "mal and corrupt conduct in office and for high crimes and misdemeanors." The resolution of the majority was adopted by a vote of 93 to 16. A committee was thereupon appointed to inform the senate of the impeachment. Messrs. Vedder, Prince and Tilden were appointed a committee to prepare articles of impeachment. This is the first time within the history of the State of New York that a justice of the supreme court has been impeached.

Legal Items.

A curious case originated recently in England, the subject matter of which was a gold chain. This gold chain was to be purchased and presented to the mayor of Batley in pursuance of a resolution of the town council. Is was to be worth £200 and paid for out of the rates. The minority of the town council were dissatisfied and filed a bill in chancery to restrain the purchase. Counsel for the defense contended that the mayor's office required the badge of a chain as essential to its dignity, and "that if the mayor of Batley were not provided with one, and there were any meetings of mayors on any public occasion, he would find himself without one." But the vice-chancellor said "that to suppose any reasonable human being would pay more respect to a mayor because he wore a gold chain, a chain that was bought for him out of the rates, a chain which he had not even found himself, and which was not therefore a proof of his own personal solvency, was a supposition beyond the possibility of belief." The injunction was therefore granted.

In 1825 the American steamer *Commodore Stockton* put into the port of Acapulco, Mexico, when she was sold by the United States consul, Francis W. Rice, at demand of her creditors, to pay her debts. Two of the crew refused to recognize the consul's right to settle their claims, and appealed to the Mexican courts. A Mexican judge, armed with this pretext, seized the ship, broke the consul's seals, hauled down the American flag, and advertised the vessel for sale. Consul Rice protested, and posted a notice warning all parties against purchasing. The judge sent an agent to tear down the notice, but desisted from the attempt to take one from the door of the consul's office in the presence of Mr. Rice's revolver backed by the assurance that the outrage if perfected, would cost the trespasser his life. For this the judge ordered the consul's arrest, and held him in prison for three days, during which time he sold the vessel again to new parties. Our government fully indorsed Mr. Rice's course, and demanded redress from that of Mexico, and now at the end of twenty years, the joint commission for the settlement of claims against Mexico has awarded $25,000 damages to Garrison and Fretz, who bought the steamer at the Consul's sale, and $4,000 more to Mr. Rice, on account of his arrest and imprisonment by the Mexican judge.

THE following pertinent remark we copy from the Albany Law Journal: "The supreme contempt of law, the utter disregard of judges' charges, and the persistent reliance upon their own judgment, on the part of juries, was never more strikingly illustrated than in the recent cases of Mrs. Sherman tried for murder in Connecticut, and of Mrs. Hyde tried for the same crime in New York. In the case of Mrs. Sherman the issue was either that she did or did not do the deed charged, or that if she did the deed she was insane, and therefore irresponsible. Under this issue the only verdict possible was guilty of murder or guilty of nothing, or acquittal on the ground of irresponsibility. But the incorrigible jury believing the woman to be guilty, and not desiring her hung, brought in a verdict of murder in the second degree, an offense quite different from that charged in the indictment or attempt to be proved.

Legal Items.

In the case of Mrs. Hyde the defense was insanity or self-defense, ten of the jury were for acquittal and two were for conviction of manslaughter in the third degree. The sentimental ten finally proposed a compromise to the effect that they should bring in a verdict of manslaughter in the fourth degree, the punishment of which is a fine of $1,000, and which they proposed to pay themselves. The other two, however, would not agree to this, and the whole jury was finally discharged. A jury trial in a criminal case is a conglomeration of natural justice, law and personal feeling.

A case was decided some few weeks ago in the United States Supreme Court directly affecting the jurisdiction of the federal courts, and indirectly affecting the right of colored citizens to testify in the courts of States which, like Kentucky, have laws restricting the right of colored citizens to give evidence in certain trials. This case is entitled *Blyew and Kinnard vs. The United States*, and arises under the act of congress of April, 1866, known as the civil rights act, which gave the federal courts jurisdiction of all cases, civil or criminal, which involved questions of personal rights under the act. The plaintiffs in error were convicted of murder in the federal courts in Kentucky upon the testimony of colored witnesses. It was averred in the indictment that the murder was witnessed by certain persons of color, and that these witnesses were, on account of their race and color, denied the right to testify against the defendants in the courts of the State. The Supreme court held that a criminal prosecution for a public offense is not a cause "affecting" (within the meaning of the act) persons who may be called to testify therein, that the only parties to such a cause are the government and the persons indicted, who alone can be affected by any judgment therein, and that the cause made was not one for federal jurisdiction. The effect of this decision will be to render colored witnesses as useless as before in the courts of Kentucky.

A remarkable if not entirely novel suit has been instituted in the United States Circuit Court, before Judge Shipman in New York, against the Hudson River and New York Central Railroad Company to recover the contents of a trunk valued at $100,000. The plaintiff is a member of a noble Russian family and wife of Col. Trasoff. She was traveling in this country in 1864 with old laces in one of her trunks which were alleged to be worth the enormous sum above named, and to have been stolen while in course of transportation over defendant company's line between Albany and Niagara Falls. It is not at all customary for ladies in this country to carry wearing apparel, laces, etc., among their regular baggage, the real value of which is so great as that of the baggage of our Russian visitor. But the rule of liability in New York State is, that the company is responsible for the baggage of passengers to the extent and value which may be usual and appropriate for persons of the rank and station of such passengers. Whether the Russian custom of carrying $100,000 worth of laces in a single trunk as ordinary baggage will be regarded as the criterion of the liability of our Railroad companies will doubtless be the principal point litigated in this interesting suit.

A remarkable legal point has been raised in the case of Marlow, the Jamestown, N. Y., murderer, who was to have been hanged some weeks ago, but obtained a stay of proceedings, granted by Judge Barker of the Supreme Court. It appears that a Sunday intervened during the trial and after the evidence

was closed. By order of the court the jury were kept together in the custody of officers, who permitted them to attend the Baptist Church in Maysville, N. Y. This afforded an opportunity not to be neglected by the clergyman who officiated on that occasion, and he proceeded to preach a sermon having a practiced application to the case which the jury had under consideration, taking for this text the words, "Release unto me Barabbas; now Barabbas was a robber." During his discourse the minister said, "Some in this house may think I am pleading for mercy for the man now being tried for his life in this village. Such is not the case, for I believe the man's hands are reeking with blood, also his wife's and her mother's are reeking with blood. I have read and carefully examined the evidence, and from that have come to this conclusion." Marlow's counsel very naturally assumes that it was not fair to his client that the jury should have been preached to in such a strain, and he has obtained a stay of proceedings on that ground.

We think, say, *The Internal Revenue Record*, a stop should be put to the proceedings of a minister who could have the ill taste to preach such a sermon under such circumstances.

The supreme court of Arkansas has decided that all orders of courts issued in regard to administrations by the confederate courts are void.

Book Notices.

A TREATISE UPON THE LAW APPLICABLE TO NEGLIGENCE. By Thomas William Saunders, of the Middle Temple, Barrister-at-Law. With notes of American Cases, by Henry Hooper. 8vo. pp. xvi, 164. Cincinnati, Robert Clarke & Co., 1872. Price $3.75.

This is a reprint of an English work of considerable value, on account of the lucid and concise treatment of its subject matter. The law of negligence is an all-important one, and the vast increase of late years in the number of actions brought in our courts for compensation for injuries occasioned by negligence, and the somewhat obscure state of the law in many particulars applicable to this description of litigation, have induced the author, as he remarks in the preface, to endeavor to supply, in a compendious and convenient shape, a volume by which a ready reference may be obtained to the authorities upon the subject. The author deserves the thanks of the profession not only for supplying a deficiency in that branch of the law, but for the proper restraint he put upon himself not to be verbose and wordy, and by not wandering into fields of speculation of which fault it is to be regretted too many writers of the present day are justly chargeable. Saunders' treatise made its first appearance from the press in the latter part of November in the year 1870, and from that time to this has found many friends in both England and America. Mr. Henry Hooper, the American Editor, in supplying notes and references to the cases decided in American courts, has not, in traversing the field, exhausted it of its wealth, and we sincerely hope that he will furnish us, in the second edition, a greater number and variety of citations of leading cases and important decisions. As regards the getting up of the work great credit is due to the publishers, Robert Clarke & Co. The paper is good, type large and clear, and the press work clean and even. It is, in fact, as faultless a publication as any first class house can furnish.

We have received also the first volume of Bond's U. S. District and Circuit courts Reports for the Southern District of Ohio, published by Robert Clarke & Co. Being too late for this month's issue, we shall review it in our next.

THE

AMERICAN LAW RECORD.

VOL. 1. AUGUST, 1872. NO. 2.

SUPREME COURT OF THE UNITED STATES.

December Term, 1871.

The United States, plaintiffs in error, *v.* One Hundred Barrels Distilled Spirits, John Henderson, Claimant. In error to the Circuit Court of the United States for the district of Missouri.

The proceeding is an information for the forfeiture of one hundred barrels of distilled spirits in the hands of an innocent purchaser, on the ground that the former owner, in removing the spirits to the bonded warehouse, intended at the time to defraud the Government of the tax thereon. The proceeding was taken under the act of Congress of July, 13, 1866. A jury was waived and the case submitted to the court upon an agreed statement of facts, judgment being rendered for the respondent. The decision of the District Court dismissing the information and rendering judgment for the respondent is overruled, and the case remanded, with instructions to render judgment for the United States. A dissenting opinion is rendered by Mr. Justice Field, the Chief-Justice, and Mr. Justice Miller concurring.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Distilled spirits, upon which no tax had been paid according to law, were, by the 32nd section of the act of July 13, 1866, subject to a tax of two dollars on each and every proof gallon, to be paid by the distiller, owner, or any person having possession thereof, and the same section provided that the tax shall be a lien on the spirits distilled and on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, &c. (14 Stat. at Large, 157.)

Express provision is also made by the 14th section of that act, that all goods or commodities, for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities, in case they shall be removed or

shall be deposited or concealed in any place with intent to defraud the United States of such tax, or any part thereof, shall be forfeited. (14 ibid., 151.)

Certain alterations are made in each of those provisions by the 14th section of the act of March 2, 1867, but the alterations are not material to the present case, as the same section provides that the new provision shall not exclude any other remedy or proceeding provided by law, which beyond all doubt leaves in full operation the 14th section of the prior act. (14 ibid., 481.)

Regular seizure of the one hundred barrels of distilled spirits in question was made on the first day of September, 1868, by the collector of the district, as alleged in the information, and the record shows that the information was duly filed by the district attorney on the 7th of the same month, in the District Court of the United States for the district where the seizure was made. Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury and submitted the case to the court upon an agreed statement of facts, as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation. (Suydam v. Williamson, 20 How., 434; United States v. Eliason, 16 Pet., 291; Stimpson v. Railroad, 10 How., 329; Campbell v. Boyreau, 21 How., 224.)

Pursuant to that stipulation the parties were heard, and the District Court dismissed the information and rendered judgment for the respondent. Exceptions were duly taken by the district attorney and he sued out a writ of error and removed the cause into the Circuit Court, where the judgment rendered by the District Court was affirmed, and the United States thereupon sued out a writ of error to the Circuit Court and removed the cause into this court for re-examination.

Seizure of the spirits was made, as before explained, by the collector of internal revenue for the district, and it is alleged in the information that the collector still holds the same in his possession and custody as forfeited to the United States, under the provisions in the act to amend the existing laws relating to internal revenue. Six articles, each charging a forfeiture of the spirits in question, are contained in the information, but in the view of the case taken by the court it will only be necessary to examine the fourth in the series, which is as follows:

That the said one hundred barrels of spirits were manufactured at some place within the United States to said attorney unknown, and between the first day of September, 1866, and the date of said seizure, by some person or persons to said attorney also unknown, and were then and there goods and commodities on which a tax was then and there imposed by the provisions of law, and the same were removed from the place where distilled,

with intent to defraud the United States of such tax, the same being then and there unpaid, contrary to the form of the statutes of the said United States in such case made and provided.

Seasonable claim in due form was made for the spirits by the defendant, and he appeared and filed an answer, denying all the material allegations of the information, and tendered an issue to the country which was joined by the United States. Apart from that, he also answered each article separately, and in respect to the fourth article he denied that the spirits in question were removed from the place where distilled with intent to defraud the United States of any tax then and there imposed, as alleged in the information.

Evidently the answer was precisely equivalent to the general issue, and made it incumbent upon the United States to prove the charge as alleged, and the effect of the stipulation submitting the case to the court was to substitute the court for the jury as the tribunal to determine the issue of fact presented in the pleadings. Had the stipulation contained nothing further, it is clear that the evidence on the one side and the other must have been introduced to the court substantially as provided in the recent act of Congress upon that subject, but the parties went further and stipulated in writing as to what the facts in the case were, in which stipulation it is agreed that the fourth article in the information is true, and it is insisted by the United States that that stipulation is equivalent to a confession of guilt, and that it entitles the United States to judgment, and the court would certainly be of the same opinion if that admission was unaccompanied by what follows in the stipulation in the same connection.

Standing alone, it is an admission that the charge as contained in the fourth article of the information is true, but it must be read in connection with what follows as a part of the same stipulation, and the question is whether the qualification annexed to the admission that the fourth article in the information is true changes the aspect of the evidence, and entitles the defendant to the judgment rendered in his favor by the subordinate courts.

Appended to the admission that the fourth article in the information is true is the statement that the defendant, subsequently to the removal of the spirits from the distillery, and before their removal from the bonded warehouse, and before the seizure, "paid the tax on said spirits, and that he was a *bona fide* and innocent purchaser;" and the question is whether that statement, appended as it is to the admission, qualifies the language of the admission in such a way that the admission does not establish the truth of the charge contained in the fourth article of the information.

Due weight must also be given to certain other facts stated in the stipulation in determining the question whether the judgment for the defendant was correct or incorrect. He was not the purchaser from the United States, nor have the United States ever sold the spirits in question, but the agreed statement also shows that he purchased the spirits while they were in a bonded warehouse in New Orleans, after the same had been placed therein by the owner of the distillery at which the same were distilled; that he paid the tax due on the spirits to the collector, and removed the same from the warehouse according to law, without any knowledge on his part, at any time before the seizure, of any fraud, either actual or alleged, on the part of the distiller; that the spirits were manufactured and distilled at a certain distillery in that district in the months of May and June, prior to the seizure, by the persons therein named, by the use and means of certain boilers, stills, and other vessels of which the distiller was superintendent and owner, and the parties agree to the effect that all the acts averred in the fifth and sixth articles of the information as having been done in respect to the spirits in question by some person unknown are true, when the averments are applied to the person named in the agreed statement as the manufacturer and distiller of the said spirits.

Four material ingredients are involved in the charge contained in the fourth article of the information: (1) That the spirits were manufactured at some place within the United States, between the day therein named and the date of the seizure. (2) That the spirits were then and there goods and commodities on which a tax was imposed by some provisions of law then in force. (3) That the spirits were removed from the place where distilled with intent to defraud the United States of such tax. (4) That the tax was unpaid at the time the spirits were so removed, with such fraudulent intent.

Beyond all doubt the admission that the fourth article is true is a conclusive admission that each and every one of the well-pleaded allegations which it contains are also true, which, standing alone, would certainly be a confession on the record that the property is subject to forfeiture, unless it can be shown that the fourth article in the information is insufficient in law to warrant a judgment in favor of the United States.

Viewed in that light, as the admission must be, the next question is whether the statement appended to the admission is sufficient to save the property from condemnation in the possession of the defendant. Properly analyzed the statement appended to the admission contains two averments in avoidance of the consequences which would otherwise follow from the admitted acts of the antecedent owner: (1) That the defendant paid the tax subsequently to the removal of the spirits from the distill-

ery and before they were removed from the bonded warehouses and before the seizure by the collector. (2) That he was a *bona fide* and innocent purchaser, without notice that the spirits were forfeited as alleged in that article of the information.

Where the forfeiture is made absolute by statute the decree of condemnation, when entered, relates back to the time of the commission of the wrongful acts and takes date from the wrongful acts and not from the date of the sentence or decree. (Roberts v. Witherall, 1 Salk., 223; Robert v. Witherhead, 12 Mod., 92; U. S. v. Bags of Coffee, 8 Cran., 398; The Brigantine Mars, 8 ibid., 417; Gelston v. Hoyt, 3 Wheat., 311; Caldwell v. U. S., 8 How., 381; U. S. v. Grundy, 3 Cran., 338; Wood v. U. S., 16 Pet., 342; Clifton v. U. S., 4 How., 248.)

Subsequent payment of the duties, therefore, is no defence to an information for a forfeiture founded upon antecedent wrongful acts, as the effect of such wrongful acts, where the forfeiture is made absolute by statute, is to divest the owner of all property in the goods seized and to vest the title to the same in the United States, in case a prosecution ensues and a decree of condemnation follows, as the decree of condemnation, when entered by a court of competent jurisdiction, relates back to the date of the wrongful acts as alleged and proved at the trial or in the hearing of the cause. (Fontaine v. Ins. Co., 11 Johns., 293; Kennedy v. Strong, 14 ibid, 128.)

Repeated decisions of this court have established that rule in all cases where the forfeiture is made absolute by the act of Congress, and it necessarily follows that neither the subsequent payment of the dues nor the fact that the defendant is an innocent purchaser, without notice of the wrongful acts of the antecedent owner, constitutes any defense to the charge contained in the fourth article of the information. (Wilkins v. Despard, 5 Term., 112.)

Many such adjudged cases are to be found in the reported decisions of this court, and it must be admitted that they establish the rule beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or allowing any exception to its enforcement, or employing in the enactment any language showing a different intent; and that in all such cases it is not in the power of the offender or former owner to defeat the forfeiture by any subsequent transfer of the property even to a *bona fide* purchaser for value, without notice of the wrongful acts done and committed by the former owner.

Established as that rule has been by the decisions of this court for more than half a century, it is insisted that it should

be applied in the case before the court, and it is difficult to see any reason for rejecting the proposition, as the words of the act under which the fourth article of the information is drawn denounce the forfeiture of the property in terms as absolute and unqualified as any which can be chosen in our language. (U. S. v. Bags of Coffee, 8 Cran., 398; U. S. v. Grundy, 3 ibid., 338.)

Goods and commodities falling within that provision, it is enacted, *shall be forfeited* in case they shall be removed with intent to defraud the United States of such tax, or any part thereof, and the language denouncing the forfeiture is explicit and absolute and without any qualification whatever. Compare the language of the act of Congress with the language employed in the fourth article of the information, and it will be seen that the charge against the spirits is preferred in the same language as that employed in the act of Congress denouncing the forfeiture, as the fourth article alleges that the spirits in question were then and there goods and commodities on which a tax was then and there imposed by the provisions of law, and that the same were removed from the place where distilled with intent to defraud the United States of such tax, the same being then and there unpaid; and the admission set forth in the agreed statement is that the fourth article of the information is true, which is a direct confession that the prohibited acts charged in that article were done and committed at the time and place, and by the person, and in the manner therein alleged.

Concede all that and it is clear that the United States are entitled to judgment, if it be true that the forfeiture relates back to the date of the wrongful acts charged in the information. Escape from that conclusion, it would seem, is impossible, if it be admitted that the fourth article of the information sets forth a good cause of forfeiture, and it is clear that the affirmative of that proposition must be admitted, unless it be affirmed that the 14th section of the act of Congress, on which it is drawn, does not provide for such a forfeiture, under the circumstances therein described.

Such a proposition, whether so intended or not, is precisely equivalent to a demurrer to the fourth article of the information or to a motion in arrest of judgment after verdict; and if so, then it follows, as shown by all the authorities upon the subject, that every thing well pleaded in the fourth article of the information must be taken as true, which is the exact admission contained in the agreed statement.

Nothing can be more certain in legal investigation than that the decree must have been for the United States if the claimant had demurred to the fourth article of the information, unless it can be held that the act of Congress denouncing the forfeiture is unconstitutional, as the article in question embodies the exact language of that provision, and it is equally certain that a mo-

tion in arrest of judgment would also have been unavailing for the same reason, and also because the validity of the act of Congress is beyond all doubt.

Congress possesses the power to levy taxes, duties, imposts, and excises, and it is as clear that Congress may enact penalties and forfeitures for the violation of such laws as it is that Congress may levy the taxes or duties or pass laws for their collection, safe-keeping, and disbursement.

Section 14, it is admitted, is broad enough in its terms to embrace the removal of spirits, on which there is a tax, from the place where distilled, with intent to defraud the United States of the tax, but it is suggested that another section of the same act requires that spirits, when removed from the place where distilled, shall be deposited in a bonded warehouse, and that the penalty imposed for a violation of that requirement is different from the penalty imposed by the 14th section of the act, and it must be admitted that the suggestion is correct, but it is impossible to see in what respect the suggestion tends to support the views of the defendant in the present case.

Suggestion is also made that it is not an illegal act to remove spirits from the place where distilled to a bonded warehouse, and that also is true, but the corollary attempted to be drawn from the two suggestions is a *non-sequitur* and can not be sustained, which is that the charge that the spirits were removed from the place where distilled, with intent to defraud the United States, can not be true if it appears that the spirits were removed from the distillery to a bonded warehouse, as the removal of spirits from the place where distilled to a bonded warehouse is authorized by law. Undoubtedly such a removal of spirits from the place where distilled to a bonded warehouse, if made to secure the payment of the tax to the Government, is a lawful act, but it is equally clear, if the removal is made even to a bonded warehouse to defraud the United States of the tax, that the act of removal is illegal and that the spirits removed are forfeited.

Both of those suggestions, however, are founded upon the assumed theory that the record shows that the only removal of the spirits alleged or proved was a removal from the place where distilled to a bonded warehouse, but that assumption is wholly unsupported either by the charge contained in the fourth article of the information or by the admission that the fourth article is true, as exhibited in the agreed statement. On the contrary, the fourth article of the information alleges that the spirits were removed from the place where distilled, with intent to defraud the United States of the tax, without any specification as to the place to which the same were removed, or where they were deposited; nor is that omission any objection to the form of the charge, as that article of the information follows

substantially the language of the 14th section of the act of Congress on which it is drawn.

Tested by the charge, as made in that article, and the admission applicable to it, as exhibited in the agreed statement, as the question must be, and it is clear that the spirits may have been removed elsewhere than to a bonded warehouse before they were placed in that depository by the owner and distiller. Such certainly would be the legal conclusion if the defendant had demurred to the information, and the court is of the opinion that the same conclusion must follow from the admission that the fourth article of the information is true, as the admission is expressed in the agreed statement.

Henderson, the claimant, purchased the spirits while they were in the bonded warehouse and after they had been deposited therein by the owner of the distillery where the spirits were manufactured, and having made the purchase without notice that any fraud had been practiced by the distiller, and having paid the tax before the spirits were removed from the bonded warehouse, it is insisted by his counsel, in every possible form of argument, that his title is perfect and that the spirits are not liable to forfeiture, but the decisive answer to all that is the one already given, that the forfeiture relates back to the unlawful or wrongful acts of the antecedent owner, and that he can not by any subsequent transfer of the property defeat the title of the United States, as settled by a series of decisions which, if traced to their source, have their origin in the early history of the common law. (4 Bac. Abt., by Bouv., 346 Plowd., 488 b.; Co. Litt., 25; 1 Chitt. Cr. L., 727.)

Rules of decision of such long standing and so necessary to protect the public revenue can not be changed, nor can it be admitted that the charge contained in the fourth article of the information may not be sustained, even if it appears that the only removal of the spirits made by the distiller was to the bonded warehouse, as assumed in argument by the defendant. (Clarke v. Ins. Co., 1 Story, 109.)

Unquestionably a removal of distilled spirits from the place where distilled to such a depository, if made to secure the payment of the tax, is a lawful act, but it is equally clear that if it is made with intent to defraud the United States of the tax, it is an unlawful act, and subjects the spirits to forfeiture.

Grant that the removal was rightful, as assumed by the Circuit judge, and the conclusion which he adopted would follow, but it can not be assumed in this case that the removal was rightful, as the charge in the fourth article of the information is that it was made with intent to defraud the United States of the tax, and the admission in the agreed statement is that the fourth article of the information is true, which shows as fully as it can be shown that the United States are entitled to a decree

of condemnation, unless it can be established that the fraudulent intent there charged could not under any circumstances be carried into effect by such a removal as that alleged in the fourth article of the information and admitted in the agreed statement.

Suppose it be true, as assumed in argument, that the only attempt made to execute the unlawful intent charged was the removal of the spirits from the place where distilled to the bonded warehouse, still it would by no means necessarily follow, as is supposed, that the removal was a legal act, as the removal, though to a bonded warehouse, may nevertheless have been made for the express purpose to defraud the United States of the tax, and if so, then the removal was indubitably an illegal act, and the spirits are properly subject to forfeiture as charged in the information.

Cases have arisen, as the records of this court show, where the removal to the bonded warehouse was made as a part of a preconcerted arrangement with other parties to avoid the payment of the tax, and it would not be difficult to suppose other cases where the removal of the spirits from the place where distilled to the bonded warehouse would be a necessary part of a well-devised scheme to defraud the United States by delivering the spirits to purchasers without the payment of the duties. (Distilled Spirits, 11 Wal., 364.)

Inspectors of spirits are required to be appointed by the Secretary of the Treasury, and all distilled spirits, before being removed from the distillery, are required to be inspected and gauged by a general inspector, whose duty it is to mark the vessels or packages in the manner required by law, and penalties are prescribed and imposed in case the spirits are removed from the place where distilled without a compliance with those requirements. (14 Stat. at Large, 156; 14 ibid., 481.)

Persons distilling spirits, and the owners of stills used for the purpose of distilling spirits, are required to keep books and to make certain entries therein, and to render certain accounts to assessors, and if they do not comply with those requirements they also are subject to certain penalties for the neglect. (14 ibid., 157.)

Bonded warehouses are established for the storage of spirits to be placed therein to secure the payment of the duties imposed by law, and the provision is that if any person shall ship, transport, or remove any spirits under any other than the proper mark or brand, known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or cause the same to be done, he shall forfeit the same, and shall, on conviction thereof, be subject to and pay a fine of five hundred dollars. (14 ibid., 155, 156.)

Cautious merchants, in consequence of those regulations, and many others equally stringent, are often disinclined to purchase

spirits at the place where distilled lest they should be subject to forfeiture, if equally favorable terms are offered by other parties, who have made deposits in the bonded warehouses. Distillers, therefore, intending to evade the payment of the duties may find it a most effectual way to accomplish their unlawful designs, in case they can, by bribery or otherwise, secure the co-operation of the inspector, storekeeper, or collector, to remove the spirits to a bonded warehouse, as spirits placed in that depository are less subject to suspicion and sell more readily than before they were removed from the place where distilled.

Spirits placed in such a depository sell more readily than before they were removed, because they are regarded as less likely to be subject to forfeiture than while they remained in the distillery, but it is clear that the theory that an intent to defraud the United States can not be predicated of a removal of spirits from the place where distilled to a bonded warehouse is an erroneous theory, as it is manifest that the dishonest distiller, if he can obtain the assistance of the inspector, storekeeper, or collector, as a partner or agent, will find such a removal an essential step in almost every scheme which he may devise to accomplish his wicked designs.

Viewed in any light, therefore, the court is of the opinion that the judgment of the Circuit Court is erroneous.

Questions are also presented in the record under the fifth and sixth articles of the information, but the court having come to the conclusion that the United States are entitled to judgment upon the fourth article of the information, do not deem it necessary to express any opinion as to the other questions.

Judgment reversed and the cause remanded, with instructions to render judgment for the United States.

Mr. Justice Field dissenting—I am unable to concur in the judgment of the majority of the court, and will briefly state the grounds of my dissent:

The proceeding is an information for the forfeiture of one hundred barrels of distilled spirits. The forfeiture is not decreed on the ground that the Government has not received the taxes levied on the spirits, for it is admitted that these have been paid; nor on the ground that the claimant has committed, or participated in the commission of any fraud in the acquisition of the property, for it is conceded that he purchased the spirits in good faith without any knowledge of any defect or taint in his vendor's title. Nor is the forfeiture inflicted for any violation of law, in act or deed, on the part of the distiller of whom the claimant purchased. He only removed the spirits from the place of their manufacture to the bonded warehouse of the United States, and that was a lawful, and not an unlawful act. The forfeiture is decreed because the former owner, in removing the

spirits to the bonded warehouse, intended at the time to defraud the Government of the tax thereon—an attempt, however, which he never attempted to carry into execution.

We thus have this singular and, I venture to say, unprecedented fact, in the history of judicial decisions in this country, that the property of a citizen, honestly acquired, without suspicion of wrong in his vendor, is forfeited and taken from him because such vendor, at some period while owning the property, conceived the intent to defraud the Government of the tax thereon, although such intent was never developed in action, and for the execution of which no step was ever taken.

The presumption is that the majority of the court are right in this decision, and that the minority are mistaken in their views of the law governing the case. It is, therefore, with diffidence that I venture to dissent from their judgment, a diffidence which is greatly augmented by the declaration of the majority, that it is impossible to escape the conclusion which they have reached.

But for this conclusion I should have supposed that it would have been impossible, at this day and in this age, and in our country, to obtain a decree confiscating the property of a citizen for any thing which a former owner of the property may have intended to do, but never did, with respect to it. I should have said that the intentions of the mind, lying dormant in the brain, had long since ceased to be subjects for which legislatures prescribed punishment. Against threatened injuries to persons or property remedies are provided; and this, it is believed, is the extent to which legislation can legitimately go with respect to intentions, however fraudulent or wicked, so long as they remain undeveloped by action. Penalties and forfeitures are not inflicted at this day in any civilized and free government for the motives with which lawful acts are done.

The inability to ascertain, with certainty, the intentions of a party, except as they are exhibited in his acts, and the injustice which must necessarily follow any attempt to inflict punishment for them, except as they are thus exhibited, have hitherto, in this country, prevented any legislation of that character, unless such legislation is found in the present revenue act of Congress. The injustice in its operation of such legislation, assuming such legislation to exist, could not be more strikingly illustrated than in the present case. But I am not prepared to admit, notwithstanding the cogency and persuasiveness of the able and elaborate argument in the opinion of the majority, that there is any such legislation on our statute-book.

The act of Congress under which this proceeding was taken provides, in its 28th section (14 Stats. at Large, 155,) for the establishment of bonded warehouses for the storage of spirits "to secure the payment of the internal revenue tax thereon," and,

in its 45th section, prohibits "the removal of the distilled spirits (ibid. 163) from the place where the same are distilled *otherwise than into a bonded warehouse*, as provided by law," imposing penalties upon parties making such removal, and declaring that "the distilled spirits so removed" shall be forfeited to the United States.

The same act declares, in its 14th section (14 Stats. at Large, 151,) that if any goods or commodities, upon which a tax is imposed, or the materials, utensils, or vessels, proper or intended to be used in their manufacture, are removed, deposited, or concealed in any place, "with intent to defraud the United States of such tax, or any part thereof," they shall be forfeited to the United States. And it is upon the language of this section, as applied to the facts admitted by the parties, that the majority of the court found the decree of forfeiture.

The language is undoubtedly broad enough to cover any removal of spirits, upon which a tax has been imposed, from their place of manufacture; and, if it has any reference to articles of that character, it must be construed in connection with the language of the 45th section. And the evident meaning of the two sections, if they are construed together, is, that the removal, for which a forfeiture is declared, is a removal to some other place than a bonded warehouse of the United States. Of a removal to such warehouse it is difficult to perceive how an intent to defraud the Government can be, in truth, affirmed. It would be as reasonable to declare that a debtor had an intention to defraud his creditor when he placed in the hands of the latter the money to pay his demand. It is plain, in my judgment, or rather I should have said it was plain, but for the opinion of the majority, that the removal of spirits forbidden by that section is a removal to some place beyond the reach of the Government, or where the Government would be in some way embarrassed or obstructed in the collection of its tax. It seems to me a strange application of the prohibition to make it cover a removal of spirits to a warehouse specially provided by the Government for their reception, and where they are placed in the possession and custody of the officers of the United States.

But I am unable to convince myself that the 14th section has any reference whatever to the removal of distilled spirits. The previous sections of the act relate to taxes on a great variety of articles, of several hundred different kinds, and it does not include distilled spirits among them. The removal mentioned in the 14th section would seem, therefore, to apply to the removal from the place of their manufacture of the articles thus previously designated, or at least of articles mentioned in the statute, for the removal of which no different penalties are specifically prescribed.

The sections of the act, from the 21st to the 45th inclusive, relate to the tax on distilled spirits, and contain numerous provisions applicable only to them. The punishment they prescribe for the removal of the spirits from the place of their manufacture, otherwise than to a bonded warehouse, in addition to their forfeiture, is different from the penalty prescribed by the 14th section, for the like removal of other goods. This fact would seem to be conclusive, if other reasons were wanting, that the 14th section has no reference to the removal of distilled spirits. The special provisions respecting them should except them, according to all established canons of interpretation, from the general language of that section.

"That a law," says Chief-Justice Marshall, "is the best expositor of itself, that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes, which have been uniformly acknowledged." (Pennington v. Coxe, 2 Cranch, 52.)

And it is laid down in the elementary treatises that where a general intention is expressed in one part of a statute, and a particular intention in another part, inconsistent with the general intention, the particular intention is to be regarded as an exception. (Potter's Dwarris on Statutes, 110; Sedgwick on Statutes, 423.)

The suggestion by the Counsel of the Government that a removal of distilled spirits to a bonded warehouse, although the law provides for such removal as a means for securing the payment of the tax, may be made with intent to defraud the United States of such tax, inasmuch as there may be an agreement between distillers and warehouse-men to have the spirits secretly drawn out from the vessels, or to have the spirits released upon insufficient security, does not strike me as entitled to any consideration in this case. Conspiracies there undoubtedly may be with officers of the United States to defraud the Government, but in the absence of any proof tending to establish such a conspiracy, the court would not be justified in imagining its existence for the purpose of working a forfeiture of goods in the hands of an innocent party. It would rather indulge the more rational and just presumption that all the officers of the Government did their duty, until at last some evidence to the contrary was produced.

This is a case of great hardship and manifest injustice. The claimant found the spirits in a bonded warehouse of the Government, in custody of the officers of the United States. He paid to them the tax due on the goods, and he paid to the owner their value. He had no suspicions that his vendor ever entertained

any intention to defraud the Government of the tax levied on them, and if he ever had such suspicions he might well have supposed that his vendor had repented of his intention, when he delivered the property to the keeping of the officers of the United States.

The Government through its officers took from the innocent purchaser the duties upon the goods, thus saying to him that the goods then belonged to the distiller who placed them in the warehouse. The Government now declares through its officers that these goods all the time belonged to it by reason of the previous forfeiture, and thus the honest claimant loses both the taxes and the goods, or at least is left to the doubtful chances of obtaining the former by petition to the Government, and the latter by action against his vendor.

The object of the act of Congress under which the forfeiture is declared, is to raise revenue; and it seems to me that the severe construction in favor of forfeitures in the hands of innocent parties, given by the majority of the court, must have a tendency to defeat this object; for it will scarcely be possible for any one to purchase merchandise with safety when it may be seized and forfeited in his possession for reasons such as are assigned in this case.

I am of the opinion that the judgment of the court below should be affirmed, and in this opinion I am authorized to say that the Chief-Justice and Mr. Justice Miller concur.

THE SUPREME COURT OF IOWA.

December Term, 1871.

Ottumwa Lodge No. 9, I. O. of O. F., v. Alvin Lewis, Appellant.

1. *Liability of owners of different stories in a building.*—The owner of a third and upper story of a building must keep the roof in repair at his own expense; he can not recover from the owner of the stories below him any portion of such expense, although the repairs serve to protect the property of such owner.
2. Such owners are, in legal contemplation, owners of distinct buildings, the one situated *over* the other.

Appeal from Wapello Circuit Court.

This cause was submitted to the court below, for the purpose of determining the question of the defendant's liability, upon an agreed statement of facts, of which the following is the substance, to-wit: Geo. C. Menick was the owner of lot 286, in the city of Ottumwa, and commenced the erection of a brick building thereon. Afterward, Menick agreed with plaintiff to com-

plete the third story of said building, in pursuance of a specified plan, and to deed the same, together with the right of way thereto, to plaintiff, in consideration whereof the plaintiff agreed to pay the sum of seventeen hundred dollars. The said third story was finished in accordance with the terms of the contract, and plaintiff took possession thereof, and still retains the same. Menick deeded the said third story to plaintiff, in pursuance of his agreement, and afterward by regular line of conveyance from Menick, the defendant, Alvin Lewis, became seized of the lot and the remainder of the building. The building is three story, with a cellar. The roof is flat, rising two or three feet above the ceiling of the third story room of the front, and sloping back, having a fall of two or three feet, and is covered with tin. The roof does not rise above the walls of the building, and there is no garret or other room above the third story room. The roof became out of repair, and the rain coming through fell upon the ceiling of the rooms of plaintiff, and leaked upon the carpet and furniture therein to plaintiff's damage.

Plaintiff in writing informed defendant that the roof was out of repair, and requested him to amend the same, which defendant neglected and refused to do. After waiting a reasonable time plaintiff repaired the roof at a cost of thirty dollars, which sum was necessarily expended for that purpose.

The court rendered judgment for plaintiff for thirty dollars. Defendant appeals.

Hutchison & Hackworth, for appellant.

E. L. Burton, for appellee.

DAY, J. From the statement of facts it will be seen that plaintiff is the owner of the third story of the building, and defendant owns the two remaining stories and the ground upon which the erection stands. Although this mode of ownership is not at all unusual in large cities, yet the common law does not clearly define the relative rights and duties of persons so situated. (2 Washburn, on Real Estate, 2d ed. marginal page 79.) Yet enough has been decided to render easy the determination of the question here involved.

In *Tenant v. Goldwin*, 2 Ld. Raym. 1091, it is said that if one man have the upper part of a house, and the other the lower, each may compel the other to repair his part in preservation of the other's. In an anonymous case, in 11 Modern, page 7, it is held that if a man has an upper room, an action lies against him by one who has an under room, to compel him to repair his roof. And so when a man has a ground room, they over him

may have an action to compel him to keep up and maintain his foundation.

In *Cheeseborough v. Greene*, 10 Conn., 318, which was a case in which the plaintiff owned and occupied the foundation and first and second stories of a building, and the defendant owned the third story and roof of the same building, and suffered the roof to become leaky and ruinous, occasioning damage to the plaintiff's goods in the lower story, it was held that an action on the case would not lie, but that the plaintiff's remedy must be sought in chancery. In *Loring v Bacon*, 4 Mass., 575, the defendant was seized in fee-simple of a room on the lower floor of a dwelling house and of the cellar under it, and the plaintiff was seized of a chamber over it, and of the remainder of the house. The roof became in such a condition, that unless repaired no part of the house could be comfortably occupied. The defendant refused to join in making the repairs. The plaintiff then made the necessary repairs, and brought an action in assumpsit for labor and materials employed and money expended. Parsons, C. J., announcing the opinion of the court said: "Although in the case the parties consider themselves as severally seized of different parts of one dwelling, yet in legal contemplation each of the parties has a distinct dwelling-house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof, and other parts of the edifice are the plaintiff's dwelling-house. And in this action it appears that having repaired his own house, he calls upon her to contribute to the expense, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage had he not repaired. Upon a very full research into the principles and maxims of the common law, we can not find that any remedy is provided for the plaintiff."

These are all the authorities we have been able to find bearing upon the subject. All of them, except *Cheeseborough v. Greene*, are adverse to the right of plaintiff to recover.

The case of *Cheeseborough v. Greene*, 10 Conn., 318, does not sanction the right of the owner of the upper story to recover for repairs, but holds that the remedy of the owner of the lower story is in equity, and not at law. If each party respectively is the owner of a distinct dwelling, as held in *Loring v. Bacon*, the solution of the question becomes easy; for no legal principle can readily be discovered upon which a party can recover of another for repairs made on his own property, and that, in legal contemplation, each party *is* the owner of a distinct dwelling, can not, in our opinion, be successfully refuted. The courts erred in finding for plaintiff the value of the repairs made, and its judgment is—Reversed.

SUPREME COURT OF PENNSYLVANIA.

Schlessinger v. The Adams Express Company.

1. Where a common carrier applies to a Judge of the Court of Common Pleas for an order of sale of goods in his possession to satisfy his lien, upon the ground that the places of residence of the owner and consignee are unknown, (in pursuance of the Act of Dec. 14th, 1863, P. L. 1864, Appendix, p. 1127,) and such order is granted, it is his duty to expose the goods for public sale at auction. If he sells trunks or boxes, filled with valuable goods, as trunks or boxes the contents of which are unknown, without exhibiting the goods or stating what is in the trunks or boxes, so that the buyers can not know what they are bidding for or buying, such a sale is contrary to the Act of Assembly and the order made under it, and is unlawful, and the carrier will be responsible to the owner for the value of the goods.

2. The plaintiff packed her trunks in New York in February, locked them and then came to Philadelphia to reside, leaving the trunks in the custody of a friend, but keeping the keys herself. In April, she employed the defendants to bring the trunks from New York, which they accordingly did. There being evidence to show that when they arrived in Philadelphia, they were locked and to all appearances in the same condition as when she left New York: *Held*, that it was properly left to the jury to say whether the things which were in them when she left New York, were in them when they came into the possession of the defendants.

3. Representations and declarations made by the agent of a corporation in the course of the business entrusted to his particular care are binding upon the corporation, notwithstanding they produce evidence to show that he had no authority to make those declarations or representations. Persons dealing with the corporation by such an agent, have a right to suppose that he has authority to speak for them relative to the business entrusted to his special care.

Rule for a new trial.

Opinion by THAYER, J., April 27th, 1872.

The case on the part of the plaintiff, Mrs. Schlessinger, was this. She had been residing in the city of New York. In 1871 she removed to Philadelphia. When she came to Philadelphia she left in New York under the care of Madame Lamporte, with whom she had boarded, four large trunks filled with a large number of articles, many of which, according to her testimony and that of her son, were of great value. The trunks, according to the plaintiff's statement, had been packed by herself and son about the end of February. They were securely locked and she retained the keys in her own possession. In April, 1871, she employed the defendants to bring these trunks from New York to Philadelphia. They arrived in Philadelphia on the 27th April, 1871. On the 28th of April, Mrs. Schlessinger called at the defendant's office. The trunks were then shown to her by the clerk who had charge of the undelivered freight and unclaimed packages. She told him that she was then boarding and had not room for them in her boarding-house, and asked if they would

keep them on storage. He replied that they were not allowed to take storage but that they would keep the trunks for her. She asked him how long they would keep them, and he replied, "one year and no longer." The clerk contradicted this statement. According to his version of the conversation, she told him that she was boarding and had not room for the trunks at her boarding-house, that she hoped to go to housekeeping in the course of two or three weeks and that she would call again and let him know where the trunks should be delivered. Mrs. Schlessinger's statement of what occurred is corroborated by her son, who, desiring to get a book out of one of the trunks, went to the office of the company about two months after his mother's interview with the clerk. He was accompanied on that occasion by his mother. According to his testimony his mother then asked whether they could have access to the trunks. Permission was given and the son was taken into the basement by the porter, took out the volume which he wanted, locked the trunk and returned up-stairs. He then asked his mother in French to ask the clerk again, in his presence, whether they would keep the trunks. He replied, "that they would keep them for one year but no longer." It did not appear that the defendants then objected that the trunks had been left for two months in their possession, or that they requested the plaintiff to take them away. The clerk, however, testified that the plaintiff again promised to send word where the trunks should be delivered. The plaintiff's son also testified that when in the basement he examined the other trunks to see if they were in good order, and whether the locks had given way, and that he found them all, so far as was indicated by their external appearance, in good condition.

On the 30th of December, 1870, these trunks, without any knowledge of the fact on the part of the owner were sold at auction by the defendants as unclaimed packages. They were sold as four trunks the contents of which were unknown, each trunk being sold separately, none of them being opened, none of the contents being exhibited or stated to the bidders, they being informed that the contents were unknown and being in absolute ignorance of the contents of the trunks. Under these circumstances one of the trunks was sold for $9, one for $9.50, one for $8.50, and one for $5.50. Although the trunks were sold as "contents unknown," in point of fact the defendants' agents had gone into the cellar where they were deposited, opened them and examined them a month before the sale. They made, however, no inventory of the things. "They looked," they said, "to see if there were any valuables, but discovered none." They described the contents as books and clothing. The freight for which they were sold amounted to $8. According to the plaintiff's statement she had offered to pay the freight

when the trunks arrived, and was told that she might pay when she should take the trunks away. The plaintiff claimed to recover in this action the value of her trunks and their contents, and she had a verdict for $6000.

The defendants' case was that they had never promised to keep the trunks, that the clerk of undelivered freight and unclaimed packages had no authority to make any such promise, that the plaintiff had said she would inform them where they should be sent, that she had neglected to do so, and that the trunks were sold as unclaimed packages under an order of the Court of Common Pleas, which authorized the sale. They also insisted that there was no sufficient evidence of the contents of the trunks when they came into their possession.

The questions of fact were all left to the jury. The defendants complain that it was left to the jury to determine whether the things which Mrs. Schlessinger and her son testified were in the trunks when they packed them in the end of February in New York were actually in the trunks when they came into the possession of the defendants in April. The plaintiff and her son testified that when the trunks were left in New York they were securely locked and the keys remained in her possession. The son, Rudolph Schlessinger, testified that when he opened one of the trunks in Philadelphia, after they had been in the possession of the defendants for two months he found every thing in the same condition as when he and his mother had left it in New York, and that the other trunks which he examined externally at the same time, but which he did not open, appeared to be in the same condition. In view of this evidence we do not see how the Judge could have taken the cause from the jury. It was left to them with this instruction: "The jury are to determine from such evidence as they have whether the trunks contained in point of fact the things which Mrs. Schlessinger says were in them in January and February, 1870, when she packed them and left them in the care of Madame Lamporte in New York. I leave it to you to say whether such evidence is satisfactory. It is to be received, of course, with caution, and it is to be carefully examined into, but nevertheless, it is proper for you to consider it."

It appears to us that the defendants have no just cause to complain of such an instruction.

Whether the defendants had promised the plaintiff to keep the trunks for a year, was left to the jury upon the evidence, and they were instructed that if they had so promised they had no right to sell them before the expiration of the period during which they had promised to keep them. This proposition was not controverted by the defendants, but they adduced evidence to show that the clerk of undelivered freight had no right to make such a promise. And they insisted that in the absence of

any authority to give such an assurance the company was not bound by it. This position we regard as wholly untenable. The representations and declarations of an agent of a corporation stand upon the same footing with those of an agent of an individual; and the general principle that such representations and declarations made in the course of the performance of the particular duty with which the agent is entrusted, are binding upon the principal, is too well settled to admit of the least doubt. In Tanner v. Oil Creek R. R. Co., 3 Smith, 411, such a declaration made by a freight agent was enforced against a corporation under circumstances quite analogous to those of the present case. There, as here, the promise was made by a freight agent. There, as here, it was urged that the agent had no authority to make such promise, and testimony was given to prove it, but it was held by the Supreme Court that "freight agents are competent to bind the company by their representations and promises made in the course of the business intrusted to their particular care." And the court below was reversed for a contrary instruction. It is quite clear that there would be no safety for the public in dealing with corporations, who act entirely by their agents, if a rule so just, necessary and wholesome as this, were not sustained.

Upon the subject of the sale of the trunks the jury were instructed that a sale conducted in the manner in which this sale was admitted by the defendants' witnesses to have been conducted, was not such a sale as was contemplated by the order of the Court of Common Pleas or authorized by the Act of Assembly under which that order was made.

The first section of the Act of Assembly passed December 14, 1863, (P. L. of 1864, Appendix, p. 1127,) entitled "An Act relating to the liens of common carriers and others," declares that in all cases in which commission merchants, factors, and all common carriers or other persons shall have a lien upon any goods, wares, merchandise, or other property, for the costs or expenses of carriage, storage or labor bestowed thereon, if the owner or consignee shall fail, or neglect or refuse to pay the amount of such charges within sixty days after demand thereof made personally upon such owner or consignee, it shall be lawful for any such commission merchant, factor, common carrier, or other person having such lien, after the expiration of said period of sixty days to *expose* such goods, wares, merchandise, or other property to sale at public auction, and to sell the same *or so much thereof as shall be sufficient to discharge said lien*, together with costs of sale and advertising." The second section of the Act authorizes any Judge of the Court of Common Pleas, upon the application of any of the persons or corporations having a lien upon goods, wares, merchandise or other property, (as mentioned in the first section,) verified by affidavit, and

setting forth that the places of residence of the owner and consignee of any such goods, wares, merchandise or property, are unknown, or that the goods are of a perishable nature, to make an order authorizing the sale of such goods, wares, merchandise or other property, upon such terms as to notice as the nature of the case may admit of, and to such Judge should seem meet. The third section of the Act declares that the residue of moneys arising from any such sales after deducting the amount of the lien and costs of sale, shall be held subject to the order of the owner or owners of such property.

On the 19th of November, 1870, the defendants presented a petition to the Court of Common Pleas representing that they had in their possession divers parcels of goods for delivery, and that the places of residence of the consignees were unknown to them, and praying for an order of sale. Among these goods were the four trunks of the plaintiff. On the same day a Judge of the Court of Common Pleas made an order directing the defendants to make sale of the said goods, wares and merchandise, at auction, such sale being first advertised three times in a Philadelphia newspaper, and by six printed handbills. Under this order the sale was made on the 30th of December, in the manner which has been already described.

The proposition that the terms of a judicial order for the sale of the goods, wares and merchandise of an absent owner, at public auction, would be satisfied by selling trunks or boxes locked up so that the contents could not possibly be known; the contents being declared by the sellers to be unknown, although they had previously broken them open and examined them, is so preposterous in itself, so entirely opposed to every consideration of common sense and fair play, that it was not attempted to be maintained by the defendants' counsel on the argument of the rule for a new trial. It is not necessary to enter into any argument to refute such a proposition. The Act of Assembly under which the defendants proceeded, requires the goods, wares and merchandise to be *exposed* for sale at public auction.

It is sufficient to say that the Act of Assembly under which the defendants proceeded, although it authorizes the goods, wares and merchandise in the hands of commission merchants, factors or common carriers, under the circumstances referred to, to be exposed for sale at public auction, gives no warrant for such a proceeding as this, which in its character partook rather of the features of a lottery than a sale. It is impossible to say that goods are, in any legal sense, exposed to public sale, which are neither exposed, shown or described in any manner whatever, either by words, printed characters or signs, and in regard to the very nature and existence of which the bidders are kept in profound ignorance. The sale authorized by the act, and or-

dered by the court, was a very different thing from that. It was a sale at which the buyers should at least know what was to be sold, and should be able to form some opinion of the value of that for which they were to bid. The act is not regardless of the rights of the absent owner, for it directs the residue of the moneys, arising from the sale after discharging the lien, to be held subject to the order of the owner. But what residue could be expected for the plaintiff from a sale conducted in such a manner as this? How could there be any honest competition among buyers when no one knew for what he was bidding? The act contemplates a public sale in the usual manner where the things to be sold are described, and exhibited to the purchasers. The defendants substituted for it an illegal and most unjustifiable proceeding, which it is easy to see, might be used, for the most fraudulent and dishonest purposes, and which actually resulted in great loss to the plaintiff, her large trunks filled with valuable and rare articles, having been knocked down for prices ranging from $5 to $9 a piece. There was a count in trover in the declaration, and we think the disposition which was made of the trunks, was a wrongful conversion of the plaintiff's property.

The defendants can not protect themselves under the Act of Assembly, and the order of court when they have not complied with either. It is a sufficient answer to say, you have not done that which you were authorized to do. You have done that which you ought not to have done, and have left undone that which you ought to have done.

Several points were submitted to the court by the defendants' counsel upon the trial, which were answered in the charge to the jury.

The 1st point was, that if the defendants are liable, they are liable only as gratuitous bailees without hire, and the plaintiff must prove neglect and want of ordinary care, in order to establish liability on the part of the defendants. In answer to which the jury were instructed that if the defendants offered to deliver the property after it came to their hands, and were to keep it for the plaintiff without compensation, the plaintiff must show either neglect or misconduct on the part of the defendants before she could recover. They were also told that in the opinion of the court, it was not so much a question of negligence as it was a question whether the defendants had disposed of the trunks in an improper manner. It was not pretended that the goods had been casually lost, but that the defendants had improperly disposed of them. This was the very point of the case, and to it we think the attention of the jury was properly directed.

The 2d point was, that there was no evidence of neglect or want of ordinary care, and we entertain no doubt that the court was right in refusing so to charge.

The 3d point was, that if the evidence showed that Mr. Granger, [the clerk of the undelivered freight and unclaimed packages,] had no authority to contract or promise to keep the trunks for one year, then such promise would not bind the defendants. We think the point was properly refused for the reasons which have been already given.

The 4th point related to the defence that the goods were sold under an order of court, and was answered in the general charge, and we think correctly answered.

The 5th, 6th, 7th, 8th and 10th points were properly refused.

The 9th point was. that if the defendants took ordinary care of the trunks, the plaintiff must prove fraud or negligence against them in order to recover, and that there is no proof of such fraud or negligence.

In answer to which the jury were told by the court, that the plaintiff must prove negligence or misconduct, that there was no evidence of fraud. It would have been very improper for the court to have taken the case from the jury by telling them that there was no evidence of negligence, after instructing them that the sale of the trunks by the defendants, owing to the manner in which it was conducted was irregular and unlawful.

It only remains to notice the 11th reason assigned for a new trial, which is, that the damages are excessive, upon this subject the jury were advised to proceed with great caution in assessing the damages if they should find a verdict for the plaintiff, to bear in mind the natural bias which might possibly influence the plaintiff and her son in valuing the property which they had lost; that the value of the things was not to be affected by any considerations which were merely personal to the plaintiff, or to be settled by any fanciful or sentimental ideas of value. They were reminded that it was their duty in determining the question of value to be guided by practical rules of common sense, and to affix such value only to the property as it really and intrinsically possessed, such a value as would be represented by the prices which it would bring at a fair sale. Upon a careful and critical review of the whole evidence, we are unable to say that the jury have disregarded these instructions or that they have transcended the limits which their duty assigned to their functions. It was a matter to be determined by the exercise of their best judgment. We are not convinced that it was not so determined, or that the result which they arrived at was against the weight of the evidence or the justice of the case.—Rule discharged.

SUPREME COURT UNITED STATES.

Albert L. Mowrey, Appellant, *v.* Asa Whitney.

1. The ancient mode of annulling or repealing the king's patent was by *scire facias* generally brought in the chancery where the record of the instrument was found.
2. In modern times the Court of chancery, sitting in equity, entertained a similar jurisdiction by bill when the ground of relief is fraud in obtaining the patent, and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered.
3. But *scire facias* could only be sued out in the English courts by the king or his attorney-general, except in cases where two patents had been granted for the same thing to different individuals, and the sixteenth section of the act of July 4, 1836, concerning patents for inventions, is based upon analogous principles.
4. Both upon this authority and upon sound principle no suit can be brought to set aside, annul, or declare void, a patent issued by the government, except in the class of cases above mentioned, unless brought in the name of the government, or by the authority or permission of the attorney-general, so as to be under his control.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Justice MILLER delivered the opinion of the Court.

This is a bill in chancery brought to set aside and annul a patent for an invention, which was renewed in the office of the Commissioner of Patents, on the ground that, in making the extension, the commissioner was deceived and imposed on by the fraud and false swearing of the patentee.

The suit was brought in the Circuit Court of the Eastern District of Pennsylvania, in which the defendant resided, by Albert L. Mowrey.

The patent was for an improvement in the process of annealing car wheels, and the interest of the plaintiff in the matter is that, before the time of the first issue of defendant's patent had expired, plaintiff had been engaged in same business, and that he is now sued by the patentee for infringement of his extended patent in an action still pending; and that in the progress of the investigations necessary to his defense of that suit, he discovered the fraud by which the extension was obtained.

The bill was demurred to, and the demurrer sustained, on two grounds: first, that the extended patent had expired, by its own limitation, before the bill was filed; and secondly, that plaintiff could not, in his own right, sustain such a suit.

As regards the first of the propositions we do not deem it necessary to make any decision. When a case arises in which the United States, or the Attorney General, shall initiate a suit to have a patent declared null, *ab initio*, which, though no longer in force as to present or future infringements, is used to sustain suits for infringements during its vitality, the question will be

considered; for we are of the opinion that no one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government has issued as an individual, except in the cases provided for in section 16 of the act of July 4, 1836.

The ancient mode of doing this in the English courts was by *scire facias*, and three classes of cases are laid down in which this may be done: 1. When the king by his letters patent has by different patents granted the same thing to several persons, the first patentee shall have *scire facias* to repeal the second. 2. When the king has granted a thing by false suggestion, he may by *scire facias* repeal his own grant. 3. When he has granted that which by law he can not grant, he *jure regis*, and for the advancement of justice and right, may have a *scire facias* to repeal his own letters patent: 4 Coke's Institutes, 88; Dyer R., 197–8, and 276, 279. The *scire facias* to repeal a patent was brought in chancery where the patent was of record. And though in this country the writ of *scire facias* is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the government.

This is settled so far as this court is concerned by the case of the United States vs. Stone, 2 Wallace, 525, in which it is said that the bill in chancery is found a more convenient remedy. A bill of this character was also sustained in the English chancery in the case of the Attorney General vs. Vernon, 1 Vernon R., 277, on the ground of the equitable jurisdiction in matters of fraud. And in the case of Jackson vs. Lawton, 10 Johnson, 24, Chancellor Kent says that in addition to the writ of *scire facias* which has ceased to be applicable with us, there is another remedy by bill in the equity side of the court of chancery.

It will be observed that in the case of a conflict under two patents granting the same right, the *scire facias* may, according to the authorities cited, be brought in the name of one of the patentees, but in the other cases, when the patent was obtained by fraud upon the king, by false suggestion, or where it was issued without authority, and for the good of the public and right and justice it should be repealed, the writ is to issue in the king's name or his attorney-general. It is also said that when a patent is granted to the prejudice of the subject, the king of right is to permit him upon his petition to use his name for the repeal of it, *in scire facias*, at the king's suit: The King vs. Sir Oliver Butler, 3 Levinz, 220.

The sixteenth section of the Patent act of 1836 seems to have in view the same distinction made by the common law in

regard to annulling patents, for while it authorizes individuals claiming under conflicting patents, or one whose claim to a patent has been rejected because his invention was covered by a patent already issued, to try the conflicting claim in chancery, and authorizes the court to annul or set aside a patent so far as may be found necessary to protect the right, the suit by individuals is limited to that class of cases. And it is provided that the decree shall be of no validity except between the parties to the suit. The general public is left to the protection of the government and its officers.

It seems reasonable that the remedy by bill in chancery, which is substituted for the *scire facias*, should have the like limitation in its use. The reasons for requiring official authority for such a proceeding are obvious: 1. The fraud, if one exists, has been practiced on the government, and as the party injured, it is the appropriate party to assert the remedy or seek relief. 2. A suit by an individual could only be conclusive in result as between the patentee and the party suing, and it would remain a valid instrument as to all others. 3. The patentee would or might be subjected to innumerable vexatious suits to set aside his patent, since a decree in his favor in one suit would be no bar to a suit by another party. If on the other hand an individual finds himself injured either specially or as a part of the general public, it is no hardship to require him to satisfy the Attorney General that the case is one in which the government ought to interfere, either directly by instituting the suit, or indirectly by authorizing the use of its name, by which the Attorney General would retain such control of the matter as would enable him to prevent oppression and abuse in the exercise of the right to prosecute such a suit.

It would seriously impair the value of the title which the government grants after regular proceedings before officers appointed for the purpose, if the validity of the instrument by which the grant is made can be impeached by any one whose interest may be affected by it, and would tend to discredit the authority of the government in such matters.

The decree of the Circuit Court, sustaining the demurrer and dismissing the bill, is therefore affirmed.—*Legal News.*

UNITED STATES SUPREME COURT.

The County of Bath et al. *v.* Henry Amy.

Jurisdiction of U. S. Circuit Court to issue Writ of Mandamus.

That the power to issue a writ of mandamus as an original and independent proceeding does not belong to the Circuit Courts, and is authorized only when ancillary to jurisdiction already acquired, and can not operate as an enlargement of jurisdiction.

The County of Bath et. al. v. Henry Amy.

In error to the Circuit Court of the United States for the Dist. of Kentucky.

Opinion by STRONG, J.

It must be considered as settled that the circuit courts of the United States are not authorized to issue writs of mandamus, unless they are necessary to the exercise of their respective jurisdictions. Those courts are creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them. The Judiciary Act of 1789, which established them, by its eleventh section enacted that they shall have original cognizance, concurrently with the courts of the several States, of "all suits of a civil nature at common law or in equity," between a citizen of the State in which the suit is brought and a citizen of another State, or where an alien is a party. While it may be admitted that, in some senses, the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the Judiciary Act. At the time when the act was passed it was a high prerogative writ issuing in the King's name only from the Court of King's Bench, requiring the performance of some act or duty, the execution of which the court had previously determined to be consonant with right and justice. It was not, like ordinary proceedings at law, a writ of right, and the court had no jurisdiction to grant it in any case except those in which it was the legal judge of the duty required to be performed. Nor was it applicable, as a private remedy, to enforce simple common law rights between individuals. Were there nothing more, then, in the Judiciary Act than the grant of general authority to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary powers, residing in the British Court of King's Bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the fourteenth section of the same act, which enacted that circuit courts shall have "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the eleventh section, which conferred, only to a limited extent, upon the circuit courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the fourteenth section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given. Why make this grant, if

it had been previously made in the eleventh section? The limitation only was needed. This subject has heretofore been under consideration in this court, and in McIntyre v. Wood, 7 Cranch, 504, it was unanimously decided that the power of the circuit courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. The court said:—"Had the 11th section of the Judiciary Act covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States, and the fourteenth section of the act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the Legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases." And in McClung v. Silliman, 6 Wheaton, p. 601, this court said, when speaking of the power to issue writs of mandamus: "The fourteenth section of the act under consideration (the Judiciary Act) could only have been intended to vest the power * * * in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ purposed to be sued out." In other words, the writ can not be used to confer jurisdiction which the circuit court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired. The doctrine asserted in both these cases was conceded to be correct by both the majority and the minority of the court in Kindall v. The United States, 12 Peters, 584; see also M'Garrahan v. The Secretary, 9 Wallace, 311. The power to issue a writ of mandamus as an original and independent proceeding, does not, then, belong to the circuit courts.

It has been argued on behalf of the defendant in error, that the writ of mandamus is a civil action in Kentucky; that the proceedings therein were regulated by an act of the Legislature of that State, approved January 8th, 1813, still in force, which directed how a traverse to the return shall be tried in the State courts, and what judgment may be pronounced, and that the Act of Congress of May 19, 1828, directed that the proceedings in suits at common law in States admitted to the Union since 1789, of which Kentucky is one, shall be the same in the Federal courts as those used when the act was passed, in the highest courts of original and general jurisdiction in those States. Hence it is inferred that the law of Kentucky respecting mandamus has been adopted as part of the rule of practice of the United States Circuit Court for that State. The argument rests on a misapprehension of the meaning of the Act of 1828. It was a process act, designed only to regulate proceedings in the Fed-

eral courts after they had obtained jurisdiction—not to enlarge their jurisdiction. The purpose was to make the forms of process and forms and modes of proceeding in those courts correspond with the forms and modes in use in the State courts. The words of the act are, "that the forms of *mesne* process, except the style, and the forms and modes of proceeding in suits in the courts of the United States held in those States admitted into the Union since the 29th of September, in the year 1789, in those of common law, shall be the same in each of the said States respectively, as are now used in the highest court of original and general jurisdiction of the same." It is quite too much to infer from this an enlargement of jurisdiction, or an adoption of all the powers which the State courts then had. There is, then, no Act of Congress which has conferred upon circuit courts authority to issue the writs of mandamus as an original proceeding, or at all, except when necessary for the exercise of the jurisdiction conferred upon them by law.

Applying this rule to the present case it is decisive. The relator applied to the Circuit Court for a mandamus to compel the levy and collection of a tax to pay certain coupons or interest warrants attached to bonds alleged to have been issued by the county of Bath, and to belong to him. His claim for payment had not been brought to judgment in the court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous.

This renders it superfluous to consider the other objections urged against the jurisdiction.

The judgment of the Circuit Court is reversed, and the cause is remanded with instructions to dismiss the petition for a mandamus.

UNITED STATES CIRCUIT COURT, D. OF WEST TENN.

United States *v.* Fifteen Hundred Bales of Cotton.

1. Courts will take judicial cognizance of the public history of the country, and in the modes of its ascertainment it is treated like a question of law, and investigated in the same manner in its own proper sources; thus public documents and histories are to be consulted.
2. Without deciding whether the court below should have taken judicial cognizance of the precise *date* when the surrender of the Rebel General Kirby Smith occurred, or whether, when such accuracy becomes material, the proofs, which the parties desire to present must be submitted to a jury, this is certainly clear that if the court assumes the duty of its determination it must decide it correctly; and it is as much an error for a court to mistake an historical fact of which it has taken cognizance as to mistake a principle of law. Thus the charge to the jury that the Rebel General Kirby Smith

surrendered on the 24th of May, 1865, was error. The common histories of the country, the Annual Encyclopedia, and repeated judgments of the courts show it to have taken place on the 26th of May, 1865.

3. It was conceded by the court below that if the cotton in question—which had been laden on a steamboat on the Red and other rivers in that portion of the State of Louisiana, then proclaimed to be in insurrection, and which was in actual military occupation of the Rebel military forces, commanded by General Kirby Smith—had started upon said steamboat, before the actual surrender of General Smith, for transportation to Memphis, Tenn., which was within the lines of Federal military occupation, then the same would be forfeited under section 5, act July 13, 1861, and amendatory acts prohibiting commercial intercourse between citizens of States in insurrection and citizens of the rest of the United States. Thus, upon the theory of the learned judge himself, said cotton was forfeited, because it had started on its transit before said surrender, it having left on May 25, and said surrender taking place on the 26th of May, 1865.
4. The legal consequence deduced from the erroneous assumption as to the time of the surrender of General Kirby Smith, that trade and intercourse became lawful between Louisiana and Tennessee and hostilities ceased upon the said surrender, was no better grounded in the law than was the fact itself in the history of the country. The proclamation of the President, or other political recognition of the return of peace, was necessary to work such a consequence. The conditions of war and peace, the political *status* of government and people in our system, are purely of political, and not judicial determination. The entire legislative history and public action of the country in reference to the late Rebellion conclusively show that such has been the theory upon which our courts and the Government have proceeded in its suppression, and dealing with its consequences. The Supreme Court of the United States in repeated and literally applicable judgments have so decided, and thus have set the matter wholly at rest.
5. It was error to suppose that the cessation of hostilities was synonymous with the surrender of organized armies, and that peace meant the disbanding of military forces, instead of a full return of the masses of the people to loyalty and good citizenship.
6. Where cotton had been sold to the Confederate government upon the understanding that it should sell and divide the proceeds, no forfeiture of such cotton will be incurred under section 1, act of August 6, 1861, to confiscate property used for insurrectionary purposes, where it appears that the owners of the same were compelled by force or bodily fear to make such sales; but the mere existence of a law prescribed by an insurrectionary government in itself is insufficient to justify those who owe allegiance to a lawful sovereignty. And therefore the charge to the jury that a mere law without more was an excuse for obeying it was erroneous.
7. The Confederate government could make no law. Its prescriptions imposed no obligations, political or moral, and the only justification for obedience which the citizen could make to his rightful sovereign was deadly coercion by violence or threats.—Ed. Int. Rev. Rec.

EMMONS, J.—This was a writ of error to reverse the judgment in the District Court. The forfeiture was claimed upon two grounds. That the cotton had been voluntarily sold and delivered to the Confederate Government in aid of the rebellion—and that it had been unlawfully removed from a district within the rebel lines to one within the lines of Federal occupation.

The writ of error brings up a written record of very voluminous character. We can not but presume that it in some

degree fails to represent the actual history of the trial. Nothing is more common than for a written record, by omissions overlooked by court and counsel when it is made up, to misrepresent most substantially the real judgment of the court. The decision here must necessarily be upon the bill of exceptions as it is, but our respect for the learned judge who tried this cause —our knowledge of his other judgments and rulings, so clearly evincive of opinions at war with some of those contained in this record—induce the belief that there must be a failure in some degree to reproduce the trial just as it occurred.

The cause was argued many months since, and the court entertained no doubt whatever that manifest errors appeared. Upon inquiry of counsel, they were at the moment unable to find in the record the exceptions which were necessary to bring them here for consideration. The character of the charge and rulings were immaterial unless they were excepted to by the party aggrieved. The cause stood over for counsel to prepare their briefs, referring to the record for the facts material to the judgment, and especially to the exceptions—if any there were.

The Government's counsel aver they have long been ready, but from courtesy to the counsel of the defendant in error, who were not so, the cause although several times referred to from the bench, was not again called to our attention until a few days since. A full, satisfactory and learned written argument is now before us for the plaintiff in error. The exceptions are ample to bring in review the faults complained of in the charge.

A single fault renders reversal as necessary as though there were many. As the cause will stand for a new trial in the Circuit Court, no opinion will be expressed upon questions not necessary for the decision, although they may be involved in a rehearing of the cause. There are, too, quite a number of points discussed and decided adversely to our opinions, which will, in all probability not again, arise in another trial.

A single question will be considered, and upon its answer alone the reversal of the judgment will rest. Did his Honor the District Judge correctly lay down the law in the following portion of his charge. It was made in disregard of a carefully drawn request to give contrary instructions.

After remarking that the courts without any Congressional resolution or law, or Presidential proclamation, or other Governmental action, must take judicial notice, without proofs, that civil war existed, he said:

"If the Court will take judicial cognizance of the existence of the war, then they ought also to take cognizance of the fact of peace being restored. Will the Court not take cognizance of the proof that Kirby Smith's surrender took place on the 24th of May, 1865? *The war was then over.* There were then no organized bodies of men arrayed against the Government. Pris-

oners were paroled and sent to their homes. Everybody knew this, and will it be said that this Court will close its eyes to the fact and not know it until told so by the President?

"The jury having returned into court asked 'if the opinion of his Honor as to the time when hostilities ceased, was binding upon the jury?'

"His Honor replied that it was—that hostilities ceased on the 24th or 25th of May, 1865, and that fact he took judicial notice of.

"A juror then said, 'Your Honor did not charge us in relation to the count in the information in regard to gold and foreign bills of exchange.'

"His Honor stated that there was no proof to show that gold was used to pay for the cargo of the Decatur, and that he did not consider it necessary to charge in regard to that count, as the cessation of hostilities covered the case, and virtually repealed those laws."

We do not consider the erroneous assumption here that there was no proof of a fact which was largely contested before the jury. It is noticed only to say it is not impliedly sanctioned.

This charge embodies several substantial errors.

The court will take judicial cognizance of the public history of the country. It is treated, in its modes of ascertainment, like a question of law, to be investigated in the same manner, in its own proper sources. Public documents and histories are to be consulted without deciding whether the court should have taken judicial cognizance of the precise date when the surrender occurred, or whether, when such accuracy becomes material, the documentary, historical, and other proof which parties chose to present must not be submitted to a jury, it is of course clear that if the judge assumes the duty of its determination, he must decide it correctly. It is as much an error for the court to mistake an historical fact of which it has taken cognizance, as to mistake a principle of law. That his honor was in error when he told the jury that General Kirby Smith surrendered on the 24th of May, 1865, is now conceded. It is unnecessary to the original documentary proof which demonstrates his mistake. The common histories of the country and repeated judgments in the books show it. The Annual Encyclopædia for 1865, page 84, states it to be upon May 26.

Dillon (Cir. Court Reports, 573, Phillips v. Hatch) states it the same date. There is no difference of opinion anywhere. This was a turning point in the case below. The vessel left upon the 25th. It was conceded by his honor that if the surrender had not been until the 26th, so that within his own theories hostilities continued until that time, the cotton was forfeited to the Government because it started on its transit before.

The legal consequence which the learned judge deduced from this fact, thus erroneously assumed as taking place on the 24th, was no better grounded in the law than was the fact itself in the history of the country. Both were alike untrue. Trade and intercourse did not become lawful between Louisiana and Tennessee, and hostilities did not cease, upon the surrender of General Smith. The proclamation of the President, or other political recognition of the return of peace, was necessary to work such a consequence.

It has not been seriously argued that this part of the charge is law. The conditions of war and peace, the political status of governments and people, is in our system one purely of political and not judicial determination. If there were, as there is not, any doubt of this necessary rule of general law, the entire legislative history and public action of the country in reference to the late rebellion conclusively shows such has been the theory upon which our courts and the Government have proceeded in its suppression and in dealing with its consequences. In reference to a subject where repeated and literally applicable judgments of the Supreme Court of the United States set the matter wholly at rest, it could not "be useful or even in good taste to go behind them for reasons to justify what they so plainly say."

In the 8th Wall., 56, United States v. Anderson, the statute limited prosecutions in the Court of Claims to two years after the *suppression of the rebellion.* It was held that the limitation did not begin to run, and that the rebellion was not in a legal sense suppressed until the final proclamation of the President, August 20, 1866. The argument of the court shows most clearly that we must rely upon the action of the political department as the criterion in this class of cases. At page 70 it is said, "In a domestic war, like the late one, some proclamation or legislation would seem to be required to inform those whose private rights were to be affected by it of the time when it terminated."

We do not understand by this that as a matter of law necessarily in all cases that legislation or proclamations are indispensable to terminate the legal condition of public political hostility. Nor do we in this judgment suggest even that such is the law.

In reference to the point in judgment, it was natural for the court to say, especially where such definite action had in fact been had, that "it would seem to be required." Nothing more is meant, I apprehend, than that it was required by good government, in order to remove uncertainty in reference to private action. The Government has thus far carefully pursued this manifest policy. It has from time to time declared the cessation of hostilities and the return of peace, and restored inter-

course and trade, as State after State assumed the condition which in the governmental judgment, rendered safe and politic such action. But, if on the contrary, without legislation or proclamations of any kind, it had suffered all these interests to assume their old channels, the courts would look to and accept this acquiescence as an implied recognition of a changed political status, as fully as though it were testified in more direct modes and more fixed forms. The principle is alike in both cases. The courts would in all instances await the public action, in none anticipating the decision of the Government. Before any such question can arise time must elapse, public sufferance must be unquestioned, and such a condition exist as manifests an undoubted public consent to the new peaceful relations. No such situation existed here, and the ruling had no reference to such a principle.

In 2 Wall., 404, Mrs. Alexander's cotton, at page 419, in deciding that Mrs. Alexander's cotton was subject to seizure, because she resided in the enemy's country after taking the oath under the amnesty proclamation, Chief Justice Chase says that the belligerent relation having once been recognized by the political power, that "all the people of each State or district in insurrection must be regarded as enemies until by the action of legislature and the executive, or otherwise, that relation is thoroughly and permanently changed."

In 11 Wall., 244, Levy v. Stewart, deciding that the statutes of limitations were suspended during the Civil War, the court rely upon the legislation of Congress and the proclamations of the President, as fixing the period when it commenced and closed.

11 Wall., 493, Stewart v. Kahn. The act of 1864, providing that the period during which a defendant could not be served with process should be deducted from statutes of limitation being under consideration, Justice Swayne, speaking of the duration of this condition in a legal sense and the effect of the several Presidential proclamations, at page 506 says, "the decision of all such questions rests *wholly* in the discretion of those to whom the substantial powers involved are confided by the Constitution." Speaking of the *continuance of hostilities* and the power of suppressing them, at page 507 he adds: "In the latter case the power is not limited to victories in the field and the dispersion of insurgent forces. It carries with it inherently the right to guard against the renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act (that of restraining the effect of statutes of limitations) falls within the latter category." The whole judgment is a clear assertion of the Federal political right to regulate the conditions of peace, and the duty of the courts to accept, when they are constitutional, the action of the Government as entirely conclusive.

2 Amer. Law Reg., N. S., 419, United States v. 129 packages. In violation of the act of July 13, 1861, goods were laden on board a vessel in Missouri with the intention of transporting them to Memphis before the proclamation of the President declared the cessation of hostilities. Memphis at that time was in the occupation of the Federal forces. It was held that the goods were forfeited for violation of the statute, at page 430. Judge Treat announces that this is a political question and says, "the absurdity of any other rule is manifest. The state of the country as to peace or war is legally determined by the political and not the judiciary department. The same power which determines the existence of war or insurrection must also decide when hostilities shall cease." He cites the following cases as sustaining principles from which his doctrine is deduced. 3 Wh. 246, 610; 4 Wh. 52, 497; 7 Wh. 283; 12 Wh. 19; 4 Cr. 241; 2 Pet. 253; 12 Pet. 511; 13 Pet. 315, 7 How. 1; 14 How. 46, 283. All these judgments, save those in 12 Wheat. and 7 Howard, relate to the recognition by the political power of foreign governments or the belligerent *status* of revolted foreign provinces. It is not perceived that the doctrines they lay down are not directly applicable, as they have in fact been applied by the same court to cases of domestic violence. In the 12 Wheat., it was said the statute devolved upon the President the political duty of determining when armed force should be called out to put down insurrection in the States. It was for *him* to decide when the exigency occurred. The *courts* had no concern with it. In the 7 Howard, it was said, whether this rebel government of Dorr, or that under the old constitution of Rhode Island was in force, was one wholly for the Government to decide. In an action of trespass, the courts, it was said, could hear no testimony whatsoever upon such a point. What the Government recognized, the courts must conclusively deem the lawful power. Chief Justice Taney, in this case, fully illustrates the incompatibility of such a power in the courts with the conditions and consequences of the inquiry. If one jury should upon evidence decide that the Government was supreme, another might decide differently. The court's judgments must be enforced by the political power, and its decision that it did not exist would be nugatory, and it was of necessity that it confined its decision to the meaning and force of laws made by, and not to the determination of the lawfulness of the Government itself. Whether there was any necessity for the exercise of the power of the President to call out the militia, he said the court could not determine. His decision was final. The court could not call witnesses to prove which party represented a majority of the people. If the judicial power were thus extended, he said, the guaranty in the Constitution of a republican form of government was a guaranty of anarchy, not

of order. Equally incongruous results would follow if courts, instead of the Government, were to decide when *hostilities* are ended, and when trade and intercourse should be resumed.

3 Amer. Law Reg., 73, U. S. v. 100 bbls. Cement.—In a case under the same act, on page 78, the same Judge (Treat), after saying that a condition of hostilities is to be determined by the political department, adds, "that the status must remain in a legal sense until the same authority decides it to be at an end. Such is the true interpretation of the statute and proclamations."

Dillon's Cir. Court Rep., p. 571. Phillips v. Hatch, 1871.—A note was made in Texas, after the surrender of Kirby Smith on the 26th of May, 1865, but before the proclamation of the President in August of that year, declaring that hostilities had ceased. In deciding that the note was void, because made between belligerents, Dillon, J., says: "From the nature of the question, from the fair implication of the act of July 13, 1861, (the one here in question), from the confusion which would ensue from any other rule, it is the opinion of the court that the rebellion must be considered as in existence until the President declared it at an end in the proclamation of August 20, 1865." Judge Dillon adds an instructive review of the statutes, proclamations and judgments in full justification of his ruling.

In a note to the same volume, p. 391 it is said that Judges Dillon and Caldwell decided that the rebellion in Arkansas did not end until the proclamation of the President so declared it.

These unquestioned doctrines have not been extemporized for the modern and exceptional exigencies of the late rebellion. They belong to the jurisprudence of all countries, and were adopted as part of that of our own from its earliest history. Our most conservative judges—Marshall, Story, and Taney—have been foremost in announcing them.

No citizen would challenge the justness and the necessity of this rule. Judges have their peculiar duties, which, if faithfully and learnedly studied, have little tendency to make them familiar with current and rapidly changing conditions, upon which depend the important political questions of whether it is safe to relax on the instant military rule and restore intercourse and trade. In possible exigencies it may be true, as the learned Judge said, that we know when peace is restored "without being told by the President." But all will concede that the safe depository for this power is with a President and Cabinet, and the Congress, all of whom being specifically charged with the duty, constantly engaged in ascertaining the facts upon which the policy of political action depends, and in full official communication with all the best sources of information, must necessarily be better informed in reference to situations, and better qualified to determine when peaceful relations should be reinstated with public enemies than a single judge. The

mistake of his Honor consisted in supposing that the cessation of *hostilities* was synonymous with the surrender of organized armies; that peace meant the disbanding of military forces, instead of a full return of the masses of the people to loyalty and good citizenship. If armies disband only to disseminate their violence in private force or individual wrongs, governmental military rule may be necessarily continued, or restored after its discontinuance. The history of the country has shown that, in political opinion, this has been often necessary, and, whatever the judiciary may think, as citizens, of the policy of its exercise, the fact of its existence and duration must even be accepted by it as inexorably as it accepts any other political condition.

The only resort for a tribunal, in any case, is that sad one, of which we have had too much experience, when violence renders impossible the longer recognition of the sovereignty which created it.

For the purpose of this reversal it is unnecessary to look further into the record. There is one other portion of the charge, however, which we desire briefly to notice. It appeared that the cotton had been sold to the Confederate Government upon the understanding that it should sell and divide the proceeds. In order to produce a forfeiture it must appear that the owners of the property were not compelled, by force or bodily fear, to make the sale. In reference to this subject the district judge said: "If this property was the property of the Confederate States authorities by *any law*, or was received by the agents of these Confederate States authorities acting under any military order requiring the citizens to furnish it as a tax or exaction, *that* should not be considered a voluntary act on the part of the original owners of the property, and would not subject it to seizure.

"The war was a civil war, as declared by the United States Government, and the Confederates were accorded their rights, and treated as belligerents, and therefore they had the right to make rules and laws for the government of all within their lines. They had the right to levy taxes, and perform other functions.

"The military commanders had the same rights as other military commanders under the government with which they were at war.

"They had a right to make exactions to carry on the war. They had the right to raise taxes, and to have the citizens comply, and give up their property on such terms as levied or ordered by the Government."

It is not for the purpose of saying that the accident of a pretended government, and laws, and officials, may not in any circumstances affect the question of the citizens' intent. There

may be such wholesome fear of force and injury as to induce acquiescence in unlawful demands, without its actual infliction. This is fully conceded. These facts may not be without their force upon retrial to show the absence of a voluntary sale by the owners of this cotton. But that the mere existence of a law prescribed by an insurrectionary government is sufficient to bind the conscience or justify the action of those who owe allegiance to a lawful sovereignty is a doctrine finding no warrant in the history of any government in the world.

9 Wall., 83, U. S. v. Keehler. The defendant was postmaster before the war, and gave bond as such. In virtue of a Confederate statute he paid over to a mail contractor, whom the Federal Government owed for services, the money in his hands. It was held this pretended law was no justification for such payment. At page 86, Justice Miller, for the court, says: "It can not be admitted for a moment that a statute of the Confederate States, or the order of its Postmaster-General, could have any effect in making the payment to Clemens valid. The whole Confederate power must be regarded as a usurpation of unlawful authority, incapable of passing any valid laws, and certainly incapable of divesting, by an act of its congress, or an order of one of its departments, any right or property of the United States. Whatever weight may be given under some circumstances to its acts of force on the ground of irresistible power, or whatever effect may be allowed in proper cases to the legislatures of the States while in insurrection, we propose to decide only when they arise. The acts of the Confederate Congress can have no force as law in divesting or transferring rights, or *as authority for any act opposed the just authority of the Federal Government.*

The act now before the court was a sale in order to aid the overthrow and promote the destruction of that government.

It being further urged in Keehler's case that the Confederate Government had ample military forces at the place where the defendant resided to compel obedience to its laws, and it did so enforce it like other governments, this position is answered as follows at page 87: "It will be observed that this statement falls far short of showing the application of any physical force to compel the defendant to pay the money to Clemens. Nor is it in the least *inconsistent with the fact* that he might have been desirous and willing to make the payment. It shows no effort or endeavor to secure the funds in his hands to the government to which he owed both the money and his allegiance. Nor does it prove that he would have suffered any inconvenience, or been punished by the Confederate authorities, if he had refused to pay the draft of the insurrectionary post-office department upon him. We can not see that it makes out any such loss of money by inevitable overpowering force, as could even on the

mere principle of bailment discharge a bailer. We can not concede that a man who, as a citizen, owes allegiance to the United States, and as an officer of its government holds its money or property, is at liberty to turn over the latter to an insurrectionary government, which only demands it by ordinances and drafts drawn on the bailer, but which exercises no force or threat of personal violence to himself or property in the enforcement of its illegal orders."

9 Wall., 197, Hickman v. Jones. During the rebellion the plaintiff in this action was arrested and tried for treason against the Confederate Government. He now brought suit against the members of the court and all the officers in any way connected with the arrest and trial. The Supreme Court held that every act of the defendant was to be treated as if they were ordinary trespassers—that the Confederate constitution, government, and laws afforded no warrant whatever for their action. On page 200 Justice Swayne for the court, said, "The rebellion out of which the war grew was without any legal sanction. In the eye of the law, it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the State to which it belonged. The proportions and duration of the struggle did not affect its character, nor was there a rebel government *de facto* in such a sense as to give any legal efficacy to its acts. It was not recognized by the national nor by any foreign government. It was not at any time in possession of the capital of the nation. It did not for a moment displace the rightful Government. The Government was always in existence, always in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary States. The union of the States for all the purposes of the Constitution is as perfect and indissoluble as the union of the integral parts of the States themselves, and nothing but revolutionary violence can in either case destroy the ties which hold the parts together. For the sake of humanity, certain belligerent rights were conceded to the insurgents in arms. But the recognition did not extend to the pretended government of the Confederacy. The intercourse was confined to its military authorities. In no instance was there intercourse otherwise than of this character. The rebellion was an armed resistance to the rightful authority of the sovereign. Such was its character in its rise, progress, and downfall. The act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted.

It is unnecessary to quote from the numerous other judgments in the Supreme and Circuit courts, expressly and impliedly sustaining this undoubted position. This subject has been referred to only because an elaborate charge, so wholly disregarding them, had been delivered to a jury in an important and an exciting case; it was thought a duty to reproduce a few of the many concurring judgments which so fully demonstrated the error of the learned district judge.

The case of Smith v. Brazelton, decided by the Supreme Court of Tennessee, is supposed by counsel to assert a contrary doctrine. We do not stop to reconsider that case. It was before us in Riddle, Coleman & Co. v. Pillow et al. We then said the question was one depending upon the Constitution and laws of the United States, and in reference to which the rulings in the Federal courts were mandatory; and, although we very confidently disapproved what we deemed it manifest errors in according to the Confederate government equally belligerent rights, we took pains to say no judgment was passed upon the peculiar facts in contest in that case; we said "hostilities existed and armies were on the march, the general commanding took what he did to warm and shelter his soldiers;" and, without deciding whether physical necessity, and to prevent suffering and want would, constitute in any possible case, a justification for the forcible appropriation of property, we denied then, as we do now, that it would derive the slightest additional support from the immaterial accident that the claim to do so was predicated upon any pretended authority derived from a rebel government.

In reference to a question about which there is not a conflict in tribunals whose judgment we have any right to regard, it is unnecessary to follow the frequent repetitions which have applied it in so many different exigencies. All, without exception, say the Confederate government could make no law. Its prescriptions imposed no obligations, political or moral, and the only justification for obedience which the citizen could make to his rightful sovereign was deadly coercion by violence or threats. No such proof appears upon this record. The charge which informed a jury that a mere law, without more, was an excuse for obeying it, was erroneous.

The judgment is reversed, and a *venire de novo* will issue, returnable to this court.

For the Government, H. E. Hudson, Esq., United States district attorney, Messrs. Haynes & Stockton, of counsel; Henry Croft, Esq., Thomas R. Smith, Esq., of counsel for defendants in error.

SUPREME COURT OF OHIO.

TO APPEAR IN 21 VOL. O. S. REPORTS.

ACTION AGAINST SHERIFF.

David Keithler vs. John S. Foster et al.—Error to the District Court of Brown county.

DAY, J.—Held:

1. A cause of action against a Sheriff, for not paying money collected by him on execution, does not accrue until demand is made on him for payment; and the statute of limitations begins to run from the time of demand.

2. Such demand, however, must be made in a reasonable time, and, if no cause for delay is shown, should be made at least within the time limited by the statute for bringing the action; and, in the absence of special circumstances, if no demand be shown within that time, it will be presumed to have been made at the expiration of that period, so far as regards the statute of limitations. Judgment of Common Pleas and District Court reversed, and cause remanded for further proceedings.

AMENDMENT OF BILL OF PARTICULARS.

John Bickett vs. John Garner.—Error to the District Court of Clinton County.

BY THE COURT:

Garner sued Bickett before a Justice of the Peace, claiming in his bill of particulars $290 81, on an account. Bickett denied all liability, but Garner recovered a judgment before the Justice, of $213 81 and costs; and Bickett appealed. In the Common Pleas, on appeal, Garner moved for leave to amend the account which formed his bill of particulars before the Justice, by adding an item of $532. Bickett objected, but the motion was granted, and Garner filed his petition on the amended account claiming $825 71. Bickett answered denying the claim, and went to trial. Verdict and judgment for Garner for $632 37. Held: That the Common Pleas erred in allowing, against the objection of Bickett, the amendment increasing Garner's claim beyond a sum that would have been within the jurisdiction of the Justice of the Peace. Without consent of parties, the appellate court is only authorized to allow such an amendment as might have been allowed by the Justice.

Judgment reversed and cause remanded.

BURDEN OF PROOF.

William Silvus vs. The State.—Error to the Court of Common Pleas of Athens County.

WHITE, J.—Held:

On the trial of an indictment for murder the burden of proving that the homicide was excusable on the ground of self-defense rests on the defendant, and must be established by preponderance of the evidence. Judgment affirmed.

Supreme Court of Ohio.

CONSTRUCTION OF WILL.

D. W. Stableton and wife vs. James Ellison and others. Reserved in the District Court of Adams County.

WELCH, C. J.:

Where in a petition for partition the demandant prays for equitable relief touching the title of the property, the proceeding is to be regarded as a civil action, within the meaning of the code, and, as such, subject to appeal.

J. E. by his will disposed of his property as follows: "To my beloved son, James Ellison, I give and bequeath a tract of land on the waters of Beasley's Fork of Brush Creek, containing one hundred and thirteen acres (on which John Morrison now lives, and also a man of the name of Sims lives at present on said tract), to him my said son James, his heirs and assigns forever. And all the rest of my estate, real and personal, I give and bequeath to my beloved wife, Mary Ellison, allowing her, said Mary, to make such distribution of my said estate as she in her discretion may judge best and most advisable among my children, James, Mary, William, David, Elizabeth, Margaret, Ann, Robert, Bratton, and John Glasscon. It will be understood by my beloved wife, that if she should judge the one hundred and thirteen acres of land bequeathed above to my son James should be equal to his proportion of my estate, she will not feel herself under obligations to give him more, as it is not my will to give him said land over and above an equal portion with the rest. And I do hereby constitute and appoint my brother, Robert Ellison, executor, and my wife, Mary Ellison, executrix, of this my last will and testament. But should my wife Mary marry again after my decease, then and in that case it is my will that she be divested of the power given her above of distributing my estate, and that my estate, both real and personal, in that case be divided as the law may direct, yet so as not affect the title of my son James to the land assigned to him above."

The widow survived the testator, remaining unmarried, and during her life time conveyed to some of the children named parcels of real estate, as and for their respective shares thereof, but died seized of the remaining parcels. In an action by some of the children, asking for a construction of the will, and an equitable partition of the real estate.—Held:

1. That the wife took a life interest only in the real estate devised, with power to distribute the remainder among the children named in the will.

2. That the power so granted to the widow was not one of unlimited discretion, but required her to distribute the entire property among the children named, giving to each what she *bona fide* judged to be an equal portion.

3. That under the circumstances, the power never having been fully exercised, equity requires that the entire estate should be apportioned equally between all the children named, the partial distributions already made, together with the devise to James, to stand as advancements, and be accounted for as such, but not beyond the amount of the equal portion of the party so advanced.

4. That in adjusting such advancements, valuations should be estimated as of the date of the widow's death, and interest thereon accounted for from that time, but excluding from the estimate improvements made by the party.

5. Where the testator at his death held the legal title to land the equitable estate in which belonged to another, the widow had power under the will to convey the legal title to the person having the equity, and such lands will be excluded from the distribution.

Decree accordingly.

EVIDENCE—AGENCY.

Thompson, Dean et al., vs. King, Pennock and King.—Error to the Superior Court of Cincinnati.

McIlvaine, J. Held:

1. Although, as a general rule, the judgment of a Court of error reversing the judgment of an inferior tribunal for refusing to grant a new trial where it is claimed that the findings of fact are not sustained by sufficient evidence, will not be disturbed, yet, if upon review of all the testimony, it clearly appears that such findings were sustained by the weight of testimony, this Court upon error will reverse the judgment of reversal.

2. In an action by the shipper against the owner of a steamboat engaged in the business of common carriers, to recover for the non delivery of goods as per bill of lading, the defendants are liable only for so much of the goods as was actually received on the boat or delivered to some one authorized to receive freight on her account.

3. In such action, parol evidence is admissible for the purpose of explaining or contradicting the terms of the bill of lading, in so far as it purports to be a receipt for freight delivered to the boat.

4. The mere employment of an officer or agent for such boat does not clothe him with apparent authority to issue bills of lading for goods not on hand, or not delivered to one authorized to receive freight on account of the boat.

5. Where the agent of such boat carelessly issues a bill of lading acknowledging the receipt of freight not on hand or not delivered to a person authorized to receive it, the owners of the boat are not stopped, by reason of such carelessness, from denying the receipt thereof, although the shipper may have been misled thereby.

Judgment at General Term reversed, and the judgment at Special Term affirmed.

Henry Doughman, administrator of Elizabeth Doughman, deceased, vs. Daniel Doughman. Error to the District Court of Clermont County.

By the Court.:

Section 313 of the Civil Code, as amended April 15, 1867, provides that, "No party to a civil action shall be allowed to testify by virtue of Section 310, in any civil action where the adverse party is . . . the administrator of a deceased person," except as to facts which occurred after the decedent's death, &c.

Held—In an action by H., administrator of E., against D., the administrator H. was competent to testify, on his own behalf as administrator, to facts which occurred prior to the death of his intestate.

Judgment reversed and cause remanded.

GUARDIAN AD LITEM.

Hartford T. Rankin and others vs. Margaret A. Kemp and husband. Motion for leave to file a petition in error

By the Court—Held:

1. Under the act of July 1, 1858, (S. & C. 673, Sec. 14, 5,) which requires guardians of infants to "appear for and defend, or cause to be defended, all suits against the infant, the guardian is authorized to appear for an infant defendant to a petition for dower; and where he appears and answers as guardian, and his answer is received and acted on by the Court, the effect is the same as though he had been expressly appointed *guardian ad litem*, and had appeared and answered as such.

2. Where the answer of such guardian admits some of the facts stated in the plaintiff's petition, instead of denying them all, as required by the code, and the record shows that the case was heard "upon the petition, answer and exhibits," and that the Court found all the averments of the petition to be true, it will be presumed that the Court had sufficient evidence, in the exhibits or otherwise, to justify the finding. Motion overruled.

INDICTMENT—INSTRUCTION.

Thomas Callahan vs. The State of Ohio.—Error to the Court of Common Pleas of Hamilton County.

WEST, J. Held:

1. Where a pistol shot is discharged with criminal intent at one person, wounds another, who is at the time known to be in such position or proximity that his injury may be reasonably apprehended as a possible consequence of the act, a conviction on an indictment averring the shooting of the latter with intent, is good, under the twenty fourth section of the crimes act, and it is not error in the trial to instruct the jury accordingly.

2. On the trial of a criminal cause, the Court may properly refuse to give to the jury a specific instruction, which, though correct under a different state of facts, requires essential modification to prevent it from misleading the jury and excluding from their consideration the particular and material facts and circumstances of the case in hand.

3. If one, maliciously intending to kill, wound or maim B, by mistake shoots at and wounds A, supposing him to be B, a conviction on an indictment for maliciously shooting A, with intent, is good under the twenty-fourth section of the crimes act.

Judgment affirmed, and cause remanded.

JURISDICTION.

Jacob Renner vs. William R. Bennett. Error to the District Court of Montgomery County.

WELCH, C. J.:

1. Where the United States, without the consent of the State, purchases and uses lands for any of the purposes specified in Sec. 8. Art. 1. of the Federal Constitution, it acquires no jurisdiction over the land.

2. Where such purchase is made with the consent of the State, or with an express cession of jurisdiction by the State, Congress has power to relinquish or recede to the State the jurisdiction thus acquired, without abandoning the property or its legitimate use.

3. A jurisdiction thus acquired from a State, although exclusive while it subsists, is to be regarded as a mere suspension of the State jurisdiction, and therefore an act of Congress relinquishing such jurisdiction, and receding it to the State, is effective for that purpose, without any acceptance or assent by the State.

4 Jurisdiction thus acquired is not an original inherent power conferred upon Congress by the people; the eighth section of Article 1 of the Constitution makes no grant of such a jurisdiction, but merely prescribes a form in which it may be made by the State; and, therefore, Congress may relinquish it at pleasure.

5. The body of the act of Congress of January 21, 1871, relinquishing to the State jurisdiction over the place for the location of an asylum for disabled volunteer soldiers, is not so in conflict with the proviso therein, reserving the powers and rights theretofore conferred on the Board of Managers incorporated by Congress, that they may not stand together, and both have operation and effect.

6. The effect of said act is to restore to the State its jurisdiction, but without the power to violate the charter rights of the corporation, or rather of the United States claiming and enjoying them through and by the corporation, thus putting the State in the same relation to this corporation that it sustains toward such of its own corporations as have an irrevokable and inviolable charter.

7. Persons residing in said Asylum at the time of an election, after the jurisdiction thereover had been restored to the State, and for the year next preceding the election, are to be regarded as residents of Ohio for the entire year, within the meaning of Section 1 of Article 5 of the State Constitution, notwithstanding the fact that part of the year transpired while the jurisdiction was in the United States. Judgment reversed.

LIABILITIES OF RAILROAD COMPANIES.

The Pittsburgh, Fort Wayne and Chicago Railroad Company vs. Daniel Methoen. Error to the District Court of Wayne County.

McILVAINE, J.—Held:

1. If a statute in the nature of a police regulation gives a remedy for private injuries resulting from the violations thereof, and also imposes fines and penalties at the suit of the public for such violations, the former will not be regarded in the nature of a penalty unless so declared.

2. In an action brought by a private person to recover damages for the violation of a duty imposed upon the defendant by such statute, it is a compe-

tent and sufficient defense to show (unless precluded from so doing by the terms of the statute or by clear implication arising therefrom) that the plaintiff by his own negligence contributed to the injuries complained of; and it matters not, as to such defense, whether the contributory negligence of the plaintiff arose from the violation on his part of a duty imposed upon him by a statute or a common law duty.

2. In an action by the owner, against a railroad company, to recover damages resulting from an injury to his cow "by reason of the want or insufficiency of fences," &c., as provided by the first section of the act of March 25, 1859, (S. & C. 331), entitled "an act for inclosing railroads by fences and cattle guards," it appearing in the petition that the injury complained of was done subsequent to the taking effect of the act of April 13, 1865 (S. & S. 7), entitled "an act to restrain from running at large certain animals therein named," it is sufficient answer to allege, "that the plaintiff did not live along the line of its said road nor was his said cow grazing in any inclosed field adjacent thereto. That said plaintiff knowingly, willfully and unlawfully permitted his said cow to run at large on the highway and uninclosed lands adjacent to defendant's said railroad, whereby said cow went upon said road and was accidentally killed."

Judgments of the District Court and the Court of Common Pleas reversed; demurrer to answer overruled, and cause remanded, &c.

NEGLIGENCE.

The Pendleton Street Railroad Company vs. Rebecca Stallman, Administratrix, &c.

Error to the Superior Court of Cincinnati.

McILVAINE, J.—Held:

1. In an action for negligence, wherein ordinary care is the degree of diligence involved in the issue, and contributory negligence is set up as a defense, it is error to charge the jury that if the plaintiff, by his own fault, has contributed to his injury, the defendant must then show that he was without fault himself; and that no man can be shown without fault unless he has done all in his power to avoid the injury.

2. If the instructions to the jury on a question of law involved in the issue be manifestly erroneous, the judgment should be reversed, unless it clearly appears, from the whole record, that the party against whom it was committed could not have been prejudiced thereby.

3. Although an erroneous instruction given to the jury be afterward qualified by using apt words to express the true rule on the subject, yet if upon the whole charge it be uncertain what the rule given or intended to be given, in fact, was, the judgment should be reversed for the reason that the jury may have been misled thereby.

4. As a general rule, where a new trial is granted on a motion to set aside a verdict and grant a new trial, and a new trial and judgment are afterward had in the case, a reviewing court, upon a proceeding in error to reverse the last judgment, will not review the action of the Court below in granting a new trial.

Judgment reversed, new trial granted, and causes remanded, &c.

Supreme Court of Ohio.

NO CAUSE FOR NEW TRIAL.

John Hammond vs. Mary Hammond et al.—Error to the District Court of Athens County.

DAY, J. Held:

1. Where a motion for a new trial, on the ground that the verdict is not sustained by sufficient evidence, is overruled, and a reviewing court reverses the judgment of the inferior tribunal, for error in overruling such motion, and remands the case for a new trial, the judgment of the reviewing court will not be reversed by the Supreme Court, unless it clearly appears that the verdict was sustained by the evidence.

2. A judgment rendered in a proceeding in error will not be reversed for want of jurisdiction of the person of the defendant in error by the reviewing court, though he was not served with a summons in error, where the record shows that he appeared by counsel and submitted the case to the court on its merits.

3. Where the plaintiff in an action for land dies after final judgment is rendered against him, his heirs may prosecute a petition in error for the reversal of the judgment.

4. Where such judgment is rendered against a married woman and her husband who is united with her in the action, after her death, he may join with her heirs in a petition in error to reverse the judgment. Judgment affirmed.

OFFICER DE FACTO.

Ex parte Jacob W. Strang. *Habeas corpus.* Error of the Probate Court of Hamilton County.

WHITE, J.:

1. The acts of an officer *de facto*, when questioned collaterally, are as binding as those of an officer *de jure*.

2. To constitute an officer *de facto* of a legally existing office, it is not necessary that he should derive his appointment from one competent to invest him with a good title to the office. It is sufficient if he derives his appointment from one having colorable authority to appoint; and an act of the General Assembly, though not warranted by the Constitution, will give such authority.

3. By Section 174 of the Municipal Code, the Mayor, in the absence or disability of the Police Judge, is authorized to select a member of the bar to hold the Police Court, who it is declared shall have, for the time being, the jurisdiction and powers conferred upon Judges of Police Courts, and shall be styled "Acting Police Judges."

Held—That assuming (but without deciding the question) the power of appointment thus conferred on the Mayor to be authorized by the Constitution, yet the person acting under such appointment would be a Judge *de facto*.

Judgment affirmed.

PRACTICE—NEW TRIAL.

W. P. Cooke, *et. al.* vs. John Allvater. Error to the District Court of Cuyahoga County.

WHITE, J.

The defendants, on a case coming on for second trial, one of whom alone had entered demand therefor, claimed that such trial should be had as to all of them, which, being allowed by the Court, resulted in the verdict and judgment complained of.

Held—

That having claimed and been allowed the advantage of such trial, the defendants were precluded from objecting to the regularity of the steps taken to obtain it. Judgment affirmed.

PROCEEDS OF SALE—REALTY.

Wayne Griswood vs. Mary Frink.—Error to the District Court of Pickaaway County.

DAY, J.—Held:

The surplus of the proceeds of a sale of real estate by an administrator, remaining in his hands on the final settlement of his account, under the statute is to be considered and disposed of as real estate, and the widow of the intestate is not entitled to any part thereof in her capacity as one of the distributees of the personal estate of the deceased. Judgments of the District Court and Common Pleas reversed, and cause remanded for further proceedings.

PROMISSORY NOTE.

Horatio N. Phillips vs. Milo Dugan. Error, reserved in the District Court of Trumbull County.

DAY, J.:

In an action brought on a promissory note for a specified number of dollars payable by its terms in gold or silver, to recover the amount of the note and the premium on coin of that amount in United States Treasury notes. Held:

1. A recovery can not be had for the market value of the amount of coin called for in the note, in legal tender currency.

2. A judgment for coin should be rendered for the amount found to be due on the note.

3. Inasmuch as a general judgment for such amount might be satisfied by payment of the same amount in legal tender notes, such judgment not being made payable in coin, is erroneous.

4. A judgment for coin, by necessary implication, requires that coin should be made on final process issued thereon for the satisfaction of the judgment.

5. In actions requiring judgments payable in coin, the judgment for costs must be general, so that the costs may be paid in legal tender notes. Judgment of the Common Pleas reversed. Judgment for coin entered.

RAPE.

William Blackburn vs. The State of Ohio.—Error to the Common Pleas of Montgomery County.

WELCH, C. J.

1. It is at the age of puberty, and not at the age of majority, that a female ceases to be a "child," and becomes a "woman," within the meaning of the statute defining the crime of rape.

2. Emission is a necessary element in the crime of rape.

Judgment reversed and cause remanded for further proceeding.

RULE OF PRACTICE.

Herman Levi vs. R. J. Daniels. Error to the Superior Court of Cincinnati.

WELCH, C. J.

1. As a general rule, the Court will not go beyond the errors assigned to find others existing in the record, unless the latter be such as affect the jurisdiction of the Court.

2. Where the Court, being requested to state separately its conclusions of law and fact, makes a sufficient finding of the facts, and renders a final judgment thereon, the judgment itself is to be regarded as a statement of the Court's conclusion of law, within the meaning of the code.

3. When such finding of facts is imperfect, in that it is too general in its terms, and does not specifically find the facts in issue, but is not excepted to on that ground, and the record shows that it is sustained by the evidence, judgment will not be reversed on that account.

4. In such case, if it sufficiently appears from the record that the judgment was warranted by the facts so found, and by the evidence, it will not be reversed because the Court erred in its statement of the law applicable to a state of facts not found by the Court, or shown by the evidence. Judgment affirmed.

SLANDER—EVIDENCE.

John T. Alpin vs. Elizabeth R. Morton, administratrix. Error to the District Court of Guernsey County.

DAY, J.—Held.

1. Under the provisions of the 399th section of the Code, an action for slander does not abate by the death of the plaintiff during the pendency of the suit.

2. In an action for slander, where certain actionable words were charged in the petition to have been spoken of the plaintiff on a day named, and at sundry other times between that day and the commencement of the suit: Held, that, in the absence of a motion to separately state the different causes of action, or make them more definite, as authorized by the Code, any utterance of the words charged by the defendant between the day mentioned in the petition and the commencement of the suit, may be considered as a ground for recovery of damages. But evidence of the speaking of the same words by him after the commencement of the suit, is admissible only for the purpose of proving malice in the utterance of the words mentioned and relied on in the petition as a ground of recovery, and can not be considered as a foundation of a recovery, nor to increase the damages, further than as they effect the degree of malice with which the words, spoken within the time mentioned in the petition and relied on as a ground of recovery, were uttered.

3. A statement made by a physician that an unmarried female patient is pregnant, is not a privileged communication, unless it be made in good faith to one who is reasonably entitled to receive the information; and when made

to others, and the statement is false, he is not relieved from liability to the injured party, merely because on examination of the patient, he believed it to be true. Such belief, however, may be considered in mitigation of damages.

4. Query—Whether it is error to charge the jury, in an action for slander, that "in estimating the damages," they may take into consideration "the pecuniary ability of the defendant to respond," per Day, J. Judgment affirmed.

STATUTE OF LIMITATION--PLEADING.

William McNeely and wife vs. Thomas Langan. Error to the Court of Common Pleas of Hamilton County. Reserved in the District Court.

WHITE, J.—Held:

The possession necessary to bar an action for the recovery of real property, need not be continuous for the period of limitation in any one occupier. It is sufficient that the possession during such period was in the defendant and those under whom he claims; and, as to third persons against whom the possession was held adversely, it is immaterial, if successive transfers of the possession were in fact made, whether such transfers were by will, by deed, or by agreement either written or verbal. Judgment affirmed.

Margaret Mount, administratrix of William Mount, deceased, vs. Joseph F. Lakeman, Clerk of Millcreek Township, &c. Error to the Court of Common Pleas. Reserved in the District Court.

By the Court—Held:

1. An action to recover money received by a Township Treasurer and converted to his own use, as for money had and received by the defendant for the plaintiff, is barred by the limitation of six years, provided by Section 14 of the Civil Code, and is not governed by the limitation of ten years, provided in Section 17 or in Section 18 of the Code.

2. The action not being on the official bond of the Treasurer, the Township Clerk was not the proper party plaintiff, (S. and C. 1,356, Section 27,) although the Trustees of the township ordered him to sue for and collect the money. Judgment reversed.

TAXATION.

Augustus Carrier vs. Lewis J. Gordon, Treasurer. Error to the District Court of Paulding County.

WELCH, C. J.:

Tangible personal property situate in the State, and liable to taxation, does not become exempt from such liability by the fact that it has been purchased from the owner by a non-resident with the intention of transporting it beyond the State, and is merely awaiting the necessary opening of navigation for its removal, but has not, in fact, been started on its transit. Judgment affirmed.

VALID ASSIGNMENT.

Addison Shankin *et al.*, vs. Commissioners of Madison County. Motion for leave to file petition in error to the District Court of Madison County.

WEST J.—Held:

Digest of Recent Decisions.

1. The liability of a County Treasurer, incurred by his embezzlement of the public funds in his custody, is a sufficient consideration to support the assignment of a banker's certificate of deposit to the county, in reinbursement of the loss.

2. The transfer of such certificate by delivery, without indorsement, is a valid assignment, effectual to pass the property therein, if so intended; and the beneficial interest having vested thereby, subsequent indorsement by the administrators of the assignor can only operate on the naked legal title, the transfer of which, being a barren possession in their hands, can not prejudice his estate.

3. The warrant of the County Auditor required by Section 8 of "the act to establish the Independent Treasury of the State of Ohio," passed April 12, 1858, is neither a condition nor muniment of title; and the transfer of a banker's certificate of deposit, in a mode otherwise sufficient to pass the property therein to the county, will not be avoided by its deposit in the county treasury without the authority of such warrant.

4. County Commissioners are clothed with power to accept the assignment of such certificate on account of the liability of a County Treasurer incurred by his embezzlement of the public funds in his custody, and to maintain an action thereon against the makers.

5. The acceptance of such certificate, by the Commissioners, with knowledge of the embezzlement, on account of which it is transferred, does not place the county *in pari delicto*, so as to vitiate the transfer and to avoid recovery. Leave the file petition in error refused.

WRONGFUL EXPULSION FROM SCHOOL.

Philip Roe vs. Hannah Deming *et al.* Error to the Court of Common Pleas of Washington County. Reserved in the District Court.

By the Court: The father of a child entitled to the benefits of the public school of the sub-district of his residence, may maintain an action against the teacher of the school and the local directors of the sub-district, for damages for wrongfully expelling the child from the school.

Judgment reversed and cause remanded.

DIGEST OF RECENT DECISIONS.

ATTACHMENT.

Attachment of interest of a partner.—The resulting interest of a individual partner in an unsettled partnership, is not subject to attachment execution; and an attaching creditor can not maintain a Bill in Equity for an account of the partnership affairs. The attachment execution does not amount to a statutory assignment of the partner's interest. The bill is substitutional, and not ancillary to the attachment.—*Alter v. Brooke and Barrington et. al. Supreme Court of Penn. Opinion by Agnew, J. April 8th*, 1872.

APPEAL.—JURISDICTION.

Appellate power of Supreme Court of the U. S.—Where a plaintiff in error claimed in the court below, that he was entitled to have a note held by him made by the defendant in error paid in gold or silver coin under the Constitution, upon a proper construction of various clauses of that instrument, and the decision of the court below was against the right thus claimed, this court has appellate jurisdiction under the 25th section of the judiciary act of 1789, or the second section of the amendatory judiciary act of 1867, to review the decision. The case of *Roosevelt v. Meyer*, (1st Wall., 512,) overruled.—*Trebilsock, plaintiff in error, v. Wilson, et al. Supreme Court of the U. S. Dec. Term*, 1871.

ADMIRALTY.

1. Jurisdiction in Admiralty.—A libel in Admiralty will not lie for wharfage as a maritime lien, the remedy in the Common Law Courts is adequate.—*Storage Co. vs. The Barque Thomas. Circuit Court of U. S. E. D. of Penn. Opinion by McKennan, Circuit Judge. April 1st.*, 1872.

2. Locus, or territory, of maritime jurisdiction.—The admiralty and maritime jurisdiction of the United States is not limited by the statutes or judicial prohibitions of England.

The locus, or territory, of maritime jurisdiction, where torts must be committed, and where business must be transacted in order to be maritime in their character, extends not only to the main sea but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt, or fresh, tide or no tide.—*New England Mut. Marine Ins. Co. v. Dunham. Supreme Court United States. Opinion by Bradley, J. March* 27, 1872.

3. Contracts.—As to contracts, the true criterion whether they are within the admiralty and maritime jurisdiction, is their nature and subject matter, as whether they are maritime contracts, having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made.

In view of these principles it was held that the contract of marine insurance is a maritime contract, within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of the United States Courts.—*Id.*

BREACH OF PROMISE TO MARRY.

When promise may be considered broken.—The defendant promised the plaintiff that he would marry her on the death of the defendant's father. Before the death of his father the defendant announced his absolute determination never to fulfill the promise. *Held* (reversing the decision of the Court of Exchequer), on the authority of *Hochester* v. *De la Tour*. 2 E. & B. 678; 22 L. J. 455, Q. B., that the plaintiff might at once regard the contract as broken in all its obligations and consequences, and sue for the breach thereof.

Frost v. *Knight. Exchequer Chamber, February* 8, 1872; *reported* 26 *L. T. R.* 77.

BAILMENTS.

Duties and Liabilities of Bonded Warehousemen.—This was an action against Macklin, a bonded warehouseman, to recover the value of whisky consumed by fire, alleged to have originated through negligence, and which whisky might, as alleged, have been saved by removal after it was endangered. The trial in the Court below resulted in a verdict and judgment for $8,000 for the plaintiffs.

Held—The appointment by the Internal Revenue Department of Storekeepers, who are invested with the joint custody with the warehouseman of the warehouse and the goods stored therein, does not lessen in any degree the diligence which the latter, as bailee for hire, is by the general law required to exercise to prevent fire from being communicated to the house or the goods in his custody. The right of the Store keeper to ingress into the warehouse for the discharge of certain duties imposed upon him by law, does not exonerate the warehouseman from the use of the least ordinary diligence in preventing the goods stored therein from being damaged or destroyed by the recklessness or carelessness of that officer. What will constitute proper diligence in this regard must, to a very great extent, depend upon the character of the duty being discharged by the storekeeper, and the power of the warehouseman to supervise or control his actions. But, as they are of equal authority in opening and closing the house, and, as it is the duty of the warehouseman to be present when it is closed, he can not complain that he is held to the exercise of reasonable diligence in seeing that no combustible matter is left in the house in a condition likely to become ignited; and he can not be excused because of the fact that it was the store keeper who was guilty of this character of carelessness.

Section 19 of the act of Congress approved March 2, 1867, forbids, under a penalty, the removal of whisky from a warehouse after sunset and before sunrise. That appellant might have disregarded this provision of the law, and that it was his duty to do so when its observance would inevitably result in the destruction of the property intrusted to his care, can not be doubted; but it must be borne in mind that the necessity which will excuse or warrant the violation of the law must be of that character which ordinary energy and intrepidity can not resist and overcome, and so long as appellant had reason to believe that the fire could and would be extinguished by the means at hand which were being used for that purpose without damage to the whisky, he would not have been excusable for the violation of the statute in question. So long as appellant did not have the legal right to begin the removal of the whisky he can not be regarded as in default for failing to act. (The Argo, Gallison's Rep., 150.) Rules and regulations of the Treasury Department, when pertinent, may be considered by the Court in giving instructions, but they are wholly inadmissible as evidence to the jury.

Judgment reversed.

Macklin vs. *Frasier, et. als. Kentucky Court of Appeals. To appear in Vol. 8 of Bush's Reports.*

CHATTEL MORTGAGE.

Removal of goods out of the State.—A sale, in Maryland, of personal property by chattel mortgage, duly recorded, is valid against all persons without delivery of possession.

The rule of the common law prevails in Pennsylvania, by which a sale of personal property, unaccompanied by delivery of possession, is void as against the intervening rights of creditors and purchasers.

Between the parties to such Maryland chattel mortgage, a Pennsylvania Court would enforce its validity.

But where the mortgage permits the mortgagor to retain possession of the property, and bring it into Pennsylvania and sell it to a *bona fide* purchaser, he loses all right to the property.—*McCabe et al. v. Blymyre, Common Pleas of Bedford County, Penn., 16th Dist. Opinion by Hall, P. J. March 8th*, 1872.

COIN CONTRACT.

Note Payable in Specie.—Where a note is for dollars, payable by its terms, in specie, the terms "in specie" are merely descriptive of the kind of dollars in which the note is payable, there being more than one kind of dollars current recognized by law; and mean that the designated number of dollars shall be paid in so many gold or silver dollars of the coinage of the United States. *Trebilcock, Plaintiff in Error*, v. *Wilson, et. al. Supreme Court of the U. S., Dec. Term.*

The act of February 25, 1862, in declaring that the notes of the United States shall be lawful money, and a legal tender for all debts, only applies to debts which are payable in money generally and not to obligations payable in commodities or obligations of any other kind.—*Id.*

When a contract for money is, by its terms, made payable in specie or in coin, judgment may be entered thereon for coined dollars. *Bronson* v. *Rhodes* (7 Wallace, 229,) affirmed.—*Id.*

DYING DECLARATIONS.

How far Admissible as evidence.—On the trial of Lieber for murder, the Court below admitted as dying declarations certain statements which not only conduced to identify the defendant as the perpetrator of the alleged homicide, and to establish and explain the circumstances of the *res gestæ*, but also purported to disclose former and distinct transactions not relating to the particular facts constituting the subject matter of the charge or the identification of the defendant, but from which the jury might have inferred the existence of malice toward the deceased.

Held.—Dying declarations are admissible as evidence only to show the act of killing, and the circumstances immediately attending it, and forming a part of the *res gestæ*. (Whar. Am. Crim. Law, 675; Russell on Crimes, 761; 1 Greenleaf on Ev., 156.) The Court erred in going further than this. *Lieber vs. Commonwealth. Kentucky Court of Appeals. To appear in Vol. 8, of Bush's Reports.*

Digest of Recent Decisions.

EVIDENCE.

1. Proof of Ownership under Mechanics' Lien Law.—The defendant signed the contract for the work in his own name, and he lived in the house on which the work was done. No proof was given to show that any other person owned the property. A question was asked of the defendant at the trial, if he owned the property. This was objected to and excluded.

Held, that this ruling was not erroneous, as the question asked for the ownership at the time of the trial, and not at the time of filing the lien, and it was not a proper way to prove a title. The witness might have been asked for facts showing title in another, or he might have produced a deed to another and showed possession in the grantee under the deed. There was presumptive evidence of ownership, and sufficient to sustain the proceeding. As between these parties, judgment in favor of the plaintiff should be affirmed.—*Coats v. Dickenson.—Supreme Court of N. Y., March Term*, 1872.

2. Admissions of Partners after the Dissolution of the firm.—The only proof to sustain the finding in favor of plaintiff, in the case at bar, for a considerable amount, consists of the admissions and acts of one of the defendant's firm, after the partnership was dissolved, and after the plaintiff's firm knew of the dissolution.

Held, that this testimony was inadmissible under the authorities (2 J. R. 300; 4 id. 224; 4 Paige, 17; 9 Cow. 57, cited); and the rule has not been changed as laid down in these authorities. The question was not presented in *Payne v. State*, 39 Barb. 634; and in *Robbins v. Fuller*, 24 N. Y. 570, the question was, whether one partner, after dissolution, could authorize an attorney to sell a partnership asset. It was held, he might. The court say, one partner might sell or receive, and could empower another to do what he could do. Judgment in favor of plaintiffs reversed.—*Shaler v. Alden et al. Supreme Court of N. Y., March Term*, 1872.

EXEMPTION.

When claim must be made.—A claim for exemption as against an attachment execution issued by a justice of the peace, is in time if made before the justice at the return of the writ.—*Yost and Yost v. Hoffner. Supreme Court of Penna. Opinion by Thomson C. J. Feb. 5th* 1872.

INCOME TAX.

Liability to re-assessment and penalty for false return.—1. An assessor of Internal Revenue has power to re-assess the income tax of a citizen who has already paid the tax first assessed against him.

2. The imposition of an addition of one hundred per centum, as a penalty for the return of a false or fraudulent valuation is constitutional.

Geo. Doll v. Geo. C. Evans and John Lamon. Circuit Court of U. S. Penna. Opinion by McKennan, Circuit Judge. April 1. 1872.

INJUNCTION.

Right of creditor not holding lien.—A corporation will not be enjoined from issuing bonds or selling personal property on complaint of a creditor,

not holding a lien, or other legal claim against the property; much less upon a claim for unliquidated damages on a guarantee.

The Erie Railway Co. v. The Wilkesbarre Coal and Iron Co. Supreme Court of Penna. Opinion by Agnew J. April 8th, 1872.

INSURANCE.

Assent to assignment of policy: principal and agent.—Appeal from judgment in favor of plaintiff. One Weeks held a policy of defendant's company issued November 14, 1868. About a month after the issuing of the policy the agent at Albany, who had effected the insurance died. One of a firm who acted as defendant's general agent at Troy, gave defendant's papers and books at the Albany agency to one Holmes. Weeks sold the property covered by the policy to plaintiff and assigned the policy to him also, and Holmes indorsed upon the policy in writing: "This policy to inure to the benefit of C. S. Buchanan," and signed it. The policy thus indorsed, and with the assignment written on it, was sent to the defendant's main office with a request, that the company consent to the transfer. The company, upon the receipt of this letter, returned to plaintiff the unexpired premium and canceled the policy which permitted such a course. The reason assigned to plaintiff for the cancellation being that the company had examined the risk and would not consent to continue it longer. Before the letter and inclosed check for returned premium reached plaintiff, the property burned up. *Held*, that the company ratified the assignment and the acts of Holmes. No objection was made to the sale, which would for itself destroy the policy, but the company acknowledge the assignment, acknowledge the consent of Holmes, and returned to the plaintiff the unexpired premium as the owner of the policy, and the person who was entitled to be treated with as such according to the stipulation of the policy. Judgment affirmed.

Buchanan v. The Westchester County Insurance Co. Supreme Court of N. Y. March Term 1872.

NEGLIGENCE.

1. **Appeal from judgment in favor of plaintiff.**—The defendants so overloaded their car that there was no room for the plaintiff within it, or upon the rear platform. He was a boy, of thirteen years of age, and was told by the defendant's conductor to get upon the front platform. This he, with two other boys, did. In addition, there were one or two others on the front platform, when the plaintiff and his companions got on. When the car got near the Prospect park gate, there was a rush of passengers from within the car upon the platform, and the plaintiff was shoved off, but re-instated himself upon the platform, without injury. Another rush was made by the passengers from within upon the front platform, and the boy was shoved off a second time. His foot passed under the wheel and was destroyed permanently. *Held*, the court properly refused to nonsuit the plaintiff, and the facts proven will uphold the verdict. Though the front platform is a place of great danger, the boy was not negligent in being there, at the request and direction of the conductor, if the car was full inside. The company's negligence is made out

when it permits it to be possible for the passengers of a crowded car to rush upon the forward platform, where three or four boys are standing, while the car is in motion, and thus produce this almost inevitable result. Passengers are forbidden to get on or off the front platform, because of the danger, and yet a crowded car full of passengers are permitted to rush upon it after the company have put small boys there, whereby one of the boys is carried under the wheel of the moving car and injured for life. The company did not take that care of the boy which the law gave him the right to receive. Judgment affirmed. *Schneider by his guardian*, v. *The Brooklyn City Railroad Company. Supreme Court of N. Y., March Term*, 1872.

2. Railway bound as common carrier to passenger who pays no fare.—At the former trial of this case the Court reversed the judgment below and ordered a new trial. See Alb. L. J., vol. IV., p. 92. Upon appeal from the judgment at the new trial, *held*, the negligence of the defendant is clearly established, and there is no claim made that there was any contributory negligence on the part of defendant. The jury has found upon the only disputed question of fact. As the case now stands the defendant's conductor invited the plaintiff to ride on a coal train of defendant's in a caboose car, without fare, and did not inform him that the defendant did not carry passengers on such trains, nor that he had no authority to permit plaintiff to ride on the train as a passenger. The question as to defendant's liability is not free from very considerable doubt, but the court is inclined to think that if the plaintiff was permitted by defendant's conductor to ride upon its coal train, when he really had no authority to give such permission, in the absence of notice to the plaintiff of such a lack of power, the defendants were bound as to the plaintiff as a common carrier, and that it makes no difference that the plaintiff was not charged with fare. Judgment affirmed. *Eaton* v. *The Delaware, Lackawanna & Western Railroad Co. Supreme Court of New York, March Term*, 1872.

3. Action against common employer by one servant for injury occasioned by negligence of another servant—The plaintiff's intestate and one Philbrick were both servants of defendant, but in different grades of employment at the time of the accident causing the injury. The deceased was subject to Philbrick and both were at the time engaged in the same particular employment. The judge instructed the jury that if the captain (Philbrick) stood in the place of defendant and was negligent, and plaintiff's intestate was not negligent, that the defendant was liable for this injury. *Held*, assuming, as we must do, for the purpose of considering this appeal, that the defendant employed good and trusty agents, furnished a good boat with all the appointments adequate to the employment of defendant's company, the rule laid down as to defendant's liability was erroneous One servant can maintain no action against a common employer for an injury occasioned by the negligence of a superior agent in the same general business. 17 N. Y. 153; 39 id. 468, cited. Judgment in favor of plaintiff reversed and new trial ordered. *Owens, administratrix, etc.*, v. *The Steam Derrick Co. Supreme Court of N. Y. March Term*, 1872.

Digest of Recent Decisions.

RAILROAD.

1. **Liability for damages from fire: negligence.**—A railroad company is liable for damages resulting from fire communicated by cinders emitted from an engine operated on its road, in consequence of the negligence of its servants or a defect in the engine, or want of the best contrivances in use for the prevention or spread of fire.—*Jackson v. The Chicago & N. W. R. R. Co., to appear in 31st Iowa.*

2. **Effect of statute penalty.**—Act of 1862, section 2, chapter, 169, laws of the Ninth General Assembly, making railroad companies liable to a penalty for violations of its provisions, in failing to fix and post rates of fare and freight, and for overcharging, was not intended to deprive a person from whom overchargers were collected, from recovering the amount paid by him in excess of the rates fixed. He may, in an action against the company, recover the amount wrongfully collected, also, the penalty provided by the act.—*Fuller v The Chicago & N. W. R. R. Co., to appear 31st Iowa.*

3. **Estoppel.**—Whether the plaintiff could recover the overcharge if he knew at the time of payment that it was in excess of the rates fixed, *quere.* But if he was ignorant of that fact at the time, he could recover.—*Id.*

4. **Character of intent.**—The word "willfully, as used in said section, does not imply the idea of malice; and if it be shown that the railroad company designedly omitted to do the things enjoined by the act, it will be sufficient to fix its liability to the penalty prescribed. Whether such omission was by design or through mistake or inadvertence is a question of fact for the jury. —*Id.*

5. **Evidence: Declarations.**—Evidence of the plaintiff's declarations to the drayman who delivered the goods to him, to the effect that he thought the freight charges were too high, was held admissible on the part of plaintiff as showing a fact connected with the payment of the overcharge.—*Id.*

6. **Constitutional law: Commerce between the states**—The aforesaid section is not in conflict with article 1, section 8 of the constitution of the United States, on the ground that it infringes on the right of Congress to regulate commerce between the several States. Such acts are in the nature of police regulations indisputably within the legislative power of the State.—*Id.*

REPLEVIN.

1. **Right to recover where possession is restored.**—When, in an action of replevin, the property replevied is restored to the possession of the defendant before his rights in respect thereto are determined, this fact will defeat his claim for the *value* of the property, whether such restoration be by act of the plaintiff or by process of law.—*Harrow v. Ryan and Ryan, to appear in 31st Iowa.*

2. **Rule applied.**—Goods belonging to R. & Co. were taken under a writ of replevin in an action against R. (one of the firm of R. and Co)., and the next day R & Co. instituted a second action of replevin and acquired, under a writ issued thereunder, possession of the goods. In a day or two after one H.

instituted a third action of replevin and replevied the goods from R. & Co. R. & Co. became intervenors in the action against R., and claimed judgment for the value of the goods, which it was found belonged to them. *Held*, the possession of the goods having been restored to them under the writ issued in the second action of replevin instituted by them, although they lost it again under the writ issued in the third action instituted by H., that they were not entitled to recover for the *value* of the goods as intervenors in the first action against R.—Id.

3. *Held*, also, that R. was not entitled in the first action against him to recover for the value of the goods, as, being a partner of the firm of R & Co., their possession, acquired under the writ issued in the action commenced by them, operated in contemplation of law as his possession.—Id.

4. **Where proceedings are stayed by injunction.**—Where proceedings in an action of replevin are enjoined under bill in chancery, but the decree merely settles the right of the parties in respect to the ownership of the property, and contains no order for its return, or adjudication respecting its value, these matters should be disposed of in the replevin action, and either party be permitted to introduce evidence to show the value of the property taken under the writ.—*Dehr v. Lampton, to appear in* 31*st Iowa.*

TAXATION.

Insurance Companies.—The annual premiums of an insurance company, being in the nature of an income, are not subject to taxation as personal property. Following The City of Dubuque v. The North-Western Life Insurance Company, 29 Iowa, 9.—*The City of Burlington v. The Putman Insurance Company, to appear in* 31*st Iowa.*

TAX SALE.

1. **Warrant: Conclusiveness of deed.**—A warrant is not an indispensable pre-requisite to the validity of a tax sale, and, therefore, the law making the deed conclusive evidence that the requirements of the statute in that respect were complied with, is constitutional. Following Parker v. Sexton, 29 Iowa, 421.—*Hurley v. Powell, Levy & Co., to appear in* 31*st Iowa.*

2. **Proof of publication.**—For like reasons the deed is conclusive evidence that the requirements of the statute (Rev. § 771) respecting the certificate and affidavit of due publication were complied with.—*Id.*

3. **Error in taxes.**—That the taxes were paid for one of the years for which the land was sold will not invalidate the sale. Following Eldridge v. Kuehl, 27 Iowa, 160.—*Id.*

4. **Effect on prior delinquencies.**—A sale of land for taxes frees it in the hands of the purchaser from any and all liens thereon for delinquent taxes for prior years.—*Preston v. Van Gorder, to appear in* 31*st Iowa.*

TRADE MARKS.

1. **Office of a trade mark.**—The office of a trade mark is to point out distinctly the origin or ownership of the article to which it is affixed, or, in other words, to give notice who was the producer. *Delaware & Hudson Canal Co.* v. *Clark. Supreme Court U. S., Dec. Term*, 1871.

Digest of Recent Decisions.

What entitles a name to protection.—To entitle a name to protection as a trade mark, the right to its use must be exclusive; and not one which others may employ with equal truth for the same purpose.

An individual has no right to be protected in the exclusive use of a sign or symbol which would practically give him a monopoly of goods other than those produced by himself.

The name of a region of country can not be appropriated to the exclusion of others who produce, or who sell, a similar article coming from the same region; therefore, as complainant is not the sole owner of the coal mining district of the Lackawanna, he has no exclusive right to the use of the word. "Lackawanna Coal."—*Id.*

WARRANTY.

1. **Affirmations of quality—Auctioneer.**—A bare affirmation of the soundness of an animal exposed to sale will not in itself amount to a warranty. To constitute it such, it must be shown that it was intended to have that effect; nor will words of naked praise or simple commendation of property offered for sale constitute a warranty.—*McGrew* v. *Forsythe et. al., to appear in* 31*st. Iowa.*

2. **Rule applied.**—An auctioneer, in offering for sale a lot of sheep, stated to the crowd, "Here is a nice lot of young, sound sheep" The sheep proved to be diseased at the time, but this fact was not then known, to either party; *held*, without determining the question whether the owner was bound by the representations of the auctioneer, that the representation did not amount to a warranty nor render the owner liable.—*Id.*

BANKRUPTCY DECISIONS.

From the National Bankrupt Reg., Vol. 6, No. 4.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Creditors having security must prove their debts.—Creditors of bankrupt having security, whether by judgment, mortgage or otherwise, must prove their debts against the bankrupt and foreclose the liens under the authority of the court in bankruptcy, or they may not only be barred of their debt, but may also lose the benefit of their securities.

When title to debtor's land will not pass as against the assignee—A sale of the debtor's land by virtue of an execution issued and levied after the filing of the petition in bankruptcy, will not pass the title to the land as against the assignee, although the judgment was entered and the lien created prior to the bankruptcy.

When property and assets are in custodia legis.—After the commencement of the proceedings in bankruptcy, all the property and assets of the bankrupt are *in custodia legis*, within the control of the bankrupt court only, and no other tribunal can interfere with its process.

It is not essential to the title of the assignee that the assignment to him by the register should be recorded within six months from its date.

When title of the assignee takes effect.—The title of the assignee takes effect by relation from the commencement of the proceedings in bankruptcy, and the recording is not required for the mere purpose of giving notice to purchasers.

To what property the limitation of two years applies—The limitation of two years in section two of the bankrupt act applies only to property held adversely to the bankrupt and his assignee.

When cause of action accrues to the assignee against purchaser under a judgment.—Where the bankrupt fraudulently conveyed his lands to avoid a judgment, a purchaser under the judgment and a sale made under execution after proceedings in bankruptcy commenced, can not defend on the ground that the assignee did not commence suit to set aside the execution, sale and deed within two years after the assignment. No cause of action accrued to the assignee against such purchaser until he acquired his title under the judgment and execution sale.

Bankrupt's property may be sold free of encumbrances.—The bankrupt court may order a sale of the bankrupt's property free and clear of encumbrances, and the secured creditor will then have his remedy only against the fund in court. If the secured creditor fails to prove his debt and proceeds against the fund, he does so at his peril.—*Davis, assignee, v. Anderson et al.*

UNITED STATES DISTRICT COURT—KENTUCKY.

Where money belonging to a third party which was applied by the bankrupt in payment of his own debts, was recovered by the assignee, must be distributed among creditors generally.—A. consigned goods to B. with orders to sell them and take negotiable notes payable to his order. B. sold the goods to C. taking negotiable notes payable to himself instead of to A. At the time of the sale, C. was accommodation endorser for B. to a large amount. B. discounted the notes above mentioned and paid the proceeds to C. to apply toward taking up the notes on which C. was endorser. B. was insolvent at this time, and shortly thereafter was adjudged a bankrupt. His assignee brought suit and recovered the amount thus paid to C. on the ground that he, C., had reasonable cause to believe B. was insolvent when he received the money. A. filed a bill in equity to recover the money in the hands of the assignee, claiming that as it never belonged either to B. or C. he ought to be allowed to assert his right to it. The court held that it was not *shown* that the money paid to C. by B was the product of the sale of A's goods, that although the bill alleges the whole of it was thus derived, and the allegation is not denied by the answer, the allegation is not on this account to be taken as true, that it is only an allegation of some fact which is presumed to be within the knowledge of the party answering, that can be taken as true, simply because it is not denied. The court further held that the fund having been recovered not in virtue of any right in the complainant personally, but in virtue of the rights of the bankrupt's creditors generally and in virtue of the clear legal right of all the creditors, under the bankrupt law, it must be distributed among them generally and not given to one.—*White v. Jones, assignee.*

UNITED STATES DISTRICT COURT—W. D. WISCONSIN.

Assets means the entire estate and not balance.—The term assets in the thirty-third section of the bankrupt act as amended July fourteenth, eighteen hundred and seventy, is not used to express the net balance to be distributed among the creditors, but means the entire estate of the bankrupt, irrespective of the use to which it may be appropriated by the court. Hence, where the estate was originally sufficient to pay fifty per cent. of the debts proved, but a large part has been wasted by litigation, the bankrupt is entitled to his discharge without the assent of his creditors.—*In re Kahley et al.*

Legal Items.

A bar association has been formed in Cincinnati, with the Hon. Alphonso Taft as its president.

Two men, convicted of petit larceny, were publicly whipped at the jail in Henrico County, Virginia, recently. An exchange says that everybody present seemed disgraced and shocked by the barbarous exhibition, which is the firs. public whipping given under color of law in Virginia since the war.

In *Ewing* vs. *Thompson*, 66 Penn. St., 382, it was held that an action could be sustained for the breach of a parol contract for the sale of lands; but that the measure of damages is the actual consideration passing between the parties. The validity of parol contract of this chararter is declared by statute in Pennsylvania.

The latest novelty in divorce jurisprudence comes from London, where a woman met the petition of her lord by the plea that she had been led into evil solely through the plots of an agent employed by her husband to watch her movements. Her defense met the approval of Lord Penzance, who decided that the husband was responsible for the acts of his agent.

The managers of the Barnard impeachment case, says the *Albany Law Journal*, met in that city on Tuesday, the 25th of June, for the purpose of selecting council to aid the prosecution—Messrs. Francis Kernan and George F. Comstock having declined to act. The Hon. Charles O'Conor was invited to take the position of leading counsel, but has not returned a decisive answer. Mr. John E. Parsons, of New York, and Ex-Judge Daniel Pratt, of Syracuse, were also selected. The Hon. Joshua M. Van Cott has been heretofore retained.

A French will has recently come to light which is a specimen of genuine oddity. This singular testamentary document was made by a Capuchin Monk, well known in the Faubourg St. Jacques, where many poor persons were supported by alms solicited and collected by him. His whole inheritance, on his

death, was found to be his breviary, frock, cord, a wallet, and a volume by M. Thiers. His will was discovered among his papers, and reads as follows: "I bequeath, 1st, to the Abbe Michaud my breviary, because he does not know his own; 2d., to M. Jules Favre my frock, to hide his shame; 3d., to M. Gambetta, my cord, which will prove useful one day round his neck; 4th., to M. Thiers, his own work, that he may read it over again; and 5th., to France, my wallet, because she may shortly have occasion for one to collect alms."

Theophilus Parsons never had his superior at the bar nor his equal on the bench, in Massachusetts. When he took his seat on the latter in 1806, business had so accumulated on the County Docket that few cases could come to trial in less than three years. Judge Parsons resolved that the dockets should be cleared. No delays were allowed, the cases took their turns, and counsel and clients were made to understand that they must go to trial when called. A new face of things was soon visible in the courts, and all but the lawyers were satisfied. They said that the chief justice was arbitrary and overbearing, especially as he would never permit an argument to be made to the jury unsupported by evidence. He stopped Mr. Dexter in an argument one day, on the ground that he was trying to persuade the jury of that for which there was no evidence. The latter became quite angry, and replied: "Your honor did not argue your own case in the way you require us to." "Certainly not," was the reply, "but that was the judge's fault, not mine." In a trial of importance in Boston, Mr. Otis offered some testimony, which Judge Parsons ruled out. The former submitted, but in his argument was beginning some allusion to it, when the Judge said, "Brother Otis, that will not do; you know that evidence was ruled out." But it was very important to the case, and shortly after Mr. Otis referred to it again. Then Judge Parsons said, "Mr. Otis, please understand and remember that fact is not in the case, and is not to be brought in thus indirectly." Mr. Otis again submitted and apologized; but with characteristic pertinacity before long again ventured upon an allusion to it. "Sit down, Mr. Otis; sit down sir," was the stern command; and without permitting him to say any thing more, the Judge rose and charged the jury.

There are in the United States one hundred and thirteen savings banks, without capital stock, that declare no dividends, but receive and invest money for the exclusive benefit of their depositors, paying interest on the deposits. These institutions have accumulated from their earnings and unclaimed deposits, large surplus or contingent funds, some of them amounting to millions of dollars. From 1864, when the first internal revenue law was passed, up to the present time, the liability of these banks to taxation on their surplus funds has been a disputed question. At the instance of Bowery Savings Bank, of New York, Commissioner Rawlins heard lengthy arguments from some of the most distinguished lawyers in the country, and decided that the banks were not liable. Subsequently, Commissioner Delano affirmed that decision. The question was again argued before Acting Commissioner Douglass, and he

decided that the banks were liable. Under this decision, Assessor Errett, of Pittsburg, Pa., assessed the tax on the surplus funds of the Dollar Savings Bank of that city. The officers of the bank refused to pay, and the claim was placed in the hands of United States Attorney Swoope for collection. After he had instituted the suits General Pleasanton was appointed Commissioner. He, after another argument, overruled the decision of Commissioner Douglass and instructed Mr. Swoope to discontinue the suits against the Dollar Savings Bank. This Mr. Swoope refused to do, unless the order came from the Attorney General, to whom he protested against the discontinuance, upon the ground that all these banks were clearly liable to the tax. The Attorney General declined to order the suits stopped, and instructed Mr. Swoope to proceed and obtain a judicial determination of the question.

During the last term of the United Circuit Court held at Pittsburg, the case was tried, the jury rendering a special verdict. The argument on the legal question was made by Mr. Swoope for the Government, and Robert Robb, Esq., for the bank and Judge McKennan delivered the opinion. Under this decision the Government is entitled to the tax from all these banks on their suplus funds since 1864, which will amount to several millions of dollars. It was a test case, and is the first judicial decision of the question that has been so embarrassing to the Revenue Department.

Book Notices.

REPORTS OF CASES DECIDED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES WITHIN THE SOUTHERN DISTRICT OF OHIO. Edited by Lewis H. Bond, Counselor-at-Law. Published by Robert Clarke & Co., Cincinnati. Vol. 1, price $7.50.

This volume of reports contains some of the ablest opinions delivered by Judge Leavitt, from 1855 to 1865, and discusses with clearness and comprehensiveness, some of the most subtle points of law. Col. Bond was very fortunate in his selection, which comprises the more important branches of the law, and the profession will undoubtedly be thankful for the omission of the publication of such cases as have arisen under the Fugitive Slave act, it not being probable that slavery will ever have again an existence in this country. This volume contains also several important patent cases, raising questions of Abandonment, Assignment, Combination, Evidence, Foreign Use, Infringement, Injunctions, License, Novelty, Pleading, Practice, Re-issue, Specifications, &c., the reading of which will be of no little value to the practitioner in that particular branch of the law. It is therefore with pleasure that we recommend this volume of reports to the bar, and feel confident that it can be perused and consulted by the profession with the greatest profit. It contains 661 pages, handsomely printed on good paper, and is bound in leather.

Just as we are going to press we have been furnished with the 2nd volume of Bond's Reports, and also with Hanover's new Treatise, "Law of Horses," both of which will be more fully noticed in our next issue.

THE

AMERICAN LAW RECORD.

VOL. 1. SEPTEMBER, 1872. NO. 3.

RESPONSIBILITY AND DISEASE.

By J. H. BALFOUR BROWNE, Barrister-at-Law, author of "The Medical Jurisprudence of Insanity."

"Every stupid man, every cowardly man, and every foolish man, is but a less palpable madman."—*Carlyle.*

THE question as to what ought to be the test of insanity in courts of law is of sufficient importance to require a definite answer, and owing to the prominence which has been given to it in connection with certain recent cases, is of sufficient interest to insure its consideration by a great many persons who do not belong either to the medical or legal profession. There seems to be little doubt that, owing to the more thorough training which is bestowed upon members of the medical profession, and owing also to the better scientific methods which have been so largely made use of in our days, a great many persons who were formerly regarded as sane have come to be looked upon as mad. So much so, that there are those who hold that the increase of insanity which has been so persistently asserted in recent times, is in reality only an apparent increase, and that the greater number of known lunatics is to be accounted for rather by an emphasis on the words "number" and "known," than on the words "number" and "lunatics." This fact, then, may to some extent account for the greater frequency with which the plea of insanity is pleaded in relation to judicial inquiries, it being certain that many persons are now recognized as insane who would formerly have been regarded as in a state of perfect mental health. Some people have thought that that fact alone was a sufficient ground for a condemnation of the existing test of insanity, which is, to all intents and purposes, almost the same which existed before those advances which

have raised medical psychology from a body of empirical opinions into a science. They hold, with some show of reason, that law must conform itself to scientific truths. The will of man against the will of nature is like an empty scale, on a hair-balance, against a loaded one. Absolute facts have a grim way of stultifying arbitrary laws. And only time is required to enable true science to assimilate all laws to its rules. There is plausibility in these arguments, but they require to be anatomized before we can say whether they are true or false.

Upon these and other grounds, then, which we shall examine hereafter, medical men have insisted upon a change in the law in respect to insanity, and at the present time a committee, consisting of medical men and lawyers, is being formed, with a view to the amendment of the law in so far as the tests of insanity are concerned. The time is not inopportune. The public has a right to have the case for and against amendment laid before it, and the public is, I am convinced, capable of arriving at as satisfactory a conclusion with reference to this matter as any medical man or lawyer, or as any committee consisting of members of these two learned professions. Medical men, then, assert that insanity is a disease, and a disease of body, and lawyers, so far as I know, are not inclined to deny this assertion. If you assured a lawyer that the intention to enter into a contract was due to certain molecular changes in the grey matter of the brain, it would not affect his theory that the essence of a contract is consent. He has nothing to do with thought as thought, or with the physical basis of thought; he concerns himself only with thought when it becomes act. His province is not mind; that he leaves to the psychologist. His province is not body; that he leaves to the physician. But his province is conduct. Now, just as the etiology of consent does not matter to him in relation to the law of contracts, so to some extent the fact that insanity is a disease is of as little importance to him in relation to medical jurisprudence. This shall be considered at greater length in a subsequent part of this paper. At the present time, I am anxious to place the position of medical men in relation to this question clearly before my readers.

Medical men seem to be under the impression that the object of the law, in all cases in which the question of sanity and insanity is in the cognizance of a court of justice, is to discover whether insanity *really exists or not*, and that impression is erroneous. The object of the law in all such cases is, first, to discover whether insanity can be *proved to exist*; and, secondly, to discover whether that insanity is of such a nature as will exempt the individual from the consequences of his criminal act.

The second of these questions is to be answered with reference to that rule of law, or legal test, the satisfactoriness of

which we propose to consider; but as a preliminary to that it may be well to consider the error into which large numbers of persons have fallen with regard to the object of all legal processes, and to point out one or two of the consequences of this error. First, then, medical men think that the object of a judicial inquiry, in which sanity is in question, is to discover whether insanity exists or not, the real object being to discover whether insanity can be proved to exist.

Injustice is a necessity of justice. True, omniscience and omnipotence might, if it wished, do absolute justice; but ordinary human tribunals must be content to do some things unjustly that many may be done justly. Friction is what retards a wheel, and yet without it there could be no motion, no expedition. So injustice is what mars our best efforts to do right, and yet without it no justice could be done. I am not looking at it in the large sense. True, the one exists *from* the other, *in* the other, and *through* the other. True, the one is the essential *other* of the other, but even looked at in a peddling governmental way, the existence of the one implies the existence of the other. All government is founded on a maxim which has this thought in it: that to get liberty we must give up liberty. So it is true, to get justice we must suffer injustice. "It is only with renunciation that life, properly speaking, can be said to begin." It may seem very horrible, at first sight, to say that the object of all our legal tribunals is the discovery, not of truth, but of *proved truth*, which must in some way differ from one another, or the distinction would be unnecessary, but the inevitability will reconcile people to the notion in time. Experience of impossibilities is a great means, nay, the only means, of discovering how to make use of opportunities. That this is inevitable is certain. Thus, suppose a man, who is innocent, to be accused of a crime, and that owing to his likeness to the real perpetrator, he is positively sworn to by several individuals who saw the crime committed. This man may, although perfectly innocent, be unable to prove an *alibi*, unable to establish the fact of his innocence by any witnesses. Now, I ask, how, under such circumstances, is a court of justice to arrive at a conclusion, as to the true state of the case? He asserts his innocence as every other prisoner, guilty and innocent, does; he produces no witnesses; and three or four persons, who have no possible reason for speaking untruthfully, swear that they saw him commit the crime of which he is accused. Under such circumstances *it would be right that the innocent man should be punished.* If there was no rule as to evidence, there could be no law; and if there was no law, life would be insecure; and property, upon which life depends so much, would be worthless from the insecurity of its possession. Because one medical man makes a mistake and kills a patient, is the science of medicine

worthless? Because law can only do partial justice, are we to have no law and no justice?

Such cases as that stated above have occurred. Innocent men have been, and are being, punished for crimes they did not commit; but under any law in the world that must be the case; and to avoid such dire mistakes you would require, in the first instance, to make human nature perfect before you could get a perfect law; and if you succeeded in perfecting human nature, law would no longer be necessary. That was the case of a sane man; take the case of an insane person. Insanity is a bodily disease, and in one way it may be said that it does not begin at all. What we call predisposing causes, might really be more scientifically called latent insanity. The disease existed in one's grandfather, but it is latent in us, until some exciting cause—for instance, a blow on the head, over-fatigue, mental distress—makes it actual. As every body has latent heat, so every organism has latent insanity. But even where insanity manifests itself by external signs, it is often exceedingly difficult to detect. There are what physicians call premonitory symptoms, but no physician can say where sanity ends and insanity begins. At one time they may say "the man is sane," and at another "the man is insane," but it is impossible for any one to say when health ceased and disease commenced. When does the dawn begin? When does twilight end? Does summer really commence on the first of May? Is not health just a state of comparative freedom from disease? All nature's works are tricks of *legerdemain*. Now, as that is the case, it is evident that we always must make mistakes, and so long as there is a necessity for punishment at all, insane persons will inevitably be punished. What else is possible if medical men can not say when insanity commences? and even if they could give evidence on this point many insane persons must, without doubt, suffer punishment, simply because each one of us play a game of chance, and the dice are often loaded. Suppose a person is accused of a crime, and that no medical man sees the prisoner, or that the medical men who do see him make a mal-diagnosis—which is evidently possible—and pronounce the man sane when he is insane. Suppose that there is nothing in his past life, or in the nature of the act, to suggest the existence of insanity, and that the plea is never pleaded, although the man is actually insane; under such circumstances, just as in the case of the sane man above alluded to, the prisoner will be rightly convicted and justly punished, simply because he has not been proved to be mad. Can any thing be clearer than that such casualties are inevitable? So long as we have government by force such accidents will happen, and we must in a mournful way congratulate ourselves upon their occurrence, as we are persuaded that they are the necessary incidents of good government, and the fair adminis-

tration of the law. "The restraints upon men as well as their liberties are to be considered their rights," says Burke; and the sacrifice of some persons who are perfectly innocent is not to be regarded as such an unmitigated evil, as counsel, who eloquently assert that it is better a hundred guilty persons should escape than that one innocent person should be punished, would have us believe. That may be as they say; but the counsel who make such statements are generally for the defence. But if it was true it would not affect the argument. If law sacrifices a few innocent, what does nature do? Does she not sacrifice all living things, good and evil, just and unjust, in her own good time, for the benefit of the race? We scarcely think nature barbarous! Consequently, the proposition that judicial inquiries in such cases are for the purpose of discovering who are proved insane may be regarded as true, and the impression that the objects of courts of law in such cases is the discovery of the existence of insanity may be looked upon as erroneous.

I am now in a position to consider the second question which I proposed, and that is the legal test of insanity. For the purposes of law the insane must be distinguished from the sane. It may be true that sanity passes into insanity, and insanity passes into sanity, as gradually as night passes into day, or as day into night. Yet, just as there is a necessity for distinguishing day from night, so there is a necessity to distinguish sanity from insanity. It is not proposed, so far as I know, to treat all sane men who commit crimes in the way that we treat insane men acting in the same way, nor is it proposed to treat insane criminals as we at present treat sane criminals. We are not going to make our gaols asylums, nor our asylums gaols. Hence the necessity that there is for distinguishing between those who are mentally sane, and those who are mentally insane.

Stupidity passes into intelligence by as imperceptible degrees as those which constitute the progress of health to disease. Men grow in stature with God slowly. A man is not a fool to-day and a sage to-morrow. The growth of intelligence is as gradual as the growth of the body; and as the management of property and affairs presupposes the possession of intelligence, the law, to protect men from themselves, found it expedient to say, that unless a man had intelligence he should not have complete power over his property, and it consequently became necessary to draw a line between childhood and manhood, and the law did so, saying a man shall come of age at twenty-one. The scientific value of this test of intelligence is evidently very small. It can not be said that a man is really able to enter into an intelligent bargain to-day which he would have been unable to enter into yesterday. Besides, some men have more intelligence at seventeen than others have at forty-five. The absolute necessity for some such rule, however, and the impossibility of

one more conformable to the facts of human development, are sufficient reasons for the existence of this rough test of mental power.

Now, although it is asserted with truth that any definition of insanity is almost an impossibility, those persons who make such an allegation must be prepared, when they ask a court of law to pronounce upon the sanity or insanity of an individual, to expect that it should have some means of finding out what insanity is, and some proof of its existence. I believe that some persons are in the habit of asserting that it is at this point that the law becomes irrational. Those persons argue that it is impossible to draw a line between sanity and insanity, and that, consequently, any test of insanity, as it is not founded upon nature, must be absurd. They would desire that every case should be tried on its own merits, and would, so far as I can understand their argument, desire that the question as to sanity or insanity of an individual should be left to a jury, upon the unsupported opinion of medical witnesses, who are able to recognize but not to define insanity. A trial in which insanity was pleaded would, in that case, be conducted by the examination of medical witnesses on both sides, and the judge would leave the jury to decide upon the question of sane or insane, without telling them any test of insanity, but simply telling them to make up their minds as to which of the medical men was most trustworthy, and to give their verdict on the ground of the reliability of the witnesses. Their reliability would have to be judged of from the way in which they gave their evidence, and not from the internal evidence of the worth or worthlessness of what was said. This method would, it is argued, have many advantages. It is a most difficult thing to make scientific evidence intelligible to an unscientific mind. It is almost impossible by means of question and answer to bring out all the symptoms which indicate the presence of insanity, and to show the significance which only consists in the relation of these symptoms. To a person who does not know the science of mind, the inferences that physicians draw from symptoms and facts would not seem to be legitimate, and consequently the evidence of an expert is held worthless just when it ought to have the greatest weight. If they were only asked to say whether they thought the person sane or insane it would be much better. I believe, these medical gentlemen who argue thus have some objections to cross-examination, and are convinced that some such system as that I have sketched above would be infinitely better than the present legal process. It might be said, with some show of reason, that in the case of a man coming of age there should be no fixed rule that each case should be decided on its own merits and on the proved mental capacity of the youth, and that this capacity should be proved by the expression of opin-

ion upon the part of his friends and enemies. I have never heard this argued, but it seems to me as reasonable as the proposed amendment with reference to the abolition of the test of insanity. If any one thinks that better results (and it is by results that laws must be judged) would follow from such a course than those which are attained under the present system, I can only say that I differ from him. If any one imagines that more substantial justice would be done under such a system than under that which adopts a definite test of insanity, I can only say that he is profoundly ignorant of the science of evidence, however well he may be versed in the science of medical psychology. The theory of the law, and it is a theory for which a good deal can be said, is that a witness is summoned into a court of law to speak concerning facts and not to give opinions, and even where witnesses are asked to give opinions, they are at the same time asked to state the facts upon which they are founded, so that the jury may test the worth of their inferences. We have in recent times become enamored of evidence and disgusted with authority. We have come to respect facts and despise opinion, and we have come to these conclusions with reference to the relative value of the liquor of facts and the froth of opinion which foams upon it, for very sufficient reasons. It is true that a man's personality is sometimes an argument. If we know that personality well it might bulk largely as a fact in many reasonings. Some great men have in virtue of their personalities been mind-compellers, as Jove was a cloud-compeller. True genius is the essence of facts. But experience has taught mankind that the difficulty of an accurate estimate of the worth of a man's personality is exceedingly great. It has taught us that the counterfeit of worth is so easy, that men have come to the conclusion that in most cases authority when it looks best is most worthless, and that it is well to rely only upon facts: those

> **Chields that winna ding,**
> **And canna be disputed.**

Under these circumstances it is somewhat extraordinary to find medical men, whose whole science has to do with facts, demanding a judicial recognition of opinions. The thing is not only strange, it is ridiculous. How can a jury be said to arrive at any conclusion with reference to sanity or insanity, when they are asked to decide between the stupid notions of rival practitioners, whose diversity of opinion has become proverbial, and whose apparent incompetence in questions of mental disease is fast becoming a by word? The thing is simply grotesque. Yet, however worthless an argument may be it is always worth refuting. There are some persons who seem to have a sort of heart in their heads which leads them to sympathize

with weak arguments. For their sake, those impostors of the world of thought, fallacies, ought to be exposed.

The ground of this argument is, that it is impossible to draw any line of demarkation between sanity and insanity; and while I admit the difficulty, I can not see that the argument in any way supports the theory. Is it easier to draw a line of demarkation between guilt and innocence? That, too, like sanity and insanity, is a work of nature. Guilt passes by imperceptible gradations into innocence, as insanity does into sanity. No one can draw the line; but is that a reason for asserting that no legal distinction between these ought to be made? Is it a reason for asserting that every case ought to be decided on its own merits and upon the evidence of philosophers, who have made the human mind their constant study, and who should be asked their opinion as to the guilt or innocence of the accused? Are we to be told that upon such evidence a jury would, after coming to a conclusion as to the trustworthiness of the experts, arrive at a satisfactory conclusion as to the guilt or innocence of the accused? Is it asserted that such a verdict would be satisfactory to law, or in conformity with science? Yet the determination of the questions connected with moral turpitude is quite as difficult as the determination of those which are connected with so called moral insanity. The degrees of criminality are infinite, so much so that it would only be truth to assert that no two men who received the same sentence for what appeared to be exactly similar crimes were ever equally guilty. Search all time and you will not find one offence which was exactly similar in its moral aspects to any other. Are these arguments for such a system as that I have indicated? But the argument may be carried one step farther. Are not truth and falsehood in the same relation as guilt and innocence? Are there not white lies and black lies, and a hundred shades of grey lies? Is there not a science of casuistry? Can any one say where truth ends or falsehood begins? True, many people know a downright lie when they see it, just as many people have no doubt about the presence of mania from the wild, broken conduct of a man. But can we draw a line between truth and error? These depend upon nature as much as sanity and insanity, and are, or may be, as much dependent upon organism as mental health or mental disease. Truth is like white light: it is made up of many colors, and the mediums of minds it passes through tincture its rays. Well, if no line can be drawn, should law draw a line, and should such a difficult question as the trustworthiness of philosophers or physicians be left to the decision of a jury? Certainly not! Therefore, if the question of trustworthiness can not safely be left to a jury, there would be nothing upon which they could decide in the proposed investigation of the opinions of medical men or philosophers. If

we withdraw one of these questions, sanity or insanity, guilt or innocence, truth or falsehood, from a jury, we must withdraw all. They are precisely analogous. If we withdraw all, there is nothing left for a jury to do, and the proposed tribunal has ceased to exist. Some people may go so far as to assert that if it did it would be no great loss; but it is to be remembered that this *reductio ad absurdum* has been proved only with reference to a court which was to decide upon opinions, and which was formed with that view because of the impossibility of definition. That a trial of criminals is a necessity few will deny, and that all questions of guilt and innocence could be left to an experienced medical assessor for decision, not many will be found to assert. Are these objections answered? It seems absurd to use so much time for so little purpose. Who takes a mitrailleuse to shoot a rook?

Guilt and innocence, then, can not be clearly distinguished. Even when we have satisfactory proof of the commission of a crime, or of what we call a crime, we can not be certain that there is any moral turpitude connected with the act. "There is no crime," says Jacobi, "but has sometimes been a virtue." This requires no consideration. The fact is palpable; and yet, although that is so, it is not argued that there should be no criminal law; it is not argued that there should be no punishments: it is not argued that the present confessedly rough method of judging of guilt or innocence is satisfactory. Even those physicians who argue that there is no distinction in nature between crime and insanity, and who blame organism for all errors, do not, so far as I know, assert that there should be no such thing as government. The police is an institution which is still regarded as necessary. That being so, why should any different method of procedure be adopted in relation to the insane, than that which is adopted in relation to the sane? The state exists for the sake of healthy men, and not for the sake of those who are diseased; yet some advocates would have us believe that it is above all things important to protect those who are mad, instead of endeavoring to secure the greatest amount of happiness to those who are sane. Those persons only misunderstand the fundamental principles of the constitution of society. If, then, we are to have a test of guilt, why should we not have a test of insanity? Not because the latter is a disease, because the former is, according to many, a disease likewise. If it is argued that insanity depends almost entirely for its recognition upon medical experience, it is at the same time emphatically denied by those who have had no little experience of mental disease, the present chairman of the Commissioners in Lunacy maintaining, "that persons of common sense, conversant with the world, and having a practical knowledge of mankind, if brought into the presence of a lunatic, would in a short time find out whether he was or was

not capable of managing his own affairs." But even if it were granted that we must depend upon physicians for the recognition of insanity, it is surely certain that medical experience is, like all other experience, an experience of facts, and that facts are capable of expression by words and of appreciation, after due explanation, by common sense.

The questions which come before a court of law in cases where insanity is not mentioned, are sometimes quite as complicated as any case which involves a question of mental disease. Questions of intention or of patent law are much more abstruse to an ordinary jury than questions of conduct. Yet in all these cases juries are thought competent enough. Take, for instance, a case of poisoning. A common jury know nothing about toxicology. They are not acquainted with the complicated phenomena of death; they do not know any thing about symptoms, poisonous doses, and *post-mortem* appearances, and yet, if they have these things stated in evidence, if they hear the symptoms enumerated, the *post mortem* appearances described, and the other parts of the case laid before them, they can come to a satisfactory conclusion as to the difficult question as to the cause of death, and the guilt or innocence of the accused, and they do this by means of a legal test. Why should that not be possible in the case of insanity? Only one reason can be suggested why it has not been practiced with as satisfactory results, and that is the strange incompetence of medical psychological witnesses, for the most part, who have occupied themselves far more in declaiming about the unsatisfactory state of a law they did not understand, than in becoming acquainted with a disease which they pretended to treat.

So far what I have said only goes the length of proving that there must be a legal test of insanity, and I have not yet dealt with the question as to whether the present test of insanity is satisfactory or not. It is one thing to prove the necessary existence of some law, and another to prove the excellence of the existing rule. We have seen, then, that law can not be made conformable to accurate science; that uniformity in rule is an advantage which must not be sacrificed to a pseudo exactitude of justice; and it is better that those youths who are capable of managing their own affairs at the age of seventeen, should wait a few years before they enjoy the whole control of their property, than that there should be no definite rule with regard to minority and majority. But although that is indisputable, there must be some means of discovering whether the existing rule, say as to minority and majority, is a good or a bad one. If it was agreed on all hands that every man was able to make a good use of his property at the age of seventeen; if it was admitted that the great mass of mankind came to their prime at that age, and that they were no more likely to be

under the influence of others, or be affected with boyish rashness at that age than at thirty, then, unquestionably, the rule, as it at present exists, would be a bad one. The rule is founded, not upon a scientific estimate of the development of mind, but upon a common-sense experience; and it is because that common-sense experience is in conformity with palpable facts, that it is adopted by law and approved of by mankind. This indicates, then, that the rules of law are to be judged of, as to their excellence, by a reference to facts, and that these facts must not be occult and discoverable only by the microscopes of science, but must be visible to the unassisted eyes of ordinary men. By this criterion, then, we must estimate the worth of the existing test of insanity. At the present time the law with regard to this subject may be supposed to rest upon the answers given by the judges to the questions proposed to them by the House of Lords after the trial of McNaughten. According to these answers the knowledge of right and wrong is made the test of insanity, and without entering more fully into the doctrines involved in their answers as to the presence of delusions and as to the existence of partial insanity, I may enter upon the consideration of the question whether that test is satisfactory or not.

The argument most frequently urged against it is that it can not be a test of insanity, because a great many insane persons know right from wrong. Thus, those persons who labor under *melancholia* are often free from all delusion, and very often have the sense of right and wrong in a morbidly acute condition. Superintendents and directors of asylums for the insane manage to maintain discipline and order in their institutions by means of a system of rewards and punishments, and that fact proves that those persons who are upon all hands admitted to be insane, have a knowledge of what is permitted and what is forbidden—a knowledge of right and wrong. This argument is thought by many persons to be a satisfactory proof of the absurdity of the present legal test. What can be more absurd than to set about distinguishing between two classes of men by a knowledge which is common to both?

One preliminary question requires to be answered before we arrive at any satisfactory conclusion as to this matter, and that is, is there such a disease as monomania? Is there such a thing as a mental disease, which makes a man mad at one time, although he is sane at another; which makes him mad in relation to certain circumstances, while he is sane in other relations? Can a man be sane with reference to one subject, and insane with reference to another? The answer to these questions has been over and over again given in the affirmative by medical men, and even those who know nothing about medicine are in a position to answer it. Men have delusions about particular things, or persons, or events, but upon every other subject they

are rational and sane. The existence of such words as klopemania, pyromania, homocidal mania, in the nomenclature of insanity, shows that the separateness of diseases, in relation to these manifestations in act, has long been recognized. It being decided, then, that a man may be sane with reference to one subject, and insane with regard to another, or, as Baron Alderson put it, "may be *non compos mentis quoad hoc*, and yet not *non compos mentis* altogether;" and it being certain that a man is never wholly, and, with regard to any subject, utterly and always insane, is it not evident that the argument that the insane know right from wrong proves nothing? Should we not expect to find a man knowing right from wrong in relation to every subject upon which he was sane, and yet unable to appreciate the distinction in relation to his conduct which resulted from his insane belief? Can that be said to be any reason why right and wrong should not be the test of insanity? Does not the existence of the moral sense in all lunatics, does not the fact that order and discipline in hospitals for the insane are preserved by means of rewards and punishments, prove that lunatics are, in relation to many of their acts, sane? If a monomaniac speaks truth, are we to deny him virtue? If he lies, is it not vice? Can a man who is partially insane not at the same time be vicious? Then why plead the possession of right and wrong by all lunatics on subjects apart from their delusion as an argument against its use as a test on subjects connected with their delusion? It tells the other way if we can prove that an insane man lacks the power of distinguishing good from evil in relation to his erroneous and diseased impression.

In that case it will be proved to be a most accurate means of distinguishing the sane acts of a man from his insane acts, which is much more important than distinguishing the insane man from the sane.

Suppose an individual to labor under a delusion that God speaks to him, and commands him to give light to the world, and that the voice even indicates in what way it is to be done—say, by burning down the house. Although that man may know right from wrong; may know that it is wrong to lie, or steal, or swear; yet in relation to that one act he can not distinguish right from wrong at the time he does the deed; the supposed voice of God has made the distinction between these impossible, and, therefore, he should not be punished for the arson.

In interpreting the law as to this point, medical men have been influenced too much by their feelings as to the unsatisfactory nature of the rule, to endeavor accurately to understand what it means. The best argument which has been produced against it is to the following effect, and it is urged by some physicians who are clear of glance and intelligent of appreciation.

The speculative is very different from the active, they say. Many men can *reason* well, but *do* ill. Men live two lives: one in their heads, and the other in the world; and a great gulf often yawns between these which it is impossible to bridge over. There is a wide difference between a speculative knowledge of right and wrong, and the power which enables men to put speculative beliefs into action. This gulf may be left unbridged voluntarily or involuntarily. Hypocrisy, of course, delights in the most sublime speculations, for never intending to go beyond speculation it costs nothing to have it magnificent. But the madman may be incapable of going beyond speculation. He may know right from wrong, and yet have none of the capacity to refrain from doing the crime, although he may be fully convinced of the criminality of the act. There is a great deal in this suggestion which is worthy of consideration. Man is, as it were, two. He thinks and he acts. It is with the latter that law has to do, and it may seem wrong to choose a test of acts from thought which is partially dissociated from conduct. True, his thoughts do influence his acts, and his acts re-act upon his thoughts; still, many men know the good and choose the evil; and if that choice is dictated either by bodily fear, or by what has been called the *duress* of disease, he ought certainly to be held irresponsible for the crime committed. To fill up the notion of a crime, you require not only the knowledge of good and evil, but the power to choose the one and refrain from the other. Responsibility implies free will. If there is no real volition, there is no real criminality. Looked at in that aspect the present test of insanity seems defective. It is not in conformity with the facts, which are capable of observation by the mass of mankind, for it is certain that unless the legal test, at the same time that it supplies a means of discovering the health or disease of the cognitive faculties, supplies a means of discovering whether the individual, whose insanity is in question, has the power to refrain from the wrong of which he is conscious, it would be open to numerous objections, and there would be the most obvious and pressing necessity for a revision and alteration of the law in this respect. An engineer might as well judge of the horse-power of a locomotive from examining the cylinder and the wheels, without looking at the boiler, as a jurist gauge the capacity simply by an acquaintance with the reasoning faculties. The engine will not run without steam, potential thought will not become actual thought without volition.

Now, although it does seem that the present test is unsatisfactory, I am inclined to believe that the seeming unsatisfactoriness is due rather to a misapprehension of the true meaning of the test, than to any inherent defect in the test itself. Those who censure it do not seem to have taken the trouble to ascertain what the test really is. It is sometimes an advantage in

an argument to mistake your adversary's meaning, and refute your own misconstruction; and I believe that is what most medical men, and not a few lawyers, have done with reference to the test of insanity. The words of the judges' answer are these: "That before a plea of insanity should be allowed, undoubted evidence ought to be adduced that the accused was of diseased mind, and that *at the time* he committed the act he was not conscious of right and wrong." I think that any one who reads these words will be convinced that it is not the knowledge of right and wrong which one may speculatively entertain in calm moments which is meant to be the test of insanity, and so many persons seem to imagine, but that it is the active idea of right and wrong which a man has when thought is passing over into action that is relied upon as the distinguishing mark of sanity. These words do not mean that a man's responsibility is to be judged of by his thorough understanding of the decalogue, or of his calm doubts as to the existence of a conscience. They mean that we are to judge by means of the principle of action; and I am so far from thinking that it is the intention of the law to make a speculative belief the test of insanity, that I regard these words as indicating an intention to make the capacity of doing or refraining, the power of choice between good and evil, the real test, and that it shows that such is its intention by the words "at the time he committed the act." The question to be left to the jury is not, Does he know right from wrong now? Does he possess a conscience? but did he *at the time* he committed the act know he was doing wrong? At such a time, speculative beliefs go for nothing. A man's closet-code is not that which he takes into the market-place, into the strife. We do not judge of a man's actions by what he thinks at home, but by what he does abroad. Are right and wrong present to his mind at the time he acts, or are they absent? If they are absent, his actions can not be influenced by them: he has no choice; and that absence is due to disease. If that deprivation of moral scales is due to mental aberration, he is to be regarded as irresponsible. This knowledge of right and wrong, then, is the capacity which a man has at the particular moment of the deed of being influenced by motives, the power he has of refraining from the act in question. I believe that this construction is not only the obvious one, but that it will be found to be the meaning which has been almost invariably attached to these words by all the judges who have had to leave this question to the jury, and although cases may be pointed to in which injustice has been done by the verdict of the jury, I am convinced that these casualties are due only to the unseemly conflict which has existed between the medical testimony, and not to any difficulty in the rule of law. But it may not be inexpedient to explain my meaning more fully, and that may be done

by means of an illustration. Suppose a man to be under the influence of bodily fear, and that a neighbor, with every appearance of malevolent intention, threatens to take his life, and holds a loaded pistol to his head, that man is, according to the law, justified in killing the neighbor who would have taken his life. It is self-defence. Now, at the moment, did the sane man whose life was threatened, know right from wrong? The very proverb, "Necessity knows no law," indicates that extreme circumstances do away with all moral distinctions. All the man thought of was how to save his own life, and he did it. An instant afterward the knowledge of right and wrong returns, and he stands there sane, and responsible for any act he may commit. Now, the case is almost precisely the same in the case of an insane man. Although he may be perfectly cognizant of right and wrong, still the delusion that God commands him to set fire to the house, confounds and sets at naught all moral distinctions at the time. So a delusion that a man is going to take one's life may lead to a direr crime, from which, as in the case of *duress* above alluded to, the want of the knowledge of right and wrong at the time of the commission of the crime would be held to exempt the individual from the consequences of his act.

Now, this may seem to some to bring the law back simply to a proof of the existence of insanity as a ground for exemption from punishment, for it may be argued that thus explained no criminal has a knowledge of right and wrong at the time the act was committed; but that is not the case. Every ordinary criminal is at the moment he commits the crime fully aware that he is doing wrong; but he calculates the chances; he thinks of the probability of his escaping detection; of the satisfaction of his desire for revenge or the like, and he is influenced by ordinary motives to the commission of the crime, and must be, in case of discovery, dealt with in the ordinary way. The test of insanity thus explained seems to me to draw as accurate a line between sanity and insanity as is practicable, and, viewed in this aspect, it seems to me to be open to none of the objections which are urged against it. At the same time, I am of opinion that any test which would make itself thoroughly comprehensible to the public should be more explicit than the test alluded to at present is. I think that with very few exceptions, the members of the medical profession have mistaken the meaning of the plain words in which the test is expressed; and the legal profession, if it has understood them, which I am inclined to doubt, has not taken the trouble to explicate their meaning. I am, therefore, convinced that the legal test, while it may remain the same in substance, should be different in form. It should be re-expressed, and that with the view of bringing out the fact that the *power of choice* is the real test of

sanity, and that to make any choice efficient there must be a knowledge of right and wrong—of the permitted or the forbidden.

I have, then, in this paper considered—First, the necessity of a test of insanity, and secondly, the satisfactory nature of the present test. The first question was answered in the affirmative on the ground of expediency; and as there has been no other test proposed by those who oppose the present rule of law which would have enabled me to compare the present law with the proposed amendment, I had to examine the merits of the present test in relation to the objects it is meant to attain. As it does to my judgment seem capable of obtaining these edns; and as in times past it has for the most part worked as well as the conflicting evidence which is produced in courts of law, in such cases, would allow it, I can not see any other possible answer to the second of the questions I proposed in an earlier part of this paper, than an answer in the affirmative. The way in which the Home Secretary reverses sentences, the irretrievability of punishment by death, however interesting in themselves, have nothing to do with the question under discussion, although they have been so often imported into it that people begin to think there must be some reason for so invariable a sequence. And reason there is; the reason which induces people to win a point at any hazard, and the somewhat stupid zeal for a reform where none is absolutely necessary.—*London Law Magazine and Review.*

CRIMINAL IRRESPONSIBILITY OF THE INSANE.

THAT every murderer is presumably a madman is a comfortable doctrine which men are naturally much inclined to accept. To admit that a horrible crime has been deliberately commit ed by a human being is indirectly to reflect on ourselves, especially if the criminal, as a refined and educated person, represents human nature at its best. Our self-complacency receives a shock, and we are easily persuaded to believe in the existence of insanity, which, by disallowing to the criminal the possession of a nature such as ours, relieves us from an inference unflattering to ourselves. Pity and mercy toward a fellow creature do something to strengthen the tendency, and the result is that public opinion, which on a subject like this should be based on the surest ground, is commonly formed without consideration of the necessities of criminal justice, which ought exclusively to govern the question.

The mind has first of all to be disabused of the idea, which is unfortunately the whole rationale of punishment to many persons, that criminals are punished because they deserve it.

The proposition is one of those which, though never expressed, are tacitly recognized in the conclusions arrived at. To express it is to confute it. The criminal law undertakes no such divine office, as any one may discover for himself by running over in his own mind the lists of offenses of which the law does and does not take cognizance. Perhaps the offense of ingratitude is more generally and more justly reprobated by the world than any other. Yet the law has no punishment for it; while it punishes severely the taking of a loaf of bread by a man in the pangs of hunger, an offense which the world would pronounce most venial. The law, therefore, clearly punishes on very different grounds from desert. It has undertaken the duty of preserving public order, and it punishes such acts as endanger order to prevent their occurring again, or, as it is commonly expressed, for the sake of the deterrent effect of the punishment.

To insure that the deterrent effect of punishment shall be complete, the law has to provide as nearly as possible that punishment shall follow the commission of crime with certainty. It necessarily does harm to the cause of order that a crime should be unpunished. In the Eltham case, for example, it was clear that a murder had been committed, but the fact has not been brought home to any one. The public sense of security is therefore diminished, and crime is encouraged by the evident uncertainty of punishment. But take the common case in which it is quite clear who did the deed, but the defense of insanity is relied on to exempt the perpetrator from punishment for it. The deed done has outwardly all the appearance of a criminal act committed by a person in his senses. The fact of the crime has made a certain impression on the public mind, and it is for the criminal law to see that the effect of that impression is corrected. If the perpetrator is punished, society feels no less secure than before. But if no retribution follows the act, it goes out to the world that a man may do these things without being punished for it. If the punishment of the criminal is not the corrective employed, it is for the insane man or his friends to negative the impression produced by his act, by showing in a way satisfactory to the public that he is insane. When the cause of order has been injured by the commission of what is to all appearance an atrocious crime, and the doer of the act has been discovered, the injury must be repaired either by punishing the criminal, or by showing that he is outside the pale of ordinary responsible persons.

Nine people out of ten probably justify the exemption of the insane on the ground that they do not deserve punishment. The ground on which the criminal law puts their exemption from punishment is, that the execution of it does not exercise a deterrent effect. Take away the deterrent effect of punishment, and it becomes simply vengeance. The punishment of a mad-

man does not affect the insane, because they are incapable of being influenced by it; nor the sane, because they have no sympathy with him. The power of deterrent effect is in fact proportioned to the strength of the sympathy which the person to be affected feels for the person punished. The punishment of a man like Mr. Watson affects very little those classes commonly represented in the criminal dock. It affects men of his own stamp, and points the moral that learning and refinement do not justify a man in relaxing his guard over the violent passions, made perhaps more difficult to control by habits of seclusion. On the other hand, to hang a fellow who, reeling out of a public-house, stabs a policeman in a drunken fury, has very little effect on the man who has his club and keeps his brougham. The sympathy in question may be defined as the expectation of the same circumstances concurring in the case of the person to be affected by the example. There is no such sympathy at all, when the concurrence of the circumstances can not possibly be contemplated. To execute a madman for the sake of example to the sane would be as useless, and therefore as cruel, as to hang a dog who has killed a sheep as a warning to sheep-stealers. To execute him to deter the insane would be as inhuman as the exhibition of the dead bodies of vermin on a barn-door is ridiculous.

On this ground the plea of insanity is admitted, with the condition superadded that the fact be satisfactorily proved, as otherwise the absence of punishment for an apparent crime would be dangerous to the public peace. The test of insanity which English judges are in the habit of submitting to the jury is, whether the accused knew the act he was doing was wrong. This is a test which every one can appreciate, and to acquit a man who did not know right from wrong can not rob the law of any of its terrors. But some persons believe the test to be insufficient, as it takes no account of the state of mind in which the ideas of right and wrong are undisturbed, but the will is unable to control the actions. If such a mental state could be satisfactorily proved to exist in an accused person, there is no doubt that he ought to be exempt from punishment. Many eminent doctors assert that it does exist, and blame the law for not thinking so too. But it does not follow that, because the law retains the old test, it disbelieves the existence of such a mental derangement. It is enough for the law to disregard it on the ground that it can not be satisfactorily proved.

A general inability to control the actions by the will might, if it ever exists, be easily proved. But the state of mind which it is proposed to include in the legal definition of insanity is an inability to refrain from doing a particular act, and that act the crime which is the subject of the accusation. The only available evidence is, therefore, the opinion of a doctor, invariably con-

tradicted by the opinion of another doctor, and the fact of the crime itself. A man is charged with poisoning, and his defense is that he has a propensity to poison over which he has no control; or he is indicted for stabbing his father, and he is acquitted on the ground that he had an uncontrollable impulse to stab his father, although he knew it was wrong. The plea irresistibly reminds us of the warning Artemus Ward gave to his next neighbor: "Young man, look out; I have not the slightest control over my elbows" If such a ground of exemption were admitted, what criminal might not hope to escape punishment? How could the public confidence in the administration of justice be maintained, when a defense is admitted which no one understands, and which has the peculiar advantage of requiring no evidence to support it? It is of the essence of the plea of insanity that the ground of exemption should be generally recognized, and capable of satisfactory proof, and it is out of the question for the law to admit as an answer to a criminal prosecution a state of mind which has exactly the opposite qualities.

The question of insanity is, of course, partly a medical question, but when it means criminal irresponsibility, the doctors are the very worst tribunal to decide it. When a doctor says that a person is mad, he means that the patient would be the better for treatment as an insane person. Even if the specific question of responsibility for an act is put, the answer probably depends on exactly the same considerations. The doctor is accustomed to look on the subject submitted to him as a patient, and it is impossible to alter in a moment the habit of a lifetime. Yet the idea that the doctor is most likely to be right is gaining ground dangerously. When a criminal has been sentenced to death, there is now practically a right of appeal to two doctors on the question of insanity. Under 27 & 28 Vict. c 54 his friends have only to make it appear to a Secretary of State that there is good reason to believe that the convict is insane, and the Secretary has no option but to appoint two doctors, and if they certify that the convict is insane, to send him to Broadmoor. The Secretary of State would not, we presume, be justified in determining that there is good reason to believe that the convict is mad, when the defense has been set up at the trial, and the jury distinctly negative insanity by their verdict. But the accused has only to say nothing about it till he is convicted, and appeal on that point to the Home Secretary and the doctors, if he thinks they are likely to deal more mercifully with him. We do not know whether Mr. Bruce acted under the powers of the statute in the case of Christiana Edmunds, but, at all events, Sir William Gull and Dr. Orchard were allowed to reverse the verdict of the jury. Whether the doctors were right, and the jurymen wrong in that case, it is unimportant to inquire, because the probabilities are that they determined two entirely distinct questions.

But it is of the utmost importance to observe that not only does the new tribunal displace the old-fashioned trial of criminal issues in open court, but it takes away from the jury the jurisdiction over an issue which, according to the view the English law takes of it, they are peculiarly fitted to deal with.

But is this view, that the fact of insanity is no exemption unless satisfactorily proved, consistent with the leniency which the law of England professes to use toward an accused man? Has it not always been an axiom with us that it is better that ten guilty men should escape than that one innocent man should suffer? The axiom would never have been accepted merely out of pity for an innocent man's sufferings, unless the balance of advantages were in its favor. The ground of its acceptance is that if an innocent man is hung, and the real criminal is afterward discovered, the sense of insecurity in the administration of justice felt by all classes would be much more disadvantageous to society than the encouragement given to crime by the escape of ten guilty men. But this reasoning does not apply when the question of insanity is involved, and not the question of innocence. Suppose a madman commits a murder, but his plea of insanity is not accepted, and he is hung for the crime, the general belief will be that he is a sane man, and therefore his execution, however unjust to himself, is as useful to the cause of order as the execution of a sane man. The question of insanity can be once for all decided at the trial, and there is no likelihood of any thing occurring after the execution of the sentence to prove to demonstration that the convict was mad. When a man has been executed for a crime, and his innocence is afterward clearly established, the life which has been taken is worse than wasted. But when an insane man, who has committed a murder, and whom the world believes to be sane, is, either from the question of insanity not being raised, or being wrongly determined at the trial, convicted and executed, his life may well be considered as sacrificed to the general advantage.—*London Law Magazine and Review.*

JURIES, JUDGES, AND INSANITY.

BY DR. HENRY MAUDSLEY.

THE recent trials for murder, in which insanity has been alleged for the defense, whatever differences of opinion they may have given rise to, have clearly shown who entirely unfitted a common jury is to decide the delicate and difficult question of a prisoner's mental state. Had the wit of man been employed to devise a tribunal more unfitted for such a purpose, it might have exhausted itself in the vain attempt. It is one of the anom-

alies of British jurisprudence that while in an action for libel or any civil injury a special jury may be claimed, and the services of men who are above the lowest levels of ignorance and prejudice be thus obtained, it is quite otherwise when a person is on trial for his life. In this momentous issue, however complicated the circumstances, however obscure the facts, he must stand the verdict of twelve common jurymen. In ordinary cases of murder, when the facts are such as any person of average sense and experience may judge of, the system works sufficiently well, or at any rate no great harm ensues; but, in any in which it is necessary to form a judgment upon scientific data, a common jury is assuredly a singularly incompetent tribunal. The very term of science they are ignorant of, and they either accept the data blindly, on the authority of a skilled witness, or reject them blindly from the prejudice of ignorance. The former result is commonly what happens in regard to scientific evidences of poisoning; the latter is commonly what happens in regard to scientific evidence of insanity. There are few persons who, without having had a special chemical training, would venture to give an opinion on the value of the chemical evidence given in a case of poisoning, but every body thinks himself competent to say when a man is mad; and, as the common opinion as to an insane person is that he is either a raging maniac or an idiot, it is no wonder that juries are prone to reject the theory of insanity which is propounded to them by medical men acquainted with its manifold varieties. It would seem to be an elementary principle of justice that a prisoner on trial for his life should have the right to claim a jury of men specially competent, or at any rate not absolutely incompetent, to judge of the facts on which his defense is to be based.

It is an additional evil of the present system that judges too often share the ignorance of juries, and surpass them in the arrogant presumption which springs from ignorance. Instead of urging them to throw off all prejudice, and aiding them with the right information, they sometimes strengthen their prejudices by sneers at the medical evidences, and directly mislead them by laying down false doctrines. They may even go so far as to flatter them in the opinion that they, as men of common sense, are quite as well able as medical men to say whether a person is insane or not. In the last number of this Journal we gave a report of a trial which took place in Scotland for the reduction of a will, in which the judge directed the jury, with the greatest assurance, that the symptoms which preceded insanity and indicated its approach, in an ordinary case, went on increasing as the disease advanced, and implied that, as they had not done so in the case in question, it was preposterous to allege insanity.

To our mind, the evidence of insanity in that case was conclusive, but at any rate the statement of the judge was utterly untrue, as a very little knowledge of insanity would have taught him; and we can not help thinking that the authoritative enunciation of such false doctrine to a jury is nothing less than a judicial misdemeanor. One can not justly complain that judges should be ignorant of insanity, seeing that only by long experience and study is a true knowledge of it to be required; but it is a fair ground of complaint that, being ignorant, they should speak so confidently and foolishly as they sometimes do. Here, as in other scientific matters, it is not intuition, but experience, which giveth understanding.

Not only is it the fact that judges are ignorant, but they are too often hostile. Governed by the old and barbarous dictum that knowledge of right and wrong is the proper criticism of responsibility when insanity is alleged, they resent angrily the allegation of insanity in any case in which the person has not lost all knowledge of right and wrong. Believing that medical men are striving to snatch the accused person from their jurisdiction, they are jealous of interference, are eager to secure a conviction, and sometimes lose the impartiality becoming the judge in the zeal proper to the partisan. The reporters are happily good to them in forbearing to report all they say and do, or we fear that the dignity of the bench would have suffered more in public estimation even than it has done of late years.

It is useless to say smooth things when things are not smooth. There is a direct conflict between medical knowledge and judge-made law,* which must go until bad law is superseded by just principles in harmony with the teachings of science. For many

* Dr. Landor says: "If the principle that is essential to institute a thorough examination of the individual's past and present condition before determining his state of mind is the right one, then the proceedings of lawyers are in complete antagonism to truth. There can be no conflict between propositions more complete. Medicine declares that insanity is a physical and corporeal disease; Law, that it is not. Medicine says that imbecility and insanity are different diseases; Law, that they are identical. Medicine asserts that a theoretical study of mental diseases and defects is necessary to a proper understanding of such diseases and defects; Law denies this, and says that insanity is a fact to be determined by any dozen of ordinary men, in consultation, on the case, selected at random from any class of the population. Medicine says that a man may be insane or irresponsible, and yet know right from wrong; Law says that a knowledge of right and wrong is the test both of soundness of mind and responsibility to the law. Medicine says restrain and cure the insane and imbecile sufferer. The object of the action of the law is punishment, and, if its severity is mitigated, it is not by the law, but by the suspension of the law. The law is thus entirely antagonistic to Medicine on all those questions of mental science which involve the freedom and well-being of the imbecile and the insane, and which often determine whether they shall be put to an ignominious death or not, whether they shall be deprived of their property or suffered to retain it. This antagonism is, therefore, a most serious matter to the insane, their friends and families, not less serious to judges and legislators, and of the deepest interest to both medical and legal professions. For with such opinions inculcated by the law, existing ignorance are more deeply rooted in the public mind, so that the difficulty in treating the insane by medical men, and in giving testimony in courts, is greatly increased, especially when great judges remark (influenced, no doubt, by the degrading exhibition of opposing bitterness of medical men in courts), that 'the introduction of medical opinions and theories on this subject has proceeded from the vicious principle of considering insanity a disease, whereas it is a fact to be ascertained by evidence, in like manner as any other fact, and no more is necessary than to try the question by proof of the habits, the demeanor, conversation, and acts of the alleged lunatic.'"

years, by all authorities on insanity, in season and out of season, the truth has been in vain proclaimed: many times have futile attempts been made to arouse attention to the iniquity of the law as laid down by the judges; but it is still necessary for us to go on protesting, as our forefathers did, and as our children's children may have to do. We may, at any rate, take leave to characterize the administration of the law on every occasion in the plain terms which it deserves. Under the name of justice, grievous injustice has sometimes been done, and it would be easy to point to more than one instance in which murder has been avenged by the judicial murder of an insane and irresponsible person. The saddest and most humiliating disease with which mankind is afflicted, and which should rightly make the sufferer an object of the deepest compassion, only avails in England in the nineteenth century to bring him, in the event of his doing violence, to the edge of the scaffold or over it. To this point have eighteen hundred and seventy-two years of Christianity brought us! And Science protests in vain! Without laying claim to much gift of prophecy, one may, perhaps, venture to predict that the time will come when the inhabitants of the earth will look back upon us with astonishment and horror, not otherwise than as we now look back upon the execution of old women for witchcraft in past times—a barbarity which the judges were the last to be willing to abandon, which they clung to long after it had been condemned by enlightened opinion. Indeed, there has not been, as Mr. Bright once said in the House of Commons, a single modification of the law in the direction of mercy and justice which has not been opposed by the judges!

The ground which medical men should firmly and consistently take in regard to insanity is, that it is a physical disease; that they alone are competent to decide upon its presence or absence; and that it is quite as absurd for lawyers or the general public to give their opinion on the subject in a doubtful case, as it would be for them to do so in a case of fever. For what can they know of its predisposing and exciting causes, its premonitory symptoms, its occasional sudden accession, its remissions and intermissions, its various phases of depression, excitement, or violence, its indifferent symptoms and its probable termination? Only by careful observation of the disease can its real character be known, and its symptoms be rightly interpreted: from this firm base Medicine should refuse to be removed.

It is said sometimes, however, in vindication of the law, that it does not and can not attempt to apportion exactly the individual responsibility, but that it looks to the great interests of society, and inflicts punishment in order to deter others from crime. The well-known writer, W. R G., in a letter to the *Pall Mall Gazette*, has recently given forcible expression to this principle, and maintains that, if men would get a firm grasp of

it, the conflicts which now occur would cease. He quotes with approbation the saying of the judge who, in sentencing a prisoner to death for sheep-stealing, said: "I do not sentence you to be hanged for stealing sheep, but I sentence you to be hanged in order that sheep may not be stolen." Here we see how entirely the writer has failed to grasp the real nature of insanity *as a disease*, for which the sufferer is not responsible, and which renders him irresponsible for what he does. Were one-half the lunatic population of the country hanged, the spectacle would have no effect upon the insane person who can not help doing what he does. If a boy in school were wilfully to pull faces and make strange antics, the master might justly punish him, and the punishment would probably deter other boys from following his example, but it would have no deterrent effect upon the unfortunate boy whose grimaces and antics were produced against his will by chorea. The one is a proper object of punishment, the other is a sad object of compassion, whom it would be a barbarous and cruel thing to punish. To execute a madman is no punishment to him, and no warning to other madmen, but a punishment to those who see in it, to use the words of Sir E. Coke, "a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and which can be no example to others."

Moreover, it is not necessary to hang a lunatic in order to protect society, or in order to punish him, for it can protect itself sufficiently well by shutting him up in an asylum; and the prospect of being confined in a lunatic asylum is not one which is likely to encourage a man to do a murder; on the contrary, it is one which excites as much horror and antipathy in the minds of both sane and insane persons as can well be imagined.

And, finally, as the law did not prevent sheep-stealing by hanging sheep-stealers, but brought itself into discredit by offending the moral sense of mankind; so, likewise, it will not, by hanging madmen, prevent insane persons from doing murder, but must inevitably bring itself into contempt by offending the moral sense of mankind. Is not this result happening now? Has Mr. Baron Martin added any thing to the strength and dignity of the Bench by his conduct in the recent trial of Christiana Edmunds? That conduct has elicited such comments from all quarters as it has not often before happened in this country to find made on the administration of justice; and if the law has not been brought into contempt, it has received a rude shock among a law-abiding people. The uncertainty which now exists, whether a person shall be convicted as a criminal, or acquitted as insane, and the accidental character of the result, can not fail to be injurious to the welfare of society. And if the present agitation subsides, as former agitations have subsided, without any step in advance being made, the bad law is non e

the less certainly doomed. As we have said on a former occasion, "men will go mad, and madmen will commit crimes, and in spite of prejudice, and in spite of clamor, Science will declare the truth. Juries, too, will now and then be found enlightened enough to appreciate it; and if the voice of Justice be unsuccessfully raised, it will be but a doubtful triumph for prejudice when Science shall say, 'You have hanged a madman.'"

It will not be of much use to point out once more, what has been pointed out over and over again, that the manner in which scientific evidence is procured and taken in courts of justice is very ill-fitted to elicit the truth and to further the ends of justice. One side procures its scientific witness, and the other side procures its scientific witness, each of whom is necessarily, though it may be involuntarily, biassed in favor of the side on which he is called to give evidence—biassed by his wishes, or interests, or passions, or pretensions. It is not in human nature entirely to escape some bias under such circumstances. In due course he is called into the witness-box and examined by those who only wish to elicit just as much as will serve their purpose; he is then cross-examined by those whose aim is to elicit something that will serve their purpose; and the end of the matter seldom is "the truth, the whole truth, and nothing but the truth." Having regard to the entire ignorance of scientific matters which counsel, jury, and judge show, it may be truly said that the present system of taking scientific evidence is as bad as it well can be, and that it completely fails in what should be its object—to elicit truth and to administer justice. "The incompetency of a court, as ordinarily constituted, is," as we have formerly said, "practically recognized in a class of cases known as Admiralty cases, where the judge is assisted by assessors of competent skill and knowledge in the technical matters under consideration. Moreover, by the 15th and 16th Vict., c. 80, s. 42, the Court of Chancery, or any judge thereof, is empowered, in such way as he may think fit, to obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to enable such court or judge to determine any matter at issue in any cause or proceeding, and to act upon the certificate of such persons." The Lords Justices seldom, if ever, decide on a question of insanity without calling for a report upon the case from one of the Medical Visitors in Lunacy. If the English law were not more careful about property than about life, it would long ago have acted upon this principle in criminal trials.

However, he who advocates a reform in the legal proceedings of this country is assuredly a voice crying in the wilderness, and with less result than the Baptist had when he cried aloud there. It is not likely that any thing we can say will induce those who have the privilege or pain of constituting our gov-

ernment to leave for a time the ambitious struggles of politics, and to devote their energies to a reform of the law. And yet a government could not be better employed than in laboring to effect such a reform. A system of just laws and a simple and expeditious administration of justice would assuredly conduce more to the welfare of the community than years of parliamentary squabbles about politics. Many parliamentary questions which have occupied much time and made a great show in their day will look very small, if they are ever heard of at all, in history, while the reputations that grow out of them will have been lost in oblivion; but an effectual reform of the jurisprudence of the country, which is now an urgent need, would be a lasting benefit to the community, and an eternal honor to the statesman who initiated and carried it through.—*Abstract from the Journal of Mental Science.*

UNITED STATES SUPREME COURT.

John Watson et al. v. William A. Jones et al.

1. Where the pendency of prior suit is set up to defeat another, the *case* must be the same; there must be the same parties, or at least such as represent the same interest, there must be the same rights asserted and the same relief praved for.
2. Where the subject matter of dispute is strictly and purely ecclesiastical in its character, a matter which concerns theological controversy, church discipline, ecclesiastical government or the conformity of the members of the church to the standard of morals required of them, and the ecclesiastical courts claim jurisdiction, the civil courts will not assume jurisdiction, they will not even inquire into the right of jurisdiction of the ecclesiastical court.
3. A spiritual court is the exclusive judge of its own jurisdiction, its decision of that question is binding on the secular courts.

Appeal from the Circuit Court of the United States for District of Kentucky.

Opinion by MILLER, J.

This case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the state for the maintenance of rights which the church has refused to acknowledge, or found itself unable to protect. Much as such dissensions among the members of a religious society should be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority, the courts when so called on must perform their functions as in other cases.

Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are

equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.

It is a bill in chancery in the Circuit Court of the United States for the District of Kentucky, brought by William A. Jones, Mary J. Jones, and Ellenor Lee, citizens of Indiana, against John Watson and others named, citizens of Kentucky, and against the trustees of the Third or Walnut-street Presbyterian Church, in Louisville, a corporation created by an act of the Legislature of that State. The trustees, McDougall, McPherson, and Ashcraft, are also sued, as citizens of Kentucky. Plaintiffs allege in their bill that they are members in good and regular standing of said church, attending its religious exercises under the pastorship of the Rev. John S. Hays, and that the defendants, George Fulton and Henry Farley, who claim without right to be trustees of the church, supported and recognized as such by the defendants. John Watson and Joseph Gault, who also, without right, claim to be ruling elders, are threatening, preparing and about to take unlawful possession of the house of worship and grounds belonging to the church, and to prevent Hays, who is the rightful pastor, from ministering therein, refusing to recognize him as pastor, and to recognize as ruling elder, Thomas J. Hackney, who is the sole lawful ruling elder; and that when they obtain such possession they will oust said Hays and Hackney, and those who attend their ministrations, among whom are complainants.

And they further allege that Hackney, whose duty it is as elder, and McDougall, McPherson, and Ashcraft, whose duty as trustees it is to protect the rights thus threatened, by such proceeding in the courts as will prevent the execution of the threats and designs of the other defendants, refuse to take any steps to that end.

They further allege that the Walnut-street Church, of which they are members, now forms, and has ever since its organization in the year 1842, formed a part of the Presbyterian Church of the United States of America, known as the Old School, which is governed by a written constitution that includes the confession of faith, form of government, book of discipline and directory for worship, and that the governing bodies of the general church above the Walnut-street Church are, in successive order, the Presbytery of Louisville, the Synod of Kentucky, and

the General Assembly of the Presbyterian Church of the United States. That while plaintiffs and about one hundred and fifteen members who worship with them, and Mr. Hays, the pastor, Hackney, the ruling elder, and the trustees, McDougall, McPherson, and Ashcraft, are now in full membership and relation with the lawful General Presbyterian Church aforesaid, the defendants named, with about thirty persons, formerly members of said church, worshiping under one Dr. Yandell as pastor, have seceded and withdrawn themselves from said Walnut-street Church, and from the General Presbyterian Church in the United States, and have voluntarily connected themselves with, and are now members of, another religious society, and that they have repudiated and do now repudiate and renounce the authority and jurisdiction of the various judicatories of the Presbyterian Church of the United States, and acknowledge and recognize the authority of other church judicatories which are disconnected from the Presbyterian Church of the United States, and from the Walnut-street Church. And they allege that Watson and Gault have been, by the order of the General Assembly of said church, dropped from the roll of elders of said church for having so withdrawn and renounced its jurisdiction, and the Assembly has declared the organization to which plaintiffs adhere to be the true and only Walnut-street Presbyterian Church of Louisville.

They pray for an injunction and for general relief.

The defendants, Hackney, McDougall, McPherson, and Ashcraft answer, admitting the allegations of the bill, and that though requested, they had refused to prosecute legal proceedings in the matter.

The other defendants answer and deny almost every allegation of the bill. They claim to be the lawful officers of the Presbyterian Church, and that they and those whom they represent are the true members of the church. They deny having withdrawn from the local or the general church, and deny that the action of the General Assembly cutting them off was within the constitutional authority. They say the plaintiffs are not, and never have been, lawfully admitted to membership in the Walnut-street Church, and have no interest in it as will sustain this suit, and they set up and rely upon a suit still pending in the Chancery Court of Louisville, which they say involves the same subject-matter, and is between the same parties in interest as the present suit. They allege that in that suit they have been decreed to be the only true and lawful trustees and elders of the Walnut-street Church, and an order has been made to place them in possession of the church property, which order remains unexecuted, and the property is still in the possession of the marshal of that court as its receiver. These facts are relied on in bar to the present suit.

The statement of the pleadings is indispensable to an understanding of the points arising in the case. So far as an examination of the evidence may be necessary it will be made, as it is required in the consideration of these points.

The first of these concern the jurisdiction of the Circuit Court, which is denied, first, on the ground that plaintiffs have no such interest in the subject of litigation as will enable them to maintain the suit, and, secondly, on matters arising out of the alleged proceedings in the suit in the Chancery Court of Louisville.

The allegation that plaintiffs are not lawful members of the Walnut-street Church is based upon the assumption that their admission as members was by a pastor and elders who had no lawful authority to act as such. As the claim of those elders to be such is one of the matters which this bill is brought to establish, and the denial of which makes an issue to be tried, it is obvious that the objection to the interest of plaintiffs must stand or fall with the decision on the merits, and can not be decided as a preliminary question. Their right to have this question decided, if there is no objection to the jurisdiction, can not be doubted. Some attempt is made in the answer to question the good faith of their citizenship, but this seems to have been abandoned in the argument.

In regard to the suit in the Chancery Court of Louisville, which the defendants allege to be pending, there can be no doubt but that court is one competent to entertain jurisdiction of all the matters set up in the present suit. As to those matters, and to the parties, it is a court of concurrent jurisdiction with the Circuit Court of the United States, and as between those courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree.

But when the pendency of such a suit is set up to defeat another, the *case* must be the same. There must be the same parties, or at least such as represent the same interest; there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same.

The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.

In the case of Barrow v. Kindred, 4 Wallace, 397, which was an action of ejectment, the plaintiff showed a good title to the land, and defendant relied on a former judgment in his favor, between the same parties for the same land, the statute of Illinois making a judgment in such an action as conclusive as in other personal actions, except by way of new trial. But this

court held that as in the second suit plaintiff introduced and relied upon a new and different title, acquired since the first trial, that judgment could be no bar, because that title had not been passed upon by the court in the first suit.

But the principles which should govern in regard to the identity of the matters in issue in the two suits to make the pendency of the one to defeat the other, are as fully discussed in the case of Buck v. Colbath, 3 Wallace, 334, where that was the main question, as in any case we have been able to find. It was an action of trespass, brought in a State court, against the marshal of the Circuit Court of the United States for seizing property of plaintiff, under a writ of attachment from the Circuit Court. And it was brought while the suit in the Federal Court was still pending, and while the marshal held the property subject to its judgment. So far as the *lis pendens* and possession of the property in one court, and a suit brought for the taking by its officer in another, the analogy to the present case is very strong. In that case the court said: "It is not true that a court, having obtained jurisdiction of a subject-matter of suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same question exactly. In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits." And it might have been added, to the facts on which the claim for relief is founded.

"A party," says the court by way of example, "having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his note, and in another court of law in an action of ejectment for possession of the land. Here, in all the suits, the only question at issue may be the existence of the debt secured by the mortgage. But the relief sought is different, and the mode of proceeding different, the jurisdiction of neither court is affected by the proceedings in the other." This opinion contains a critical review of the cases in this court of Hagan v. Lucas, 10 Peters, 402; Peck v. Jenness, 7 How., 624; Taylor v. Carryl, 20 How., 594; and Freeman v. Howe, 24 How., 450, cited and relied on by counsel for appellants; and we are satisfied it states the doctrine correctly.

The limits which necessity assigns to this opinion forbids our giving, at length, the pleadings in the case in the Louisville Chancery Court. But we can not better state what is, and what is not, the subject-matter of that suit or controversy, as thus presented and as shown throughout its course, than by adopting

the language of the Court of Appeals in Kentucky, in its opinion delivered at the decision of that suit, in favor of the present appellants. "As suggested in argument," says the court, "and apparently conceded on both sides, this is not a case of division or schism in a church; nor is there any question as to which of two bodies should be recognized as the Third or Walnut-street Presbyterian Church. Neither is there any controversy as to the authority of Watson and Gault to act as ruling elders; but the sole inquiry to which we are restricted in our opinion is, whether Avery, McNaughton, and Leech are also ruling elders, and therefore members of the session of the church.

The summary which we have already given of the pleadings in the present suit shows conclusively a different state of facts, different issues, and a different relief sought. This *is* a case of a division or schism in the church. It *is* a question as to which of two bodies shall be recognized as the Third or Walnut-street Presbyterian Church. There *is* a controversy as to the authority of Watson and Gault to act as ruling elders, that authority being denied in the bill of complainants; and, so far from the claim of Avery, McNaugton, and Leech to be ruling elders being the sole inquiry in this case, it is a very subordinate matter, and it depends upon facts and circumstances altogether different from those set up and relied on in the other suit, and which did not exist when it was brought. The issue here is no longer a mere question of eldership, but it is a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut-street Church, and denying the right of the other to any such claim.

This brief statement of the issues in the two suits leaves no room for the argument to show the pendency of the first can not be pleaded either in bar or in abatement of the second.

The supplementary petition filed by plaintiffs in that case, after the decree of the Chancery Court had been reversed on appeal, and which did contain very much the same matter found in the present bill, was, on motion of plaintiff's counsel, and by order of the court, dismissed, without prejudice, before this suit was brought, and of course was not a *lis pendens* at that time.

It is contended, however, that the delivery to the trustees and elders of the body of which plaintiffs are members, of the possession of the church building, can not be granted in this suit, nor can the defendants be enjoined from taking possession as prayed in the bill, because the property is in the actual possession of the marshal of the Louisville Chancery Court as its receiver, and because there is an executed decree of that court ordering the marshal to deliver the possession to defendants.

In this the counsel for appellants are, in our opinion, sustained, both by the law and the state of the record of the suit in that court.

The court, in the progress of that suit, made several orders concerning the use of the church, and finally placed it in the possession of the marshal as a receiver, and there is no order discharging his receivership, nor does it seem to us that there is any valid order finally disposing of the case, so that it can be said to be no longer in that court. For, though the Chancery Court did, on the 20th of March, 1867, after the reversal of the decree and dismissing the bill, with costs, in favor of the defendants, the latter, on application to the Appellate Court, obtained another order dated June 26th. By this order, or mandate to the Chancery Court, it was directed to render a judgment in conformity to the opinion and mandate of the court, restoring possession, use, and control of the church property to the parties entitled thereto, according to said opinion, and so far as they were deprived thereof by the marshal of the Chancery Court under its order.

In obedience to this mandate the Chancery Court, on the 18th of September, three months after the commencement of this suit, made an order that the marshal restore the possession, use, and control of the church building to Henry Farley, George Fulton, B. F. Avery, or a majority of them as trustees, and to John Watson, Joseph Gault, and Thomas S. Hackney, or a majority of them as ruling elders, and to report how he had executed the order, and reserving the case for such further order as might be necessary to enforce full obedience.

It is argued here by counsel for appellees that the case was, in effect, disposed of by the orders of the Chancery Court, and nothing remained to be done which could have any practical operation on the rights of the parties.

But if the Court of Appeals, in reversing the decree of the chancellor in favor of plaintiffs, was no opinion that the defendants should be restored to the position they occupied in regard to the possession and control of the property before that suit began, we have no doubt of their right to make such order as was necessary to effect that object; and as the proper mode of doing this was by directing the chancellor to make the necessary order, and have it enforced as decrees are enforced in his court, we are of opinion that the order of the Court of Appeals, above recited, was, in essence and effect, a decree in that cause for such restoration, and that the last order of the Chancery Court, made in accordance with it, is a valid subsisting decree, which, though final, is unexecuted.

The decisions of this court in the cases of Taylor v. Carryl, 20 Dow., 504, and Freeman v. Howe, 24 How., 450, and Burke v. Colbath, 5 Wallace, are conclusive that the marshal of the Chancery Court can not be displaced as to the mere actual possession of the property, because that might lead to a personal conflict between the officers of the two courts for that posses-

sion. And the act of Congress of March 2, 1793, 1 U. S. Statute, 134, § 5, as construed in the cases of Diggs v. Walcott, 4 Cranch, 329; and Peck v. Senness, 7 How., 625, are equally conclusive against any injunction from the Circuit Court, forbidding the defendants, to take the possession which the unexecuted decree of the Chancery Court requires the marshal to deliver to them.

But, though the prayer of the bill in this suit does ask for an injunction to restrain Watson, Gult, Fulton and Farley from taking possession, it also prays such other and further relief as the nature of the case requires, and especially that said defendants be restrained from interfering with Hays, as pastor, and plaintiffs in worshipping in said church. Under this prayer for general relief, if there was any decree which the Circuit Court could render for the protection of the right of plaintiffs of the church property, and which did not disturb the possession of the marshal of the Louisville chancery, that court had a right,to hear the case and grant that relief. This leads us to inquire what is the nature and character of the possession to which those parties are to be restored.

One or two propositions which seem to admit of no controversy are proper to be noticed in this connection. 1. Both by the act of the Kentucky Legislature creating the trustees of the church a body corporate, and by the acknowledged rules of the Presbyterian Church, the trustees were the mere nominal title-holders and custodians of the church property, and other trustees were, or could be elected by the congregation, to supply their places once in every two years. 2. That in the use of the property for all religious services or ecclesiastical purposes, the trustees were under the control of the church session. 3. That by the constitution of all Presbyterian Churches, the session, which is the governing body in each, is composed of the ruling elders and pastor, and in all business of the session the majority of its members govern, the number of elders for each congregation being variable.

The trustees obviously hold possession for the use of the persons who, by the constitution, usages, and laws of the Presbyterian body, are entitled to that use. They are liable to removal by the congregation for whom they hold this trust, and others may be substituted in their places. They have no personal ownership or right beyond this, and are subject, in their official relations to the property, to the control of the session of the church.

The possession of the elders, though accompanied with larger and more efficient powers of control, is still a judiciary possession. It is as a session of the church alone that they could exercise power. Except by an order of the session in regular meeting they have no right to make any order concerning the use of the building; and any action of the session is necessarily

in the character of representatives of the church body by whose members it was elected.

If, then, this true body of the church, the members of that congregation, having rights of user in the building, have, in a mode which is authorized by the canons of the general church in this country, elected and installed other elders, it does not seem to us inconsistent or at variance with the nature of the possession which we have described, and which the Chancery Court orders to be restored to the defendants, that they should be compelled to recognize these rights, and permit those who are the real beneficiaries of the trust held by them, to enjoy the uses, to protect which that trust was created. Undoubtedly, if the order of the Chancery Court had been executed, and the marshal had delivered the key of the church to defendants, and placed them in the same position they were before that suit was commenced, they could in any court having jurisdiction, and in a case properly made out, be compelled to respect the rights we have stated, and be controlled in their use of the possession by the court, so far as to secure those rights.

All that we have said in regard to the possession which the marshal is directed to deliver to defendants, is equally applicable to the possession held by him pending the execution of that order. His possession is a substitute for theirs, and the order under which he receives that possession, which we have recited, shows this very clearly.

The decree which we are now reviewing seems to us to be carefully framed on this view of the matter. While the rights of plaintiffs and those whom they sue for, are admitted and established, the defendants are still recognized as entitled to the possession which we have described; and while they are not enjoined from receiving that possession from the marshal, and he is not restrained from obeying the Chancery Court by delivering it, and while there is no order made on the marshal at all to interfere with his possession, the defendants are required by the decree to respect the rights of plaintiffs, and to so use the possession and control to which they may be restored as not to hinder or obstruct the true uses of the trust, which that possession is intended to protect.

We are next to inquire whether the decree thus rendered is based upon an equally just view of the law as applied to the facts of this controversy. These, though making up a copious record of matter by no means pleasant reading to the sincere and thoughtful Christian philanthropist, may be stated with a reasonable brevity, so far as they bear upon the principles which must decide the case.

From the commencement of the late war of the insurrection to its close, the General Assembly of the Presbyterian Church at its annual meetings expressed in declaratory statements or

resolutions, its sense of the obligation of all good citizens to support the Federal Government in that struggle, and when, by the proclamation of President Lincoln, emancipation of the slaves of the States in insurrection was announced, that body also expressed views favorable to emancipation and adverse to the institution of slavery. And at its meeting in Pittsburg in May, 1865, instructions were given to the Presbyteries, the Board of Missions, and to the sessions of the churches, that when any persons from the Southern States should make application for employment as missionaries or for admission as members, or ministers of churches, inquiry should be made as to their sentiments in regard to loyalty to the Government, and on the subject of slavery; and if they found that they had been guilty of voluntarily aiding the war of the rebellion, or held the doctrine announced by the large body of the churches in the insurrectionary States which had organized a new General Assembly, that "the system of negro slavery in the South is a divine institution, and that it is the peculiar mission of the Southern church to conserve that institution," they should be required to repent and forsake these sins before they could be received.

In the month of September thereafter the Presbytery of Louisville, under whose immediate jurisdiction was the Walnut-street Church, adopted and published in pamphlet form what it called a "declaration and testimony against the erroneous and heretical doctrines and practices which have obtained and been propagated in the Presbyterian Church of the United States during the last five years." This declaration denounced, in the severest terms, the action of the General Assembly in the matters we have just mentioned, declared their intention to refuse to be governed by that action, and invited the co-operation of all members of the Presbyterian Church who shared the sentiments of the declaration, in a concerted resistance to what they called the usurpation of authority by the assembly.

It is useless to pursue the history of this controversy further with minuteness.

The General Assembly of 1866, denounced the declaration and testimony and declared that every Presbytery which refused to obey its order should be *ipso facto* dissolved, and called to answer before the next General Assembly, giving the Louisville Presbytery an opportunity for repentance and conformity. The Louisville Presbytery divided, and the adherents of the declaration and testimony sought and obtained admission in 1868, into "the Presbyterian Church of the Confederate States," of which we have already spoken as having several years previously withdrawn from the General Assembly of the United States and set up a new organization.

We can not better state the results of these proceedings upon

the relations of the church organizations and members, to each other and to this controversy, than in the language of the brief of appellants' counsel in this court.

In January, 1866, the congregation of the Walnut-street Church became divided in the manner stated above, each claiming to constitute the church, although the issue as to membership was not distinctly made in the chancery suit of Avery v. Watson. Both parties at this time recognized the same superior church judicatories.

On the 19th June, 1866, the Synod of Kentucky became divided, the opposing parties in each claiming to constitute respectively the true presbytery and the true synod; each meanwhile recognizing and claiming to adhere to the same General Assembly. Of these contesting bodies the appellants adhered to one, the appellees to the other.

On the 1st of June, 1867, the presbyter and synod recognized by the appellants, were declared by the General Assembly to be "in no sense a true and lawful synod and presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America;" and were permanently excluded from connection with or representation in the assembly; by the same resolution the synod and presbytery adhered to by appellees were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.

The Synod of Kentucky thus excluded, by a resolution adopted the 28th of June, 1867, declared "that in its future action it will be governed by this recognized sundering of all its relations to the aforesaid revolutionary body (the General Assembly) by the acts of that body itself." The Presbytery took substantially the same action.

In this final severance of presbytery and synod from the General Assembly, the appellants and appellees continued to adhere to those bodies at first *recognized* by them respectively.

In the earliest stages of this controversy it was found that a majority of the members of the Walnut-street Church concurred with the action of the General Assembly, while Watson and Gault as ruling elders, and Fulton and Farley as trustees, constituting in each case a majority of the session and of the trustees, with Mr. McElroy, the pastor, sympathized with the party of the declaration and testimony of the Louisville Presbytery. This led to efforts by each party to exclude the other from participation in the session of the church and the use of the property. This condition of affairs being brought before the Synod of Kentucky before any separation, that body appointed a commission to hold an election, by the members of the Walnut-street Church, of three additional ruling elders. Watson and Gault refused to open the church for the meeting to hold this

election, but the majority of the members of the congregation, meeting on the sidewalk in front of the church, organized and elected Avery, Leech, and McNaughton additional ruling elders, who, if lawful elders, constituted with Mr. Hackney a majority of the session. Gault and Watson, Farley and Fulton refused to recognize them as such, and hence the suit in the Chancery Court of Louisville, which turned exclusively on that question.

The newly elected elders, and the majority of the congregation, have adhered to and been recognized by the general assembly as the regular and lawful Walnut-street Church and officers, and Gault and Watson, Fulton, Farley, and a minority of the members, have cast their fortunes with those who adhered to the declaration and testimony party.

The division and separation finally extended to the Presbytery of Louisville and the Synod of Kentucky. It is now complete and apparently irreconcilable, and we are called upon to declare the beneficial uses of the church property in this condition of total separation between the members of what was once a united and harmonious congregation of the Presbyterian Church.

The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by considerations applicable to a church established and supported by law as the religion of the State.

1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument, devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

2. The second is when the property is held by a religious congregation, which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control, more or less complete, in some supreme judicatory over the whole membership of that general organization.

In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require.

And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is any one so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters.

In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of Unitarian doctrine, and as a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law throws around the trust is the same.

And though the task may be a delicate one and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust. In the leading case on this subject in the English courts, of the Attorney-General v. Parson, 3 Merrivale, 353, Lord Eldon said, "I agree with the defendants that the religious belief of the parties is irrelevant to the matters in dispute, except so far as the King's Court is called upon to execute the trust." That was a case in which the trust deed declared the house which was erected under it was for the worship and service of God. And though we may not be satisfied with the very artificial and elaborate argument by which the chancellor arrives at the conclusion that, because any other view of the nature of the Godhead than the Trinitarian view was heresy by the laws of England, and any one giving expression to the Unitarian view was liable to be severely punished for heresy by the secular courts, at the time the deed was made, that the trust

was, therefore, for Trinitarian worship, we may still accept the statement that the court has the right to enforce a trust clearly defined on such a subject.

The case of Miller v. Gable, 2 Denio, 492, appears to have been decided in the Court of Errors of New York on this principle, so far as any ground of decision can be gathered from the opinions of the majority of the court as reported.

The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society.

In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property.

The minority, in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property, from the fact that they had once been members of the church or congregation.

This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization, for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth.

Of the cases in which this doctrine is applied no better representative can be found than that of Shannon v. Frost, 3 B. Monro, 253, where the principle is ably supported by the learned Chief Justice of the Court of Appeals of Kentucky.

The case of Smith v. Nelson, 18 Verm. 511, asserts this doctrine in a case where a legacy was left to the Associate Congregation of Ryegate, the interest whereof was to be annually paid

to their minister forever. In that case, though the Ryegate congregation was one of a number of Presbyterian churches connected with the general Presbyterian body at large, the court held that the only inquiry was whether the society still exists, and whether they have a minister chosen and appointed by the majority, and regularly ordained over the society, agreeably to the usage of that denomination.

And though we may be of opinion that the doctrine of that case needs modification, so far as it discusses the relation of the Ryegate congregation to the other judicatories of the body to which it belongs, it certainly lays down the principle correctly, if that congregation was to be treated as an independent one.

But the third of these classes of cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved, and to other considerations, is every way the most important.

It is the case of property acquired in any of the usual modes, for the general use of a religious congregation, which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government.

The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any special worship, but of property purchased for the use of a religious congregation; and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation, we have pointed out how this identity or succession is to be ascertained; but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is bound by its orders and judgments. There are, in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, they synod over the presbytery, and the general assembly over all. These are called, in the language of the church organs, judicatories, and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases.

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and State, under our system of laws, and supported by a preponderating weight of judicial authority, is,

that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

We concede at the outset that the doctrine of the English courts is otherwise. In the case of the Attorney-General against Pearson, cited before, the proposition is laid down by Lord Eldon, and sustained by the peers, that it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard. And in the subsequent case of Craigdallie v. Aikman, 2 Bligh, 529, the same learned judge expresses in strong terms his chagrin that the Court of Sessions of Scotland, from which the case had been appealed, had failed to find on this latter subject, so that he could rest the case on religious belief, but had declared that in this matter there was no difference between the parties.

And we can very well understand how the Lord Chancellor of England, who is, in his office, in a large sense, the head and representative of the Established Church, who controls very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. The dissenting church in England is not a free church, in the sense in which we apply the term in this country, and it was much less free in Lord Eldon's time than now. Laws then existed upon the statute book hampering the free exercise of religious belief and worship in many most oppressive forms; and though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. And it is quite obvious, from an examination of the series of cases growing out of the organization of the Free Church of Scotland, found in Shaw's Reports of Cases in the Court of Sessions, that it was only under the pressure of Lord Eldon's ruling established in the House of Lords, to which final appeal lay in such cases, that the doctrine was established in the Court of Sessions after no little struggle and resistance.

The full history of the case of Craigdallie v. Aikman in the Scottish court, which we can not further pursue, and the able opinion of Lord Meadowbank in Galbraith v. Smith, 15 Shaw, 808, show this conclusively.

In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one, aggrieved by one of their decisions, could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches,) has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their book of disciplines, in their collections of pre edents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

We have said that these views are supported by the preponderant weight of authority in this country; and for the reasons which we have given, we do not think the doctrines of the English Chancery Court on this subject should have with us the influence which we would cheerfully accord to it on others.

We have already cited the case of Shannon v. Frost, 3 Ben. Monro, in which the appellate court of the State where this controversy originated, sustains the proposition clearly and fully. "This court," says the Chief Justice, "having no ecclesiastical jurisdiction, can not revise or question ordinary acts of church

discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We can not decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church."

In the subsequent case of Gibson v. Armstrong, 7 B. Monro, 481, which arose out of the general division of the Methodist Episcopal Church, we understand the same principles to be laid down as governing that case; and in the case of Watson v. Avery, 2 Bush., 332, the case relied on by appellants as a bar, and considered in the former part of this opinion, the doctrine of Shannon v. Frost is in general terms conceded, while a distinction is attempted which we will consider hereafter.

One of the most careful and well considered judgments on the subject is that of Appeals of South Carolina, delivered by Chancellor Johnson in the case of Harmon v. Dreher, 2 Speer's Eq., 87. The case turned upon certain rights in the use of the church property claimed by the minister, notwithstanding his expulsion from the synod as one of its members.

"He stands," says the chancellor, "convicted of the offenses alleged against him by the sentence of the spiritual body of which he was a voluntary member, and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether, if held, were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the Synod or to his denomination. . . : When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them." The principle is reaffirmed by the same court in the John's Island Church case, 2 Richardson, Eq., 215.

In Den v. Bolton, 7 Halstead, 206, the Supreme Court of New Jersey asserts the same principles, and though founding its decision mainly on a statute, it is said to be true on general principles.

The Supreme Court of Illinois, in the case of Ferraria v. Vaucancelles, 25, Ill., 456, refers to the case of Shannon v. Frost, 3 B. Monro, with approval, and adopts the language of the

court that "the judicial eye can not penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not, as they and their churches might determine, and they thereby submit to the ecclesiastical power and can not now invoke the supervisory power of the civil tribunals."

In the very important case of Chase v. Cheny, recently decided in the same court, Judge Lawrence, who dissented, says, we understand the opinion as implying that in the administration of ecclesiastical discipline, and where no other right of property is involved than loss of the clerical office or salary incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, and that its decision of that question is binding on the secular courts. And he dissents with Judge Sheldon from the opinion because it so holds.

In the case of Watson v. Farris, 45 Missouri, 183, which was a case growing out of the schism in the Presbyterian Church in Missouri, in regard to this same declaration and testimony, and the action of the General Assembly, that court held that whether a case was regularly or irregularly before the assembly was a question which the assembly had the right to determine for itself, and no civil court could reverse, modify, or impair its action in a matter of merely ecclesiastical concern.

We can not better close this review of the authorities than in the language of the Supreme Court of Pennsylvania, in the case of the German Reformed Church v. Siebert, 5 Barr., 291: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do any thing but improve either religion or good morals."

In the subsequent case of McGinnis v. Watson, 41 Penn. Stat., 21, this principle is again applied and supported by a more elaborate argument.

The Court of Appeals of Kentucky, in the case of Watson v. Avery, before referred to, while admitting the general principle here laid down, maintains that when a decision of an ecclesiastical tribunal is set up in the civil courts, it is always open to inquiry whether the tribunal acted within its jurisdiction, and if it did not, its decision could not be conclusive.

There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and

vague sense, and which is used so often by men learned in the law, without a due regard to precision in its application. As regards its use in the matters we have been discussing it may very well be conceded that, if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or any where else. Or if it should, at the instance of one of its members, entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said, in a certain general sense very justly, that it was because the General Assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable.

But it is a very different thing where a subject matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical degree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions.

And this is precisely what the Court of Appeals of Kentucky did in the case of Watson v. Avery. Under cover of inquiries into the jurisdiction of the synod and presbytery over the congregation, and of the General Assembly over all, it went into an elaborate examination of the principles of Presbyterian Church government, and ended by overruling the decision of

the highest judicatory of that church in the United States, both on the jurisdiction and the merits; and substituting its own judgment for that of the ecclesiastical court, decides that ruling elders, declared to be such by that tribunal, are not such, and must not be recognized by the congregation, though four-fifths of its members believe in the judgment of the assembly and desire to conform to its decree.

But we need pursue this subject no further. Whatever may have been the case before the Kentucky court, the appellants in the case presented to us have separated themselves wholly from the organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different, if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property, or to the use of it, which is the subject of this suit.

The novelty of the questions presented to this court for the first time, their intrinsic importance and far-reaching influence, and the knowledge that the schism in which the case originated has divided the Presbyterian churches throughout Kentucky and Missouri, have seemed to us to justify the careful and laborious examination and discussion which we have made of the principles which should govern the case.

For the same reasons we have held it under advisement for a year; not uninfluenced by the hope that, since the civil commotion, which evidently lay at the foundation of the trouble, has passed away, that charity, which is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all Christian virtues, would have brought about a reconciliation.

But we have been disappointed. It is not for us to determine or apportion the moral responsibility which attaches to the parties for this result. We can only pronounce the judgment of the law as applicable to the case presented to us, and that requires us to affirm the decree of the Circuit Court as it stands.

The Chief Justice did not sit on the argument in this case, and took no part in its decision.

SUPREME COURT OF OHIO.

TO APPEAR IN 21 VOL. O. S. REPORTS.

AFFIDAVIT IN ATTACHMENT.

James Sleet vs. Bell Williams. Error to the Common Pleas, reserved in the District Court of Hamilton County.

Welch, J.—Held:

1. In an action founded on contract, an affidavit filed as the basis of an attachment is sufficient, if it contains all the elements required by the statute, except that it states positively the amount "due" upon the plaintiff's claim, instead of showing, as the statute requires, the amount he "believes he ought to recover."

2. Where affidavits, read on the hearing of a motion, are copied into the records by the Clerk, without any bill of exceptions taken for that purpose they can not be considered on proceedings in error.

Judgment reversed.

FEE BILL.

The State ex. rel. The Attorney-General vs. The Judges of the Court o Common Pleas of the First Judicial District. *Quo Warranto.*

White, J. Held:

1. The act of April 6, 1870, limiting the compensation of certain officers therein named (67 O. L., 36), and the supplemental act of April 12, 1871 (68 O. L., 58), and which can only operate in Hamilton County, are not laws of a general, but of a local nature, and are, therefore, not in conflict with section 26 of article 2 of the constitution.

2. The object of these acts is not taxation for the purpose of general revenue, but to limit and provide for the payment of the compensation of the officers named from the earnings of the respective offices, and to reduce the expense of official service to the public.

3. It is not essential to the exaction of fees that they should inure to the personal benefit of the officer. The officers are but the agents of the State for transacting the public business, and it is immaterial to those receiving their services whether the sum to be paid therefor goes to the officer or into the public treasury, provided no more is exacted than is just and reasonable for the facilities afforded and the service performed.

4. Where fees are properly authorized to be charged for official service, the officer rendering the service may be required to collect the fees.

5. The provision of the act that, in case of a surplus accumulating after paying the compensation of the officers and the other expenses of the offices, such surplus may be transferred to the general county fund, does not render the act invalid.

6. The authority conferred by said acts on the judges of the Court of Common Pleas does not invest them with a new office, but merely authorizes them to perform additional duties as judges.

Demurrer to the plea overruled, and judgment rendered for the defendants.

HOMICIDE.

The State vs. Michael Beheiner. Error on a bill of exceptions taken on behalf of the State in the Court of Common Pleas of Brown County.

White, J.—Held:

Where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and, on his

motion, a new trial is granted, the effect of granting a new trial is to set aside the whole verdict, and leave the case for retrial upon the same issues as on the first trial.

JUDGMENT.

Harriet Ash et. al. vs. James F. McCabe et. al. Motion for leave to file petition in error to the District Court of Meigs County.

By the Court:

Where judgment in a civil action is taken against several defendants, only some of whom have appeared in the action or been served with process, and those not so appearing or being served afterward release all error in the proceedings, the defendants served with process can not reverse the judgment for such error or irregularity.

LIABILITY OF SURETY.

James M. Dye vs. M. H. H. Dye. Motion for leave to file a petition in error.

Day, J.:

Where the principal maker of a note resigned all his property to assignee for the benefit of his creditors, and no steps were taken by the holders of the note nor by the surety thereon toward presenting it to the assignees for allowance and payment out of the assets in their hands,—Held: That the mere omission of the holder of the note to present it to the assignee did not exonerate the surety from liability thereon.

LIQUOR LAW.

John Schneider vs. Sarah Hosier. Error to the Common Pleas of Preble County. Reserved in the District Court.

McIlvaine J.—Held:

1. The practice of mutilating pleadings by striking out or inserting new matter by way of amendment is disapproved; but where such alteration is made with the permission of the Court, and no prejudice results to the adverse party, the final judgment will not be reversed therefor.

2. An action for injuries sustained by a wife, in her person, or property, or means of support, under (original) section seven of the act of May 1, 1854 (S. and C. 1,432), entitled "An act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," may be commenced after the death of the husband.

3. The phrase, "means of support," as used in said section, is not too vague and uncertain to receive judicial construction.

4. A wife has an interest in her husband's capacity to perform labor as a means of support; and she may prosecute an action for damages resulting to her from the deprivation of such means of support, in consequence of the intoxication of her husband, against any person who caused such intoxication by selling to him intoxicating liquors in violation of said statute.

5. The omission of a court, in its charge to the jury, to define or explain doubtful words or phrases contained in a statute upon which the action is founded, does not constitute a ground of reversal, unless such definition or explanation was requested by the party claiming to have been prejudiced thereby.

6. In all actions under said section, in which the plaintiff shows a right to recover damages actually sustained, the jury may also assess exemplary damages without proof of actual malice or other special circumstances of aggravation.

7. The verdict in such cases should not be set aside on the ground that the damages are excessive, unless the court is satisfied that the jury abused its discretion.

8. Nor will the verdict be disturbed because the court in its charge stated general propositions of law not involved in the issue, if it appear from the whole charge that the jury could not have been misled thereby.

Judgment affirmed.

PARTIES.

Buckingham et. al. vs. The Commercial Bank of Cincinnati and others. Error to the District Court of Hamilton County.

WELCH, J.—Held:

1. The provision of section 20 of the code of civil procedure, that an action shall be deemed commenced, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor or otherwise united in interest with him, is applicable by analogy to petitions in error.

2. In a proceeding in error against several creditors to reverse a judgment obtained by them, setting aside a sale of land as fraudulent, although one of said creditors was the sole plaintiff below, and the others by their cross petition joined in the prayer of the plaintiff for relief, the defendants in error are united in interest, within the meaning of said twentieth section of the code, so that the service of a summons upon one prevents the running of the statute of limitations as to all.

3. In such case, as the judgment is a unit, and can not properly be reversed as to some of the parties, and affirmed as to others, all must be brought into court before the final adjudication.

4. Where the plaintiff in a petition in error, names as defendants thereto one only of such creditors, with the words "and others" added, but files with his petition a transcript of the record below, and refers to it as such in his petition, the petition in error will be regarded as a proceeding against all the creditors appearing by the record to be so united in the interest with the defendant named.

5. Service of a summons in error, directed to only one of several defendants in error, upon the attorney of all, is good only as against the defendant named in the writ, and does not bind the others.

Judgment reversed and cause remanded for a new trial.

Supreme Court of Ohio.

RECOGNIZANCE TAKEN BY JUSTICE OF THE PEACE.

W. W. Gamble, vs. The State of Ohio.—Motion for leave to file a petition in error, to the District Court of Ashland County:

BY THE COURT:—

Section thirty-three of the act of March 27, 1837 (S. & C. 815, 819), prescribing forms to be observed by justices of the peace in criminal proceedings has not been repealed either expressly or by implication by the code of criminal procedure. (66 Ohio laws, 287 *et seq.*)

Section 61 of the latter act, which reads as follows: "All recognizance taken during vacation by any Judge or other officer authorized to take them, shall be signed and sealed by the parties and certified to by the officer taking the same," does not apply to recognizance taken by a justice of the peace upon a preliminary examination of a person charged with the commission of an offense.

Under the provisions of Section 27 of the code of Civil Procedure, S. & C., 953), an action on a recognizance, executed in the form prescribed by said Section 33, is properly brought in the name of the State of Ohio, without joining the name of the county for whose benefit the same is prosecuted.

Motion overruled.

SERVICE BY PUBLICATION.

Wood & Pond vs. E. M. Stanberry et al.—Reserved in District Court of Morgan County.

MCILVAINE, J.—Held:

1. In an action to foreclose a mortgage, a personal judgment against a non-resident defendant, who has been served only by publication, under Section 70 of the code, (S. &. C. 964), upon a showing that the action was brought for the sale of real estate, under a mortgage, and that the defendant was a non-resident of the State, is absolutely void for want of jurisdiction over the person of the defendant; and a levy under an execution issued thereon upon the goods and chattels of such defendant, is wholly invalid as against a lien under a subsequent levy of an attachment in favor of other creditors of such judgment debtor.

2. Where a plaintiff has in his possession goods and chattels by virtue of a levy under an execution issued upon a void judgment, and afterward levies subject to his former levy an order of attachment in favor of other creditors of the judgment debtor upon the same property, and proceeds, or threatens to proceed, under the direction of the plaintiff in execution, to sell the same for the purpose of applying the proceeds upon the execution, the plaintiff in attachment may restrain the sale by injunction.

Decree for plaintiffs.

SOUTHERN RAILROAD.

POWER OF THE LEGISLATURE TO AUTHORIZE ITS CONSTRUCTION.

J. Bryant Walker, Solicitor of the City of Cincinnati, vs. the City of Cincinnati, and others.—Error to the Superior Court of Cincinnati.

SCOTT, C. J.—Held:

1. Courts can not nullify an act of legislation on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, but which neither its terms nor its implications clearly disclose.

2. It is well settled in this State, by repeated adjudication, that, independent of Constitutional prohibitions, it is within the legitimate scope of legislative power to authorize a city to aid in the construction of railroads or other public improvements, in which such city has a special interest, and to impose taxes upon its citizens for that purpose. It follows that it is equally competent for the legislature to authorize the entire construction of such improvements, by a city having a special interest therein, and to empower the local authorities to provide means therefor by the taxation of its citizens.

3. When the authority given is to construct a line of railroad having one of its termini in such city, it does not affect the question of power that the road when constructed will be mainly outside of the State of Ohio. It is the corporate interest of the municipality which determines her right of taxation, and not the location of the road, which may well be constructed with the consent of the State into or through which it may pass.

4. The authority and duty to prevent an abuse of the powers of taxation, and assessment by municipal corporations, is intrusted by the Constitution to the General Assembly and not to the courts of the State; and the power of the legislature to authorize local taxation can not be judicially denied on the ground that the purpose for which it is exercised is not local unless the absence of all special local interest is clearly apparent.

5. The act of the General Assembly of this State, passed March 4, 1869, entitled "An Act relating to cities of the first class having a popoulation exceeding one hundred and fifty thousand inhabitants," is not in conflict with the provisions of the Constitution in any of the following respects: The conferring of authority on the judges of the Superior Court of Cincinnati, to appoint trustees to carry out the purposes of the act, is not the exercise of an appointing power by the General Assembly, which Article 2, Section 27, of the Constitution forbids; it is not the creation of a new office, but the annexing of a new duty to an existing office. For the same reason it is not in conflict with Article 4, Section 14, which prohibits judges of the Supreme Court, and the Court of Common Pleas, from holding any other office of profit or trust under the authority of this State or the United States. The duty imposed upon the Court by this act is of a judicial character. Nor does the act conflict with Article 2, Section 20, of the Constitution, which requires the General Assembly, in cases not provided for in the Constitution, to fix the term of office and compensation of all officers.

6. The trustees for whose appointment it provides are not public officers within the meaning of this provision; and finally the act violates neither the express nor clearly implied prohibitions of Article 8, Section 6, which declares "The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint

stock company, corporation or association whatever, or to raise money, or loan its credit to, or in aid of, any such company, corporation, or association."

Judgment of Superior Court affirmed.

DIGEST OF RECENT DECISIONS.

ACTION—PARTNERSHIP.

Right of one partner to sue another.—There is no rule forbidding one partner to sue another at law in respect of a debt arising out of a partnership transaction, if the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts.—*Crater vs. Bininger*, 45 *N. Y.*

ACTION—STATUTE OF LIMITATION.

When statute of limitation commences.—Where money is due in instalments, assumpsit can be maintained for such money as was due at the time of bringing the action, and when another sum of the money shall become due, the plaintiff may commence a new action for that also, and so *toties quoties*. The statute of limitation commences to run upon each separate sum as it becomes due.—*Bush v. Showell, Supreme Court of Pennsylvania, March* 21, 1872.

When not taken out of the Statute of Limitation.—A payment on account of an acknowledgment by one of two or more joint debtors will not take the case out of the statute as to the others. In a joint action against several joint debtors, evidence offered to show an acknowledgment of payment by one only of the defendants, is inadmissible.—*Id.*

AGENT.

What Declarations admissible.—The declarations of an agent are not admissible to bind the principal under any circumstances until the agency is first clearly established.—*The Court of Appeals of Maryland, per Bowie, J., in National Mechanics' Bank of Baltimore v. National Bank of Baltimore.*

Evidence.—Whether there be any evidence or not, is a question for the judge; whether it is sufficient evidence is a question for the jury.—*Id.*

The Preliminary Question.—The preliminary question is to be tried by the judge, though he may, in his discretion, take the opinion of the jury upon the facts, on which the primary question depends.—*Id.*

What the judge decides.—The judge only decides whether there is *prima facie* any reason for sending it at all to the jury.—*Id.*

BIGAMY.

When committed out of the State.—A charge of the court which assumes that a party may be indicted and convicted in this State for a bigamous marriage or a bigamous cohabitation which occurred out of this State, is erroneous.—*Bowen v. The State of Alabama. Supreme Court of Alabama.*

In what Bigamy consists.—Bigamy consists in a bigamous marriage out of this State, followed by a bigamous cohabitation under pretense of such marriage in this State, or in a bigamous marriage in this State.—Revised Code, section 3599.—*Id.*

When Charge erroneous.—A charge which ignores the necessity of the proof of the venue of the offense charged in the indictment, in the county wherein the indictment was found, is erroneous. A party can only be indicted "in the county or district in which the offense was committed."—Constitution of Alabama, 1867, article 1, section 8.—*Id.*

BILLS OF EXCHANGE.

Becoming valueless through laches.—If commercial paper, when received upon the sale of property, by the vendor, at the risk of the vendee as to its payment, or as a security upon a pre-existing debt, becomes valueless through the *laches* of the party receiving it, the loss must be borne by him, and he can not recover the price of his goods or his debt.—*Darnall v. Morehouse* 45 *N. Y.*

CAUSE OF ACTION.

Proof to sustain an action upon fraud.—An action founded upon the fraud and deceit of the defendant in making false representations, can not be maintained, in the absence of proof, that he believed, or had reason to believe, at the time when he made the representations, that they were false, or that he assumed to have, or intended to convey, the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge.—*Meyer v. Amidon*, 45 *N. Y.*

CHECK.

Bank liable when taken on deposit.—When a genuine check, drawn by one of its customers upon a bank, is presented by the drawer to that bank for deposit, it is substantially a demand of payment by the holder of the check. If the bank accepts the check and pays it, either by delivering the currency or giving the party credit for it as a deposit, the transaction is closed between the bank and such party. And where the amount of a check, so presented was credited to the holder upon his deposit ticket by the officers of the bank, *Held*, the bank became liable for the amount of the check, although on the same day, and before the close of banking hours, but after it had paid other checks of the drawers presented later, it returned the check to the depositor as not good, and although the account of the drawer was overdrawn at the time of the deposit.—*Oddie v. The National City Bank of New York*, 45 *N. Y.*

COMMERCIAL PAPER.

Bona Fide Holder.—Proof of a diversion of commercial paper from the purpose for which it was delivered by the maker, casts upon the holder the burden of showing that he is, or has succeeded to the rights of a *bona fide* holder. —*Farmers' and Citizens' National Bank v. Noxon*, 45 *N. Y.*

Circumstances must show that note was taken in good faith.—A note made by N. for $5,000, indorsed by K., was delivered to C. to be discounted or the benefit of N. C. kept an account with the plaintiff's bank, in the name of "C. agent," and was known to the plaintiff to be in embarrassed circumstances; but was also known to be doing business as a broker, under the same name, and had been in the habit of procuring the plaintiff to discount notes, as large in amount as N.'s note, made and indorsed by others, and which were paid. He delivered N.'s note to the plaintiff, with other collaterals, as security for what he then owed, or might thereafter owe, and was permitted to overdraw his account some $8,000. Afterward the plaintiff discounted for C. his own note for $18,000, taking N.'s note, with others, as security, and credited the proceeds on C.'s account. C. then drew out over $9,000, which left a balance to his credit, after satisfying his draft.—*Held*, in an action by the plaintiff upon N.'s note, that the circumstances under which it was received did not show that it was not taken in good faith; that the plaintiff became a *bona fide* holder of it as security for C.'s over draft, and was a *bona fide* holder of the note, as security for the payment of C.'s own note.—*Id.*

CONSTRUCTION.

When written parts of an agreement prevail over the printed.—It is only when there is an inconsistency or repugnancy between them, which is irreconcilable, that the written parts of an agreement prevail over the printed.—*Barhydt v. Elles*, 45 *N. Y.*

CO-TENANTS.

Rights of.—Each co-tenant is entitled to the exclusive possession of the entire property as against all except co-tenants, and one wrongfully in possession can not gainsay the right of each co-tenant to possession of the whole.—*Supreme Court of California, per Crockett J., in Williams v. Sutton.*

CONTRACT—COMPOSITION CREDITORS.

When fraudulent.—Any agreement made by one creditor for some advantage to himself over other creditors, who unite with him in a composition of their debts, in ignorance of such agreement, is fraudulent and void.—*Bliss v. Matteson*, 45 *N. Y.*

A valid consideration—A parol agreement by the defendant to take a share in the plaintiff's interest in a trading adventure, is valid and binding, although the only consideration passing from the defendant to the plaintiff for such share, or his right to take it, was the obligation to share in the losses. Upon such an agreement, the plaintiff may maintain an action against the defendant to recover contribution of the losses of the adventure.—*Coleman v. Eyre*, 45 *N. Y.*

The plaintiff's promise to account to the defendant for one-half of the profits, is supported by the obligation incurred by the defendant to share one-half of the losses, and hence it is a case of mutual promises, reciprocally binding.—*Id.*

The agreement was not within the clause of the statute of frauds, requiring agreements for the sale of goods to be in writing.—*Id.*

Digest of Recent Decisions.

GUARDIAN.

When made liable for Collection of Debt—A guardian who receives in payment of a solvent debt, due to his ward, the note of a third person, instead of money, receives the same at his peril, and if he fails to collect said note, and the maker becomes insolvent, must, on his final settlement, be charged with the amount of the debt, and interest on the same, from the time it was due, although he may have used due diligence to collect said note.—*Lane et ux. v. Mickle, Supreme Court of Alabama.*

MASTER AND SERVANT.

Contract of hiring made by agent; evidence of ownership; admission of agent.—The defendant owned half of a certain farm, and her husband managed it for him. She testified, "I left all matters to my husband." The husband hired the other half of the farm from the owners, without saying for whom he hired. The defendant's husband, when he hired plaintiff, told him the farm (the whole farm) did not belong to him, but belonged to his wife, and he was going to carry it on for her. *Held*, that this testimony binds the defendant, for it is the admission of her agent acting within the scope of her authority. It is a matter of no consequence who, in point of fact, hired the shares of defendant's brother and sister. The defendant's husband, acting as agent for his wife (the defendant), hired plaintiff to work the whole farm, and she must pay the agreed price, even if as between her and her husband, he should contribute half. Judgment in favor of plaintiff affirmed. *Harris v. Wade. Supreme Court of N. Y. March Term*, 1872.

MORTGAGE.

Foreclosure of installment of mortgage.—The plaintiff foreclosed her mortgage for an installment only, and the interest on the whole sum from May 11, 1870. *Held*, that, in the absence of an answer, no greater relief could be given her by the court than she asked. This relief the defendant offered and should have been permitted to give. 2 R. S. 200, § 161. The order of the supreme court denying this right should be reversed. After a judgment for an installment had been entered, the judgment for sale of the premises for subsequent installment was proper and right, but if the payment of the amount for which the mortgage was foreclosed was improperly denied, there should have been no judgment, and the order directing the sale of the premises for a subsequent installment should be reversed. *Malcolm vs. Allen et al. Supreme Court of N. Y., March Term*, 1872.

PATENT.

1. Inception of invention.—A patentee whose patent is assailed upon the ground of want of novelty, may show, by sketches and drawings, the date of his inceptive invention, and if he has exercised reasonable diligence in "perfecting and adapting" it, and in applying for his patent, its protection will be carried back to such date.—*Reeves vs. Keystone Bridge Co., J. H. Linville, et al. Circuit Court of the U. S., Eastern District of Pennsylvania. Opinion by McKenan, Cir. J. April 1st*, 1872.

2. Illustrative drawings not an invention.—Illustrative drawings of conceived ideas do not constitute an invention, and unless they are followed up by a seasonable observance of the requirements of the patent laws they can have no effect upon a subsequently granted patent to another.—*Id.*

3. Description in printed publication.—To oppose a patent by showing that the thing patented "had been described in some public work anterior to the supposed discovery thereof by the patentee," it must be proved that the work was published before the date of the patent. This proof is not deducible from the imprint on the title-page, but it must be shown when it was put in circulation or offered to the public.—*Id.*

4. Fruit Jar.—A combination for a fruit preserving jar, all the elements of which are old, except a device to secure more effectual sealing, by which the bearing of the fastener is only on the periphery of the cover, and its downward pressure is thus certainly concentrated upon the whole circumference of the flange, is a new and original invention.—*Wm. McCully & Co. vs. Cunningham & Ihmsen, Circuit Court of the U. S., West District of Pennsylvania. Opinion by McKennan, Cir. J., April*, 1872.

PAYMENT OF ILLEGAL TAX.

When an action for recovery will lie.—If an illegal tax is collected and paid into the treasury of a county, an action as for money had and received will lie against the county for its recovery.—*Newman v. Supervisors of Livingston County*, 45 *N. Y.*

When demand not necessary.—The money having come to the treasury of the county by the wrongful act and with the knowledge of its officers, no demand is necessary before suit, nor is it necessary to present the claim therefor to the board of supervisors for audit and allowance.—*Id.*

PROMISSORY NOTE.

When an Action will lie, and what cost can be recovered.—The plaintiff purchased from the defendant the supposed note of W., giving his own in exchange. In an action brought by him against W., upon the purchased note, judgment went against him for costs, it being found that the signature was a forgery. The plaintiff, being sued upon his own note by the holder to whom the defendent had transferred it, defended on the ground of want of consideration, and judgment went against him for the amount of the note and costs. In his action against the defendant.—*Held*, that he could recover, together with the amount paid by him in satisfaction of his note, the costs of his unsuccessful action against W. (of which the defendant had notice), but not the costs of his unsuccessful defense upon his own note.—*Whitney v. National Bank of Potsdam*, 45 *N. Y.*

Construction of Blank Indorsement.—A blank indorsement will generally receive such a construction as will give effect to the intention of the parties, and parol evidence will be admitted to show and explain what liabilities were intended to be assumed at the time of the transaction.—*The Court of Appeals of Maryland, per Brent, J., in the case of Ives v. Besley.*

Intention of Parties.—If the contract set up is different from that which attaches by presumption of law, it must be established by proof showing that both parties, promisor and promisee, so intended and agreed.—*Id.*

RAILROAD COMPANY.

What constitutes carelessness.—A locomotive with a train of freight cars belonging to the appellee, in passing eastwardly through the village of Fairbury, threw out great quantities of unusually large cinders, and set on fire two buildings, and a lumber yard, the weather at the time being very dry and the wind blowing freely from the south. One of the buildings ignited by the sparks was a warehouse near the track. The heat and flames from the structure speedily set on fire the building of plaintiffs', situated about two hundred feet from the warehouse, and destroyed it. The court *held*, on demurrer to the evidence, that it tended to prove the fire escaped through the carelessness of the defendant, and that the destruction of the plaintiff's house was its natural consequence, which any reasonable person could have foreseen, and remanded the case for trial.—*Feut et al. v. Toledo, Peoria and Warsaw R. R. Co. Supreme Court of Illinois, June 28th, 1872, per Lawrence, C. J.*

Doctrines repudiated.—The court considers and repudiates the doctrine laid down in Ryan v. The N. Y. Cent. R. R. Co., 35 N. Y. 214, and by the Supreme Court of Pennsylvania in Kay v. Penn. R. R. Co., that where the fire is communicated by the locomotive to the house of A., and thence to the house of B., there can be no recovery by the latter, as the fire was not communicated directly from the railway to the house of B.—*Id.*

The true rule.—That the true rule in all cases is to determine whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, and all the circumstances surrounding the careless act at the time of its performance, and if loss has been caused by the act, and it was under the circumstances a natural consequence, which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire.—*Id.*

RAILROAD CORPORATION.

Liability on account of not delivering Trunk.—The plaintiff purchased a ticket of the defendants, a railroad corporation, at a point on their line, for New York, and had his baggage checked for that city. He arrived there by the Hudson River Railroad, a connecting line of road, at nine o'clock in the morning, and about noon of that day gave his check to an expressman in the city of Brooklyn, with directions to get the trunk from the depot of the Hudson River Railroad for him. The expressman, neglecting to do so, when two days afterward, the plaintiff demanded the trunk at the depot, it could not be found. The defendants had, in pursuance of an arrangement with the Hudson River Railroad Company, transferred the baggage to the latter at Albany, and it had been conveyed by them to New York and deposited in their depot. In an action brought by the plaintiff to recover the value of his

trunk and contents,—*Held*, that he was entitled to recover, in the absence of any proof on the part of the defendants accounting for the failure to deliver it—*Burdell v. New York Central Railroad Company*, 45 *N. Y.*

REFERENCE.

When ordered: fire insurance.—Appeal from an order of reference. The defendants had insured an elevator. This elevator was partially destroyed by fire. The defendants, under their policies, undertook to repair. The plaintiff claims that this was not done, and that a large expense was necessarily incurred by plaintiff to reinstate the vessel, and that, by reason of such omission to fully repair, not only that this expense should be paid to plaintiff, but that, by reason of the delay, made necessary by such default of defendants, the plaintiff was deprived of the use of the vessel a long time, for which a large claim for the services of the vessel is made. *Held*, that, without undertaking to decide whether or not this is a case where a compulsory reference may be ordered, the order should be reversed and a trial be had before a jury. The plaintiff's cause of action depends upon a question of fact, which should be settled by a jury. After this question is settled, there seems to be no great difficulty in a jury deciding the items of the plaintiff's claims. The greater part of it is made up of loss of the use of the vessel, which is, in fact, but a single item. Although the comparatively small amount of the remaining claim of plaintiff may be made up of many items, in view of the fact that the important question as to defendants' performance of their undertaking must be first decided, it is proper that such issue be determined in the ordinary way. The great question is as to the liability of defendants. After such liability is fixed, it seems that there will be no great conflict as to the items of the plaintiff's claim. Order reversed.—*The New York Floating Elevator Company vs. The Astor Fire Insurance Co. et al. Supreme Court of N. Y., March Term*, 1872.

SALARY OF CIRCUIT JUDGES.

Deductions except for neglect of duty, are unconstitutional.—The Chancellor of the Louisville Chancery Court sued for a *mandamus* to compel the Auditor to issue his warrant for a portion of his salary, to which the latter answered that, in accordance with the act of February 11, 1871, that portion of his salary withheld had been paid to the Chancellor *pro tem.*, elected in consequence of his failure to hold court. A demurrer to the answer was sustained.

Held—By Section 3, of the act of January 17, 1854, a Chancellor *pro tempore* may be elected for the same cause, in the same manner, and receive the same pay as a Circuit Judge *pro tem.*

The Legislature has no power to require a deduction from salaries of public officers, except for neglect of official duty. (Sec. 13, Art. 8, Ky. Constitution.) The proviso to the act of February 11, 1871, requiring a deduction beyond this, and for other cause, is to that extent void. A void act can not be ratified or made obligatory, and though appellee may have drawn his salary under the act, he was not therefore concluded by its void conditions. (13 B. Mon. 150; 2 Met., 160.)

Judgment affirmed.—*The Auditor of Franklin Co., v. Cockran Kentucky Court of Appeals. To appear in Vol. 8 of Bush's Reports.*

SERVICE.

1. **On non-resident, or one out of the jurisdiction.**—To authorize a court having equity jurisdiction to exercise the power conferred by the act of Assembly of April 6th, 1859, providing for the service of process in certain cases in equity, upon defendants not resident or found within the jurisdiction of the court, the subject matter of the suit must either be itself within the jurisdiction of the court, or must be brought within its jurisdiction by the service of its process on one or more of the principal defendants.—*Eby vs. Cowan, Supreme Court of Penn. Opinion by Sharswood J., Jan.* 16, 1872.

Judgment on return of two nihils.—Covenant on a ground rent deed—judgment on return of two nihils—the return on the alias summons was, "served by posting and publication, and nihil habit as to defendant." Held sufficient—the return need not show on its face that there is no tenant in possession.

It being made the duty of the sheriff to serve the writ on the tenant in possession, if any, and he being authorized by the law only in case there is no such tenant, to post a copy of the writ, his return that he did so post it, is a direct affirmance that there was no such tenant, as much so as if it had been expressly stated.—*Hawkins vs. Weightman, Supreme Court of Penn. Opinion by Sharswood, J., March* 4, 1872.

TRADE MARK.

When entitled to Protection.—The owner of a peculiar product of nature, like natural mineral water, who has applied to it a conventional name, by which it has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name, as his trade mark, in the sale of the article.—*Congress Spring Company v. High Rock Spring Company,* 45 *N. Y.*

Proper and legitimate business trade-mark.—Where the spring first known as and named "Congress Spring" produces natural mineral water of peculiar medical and curative properties, possessed by no other spring, the words "Congress Water," and "Congress Spring Water," appropriately indicate the origin and ownership of the water flowing from Congress Spring, and the word "Congress," used in connection with the bottling and sale of such water, is a proper and legitimate business trade-mark.—*Id.*

When entitled to relief by Injunction.—Where the plaintiffs are the purchasers of the spring and all interest of the original proprietors, who invented and used such trade mark, they are entitled to relief by injunction against sellers of mineral water attempting to appropriate the word "Congress" as descriptive of the water sold by them.—*Id.*

WARRANTIES.

Warranty: definition of "remnants."—The question in this case was, whether the plaintiff warranted the goods sold. Upon this question there was

conflicting evidence, and the finding of the referee must, under the cases, conclude this count. There being no warranty, the defendant was entitled to recover for the whole piece of cloth which was a part of the entire quantity bought in the absence of fraud. Neither party knew this piece was included in the sale. It was delivered and not returned. The subject of the sale was "colored cloth remnants," but that term would include, under the testimony in this case, a whole piece, which was so damaged as to be unsalable as a whole piece.—*The Glenham Company v. Chandler. Supreme Court of N. Y., March Term*, 1872.

BANKRUPTCY DECISIONS.

From the National Bankrupt Reg., Vol. 6, No. 5.

CONTRACTS.

1. **Agreement between officers of corporations and contractors with the corporation.**—Appeal from judgment in favor of plaintiff. The firm of Hervey, Johnson & Co. are rink builders. The plaintiff is a director of defendants. Johnson & Co. agree to pay plaintiff $10,000 if he will organize a company and procure them a contract for building the rink. Under this arrangement the contractors subscribe for $10,000 of stock in the name of the plaintiff and pay for it. One-half of this stock was issued to plaintiff and the remaining half to the firm of Johnson & Co. The court below hold that the defendant must pay plaintiff for the stock so issued to Johnson and Co. *Held*, that this was erroneous. As between the parties to the contract in question, such a contract is void, and the law would aid neither party as against the other to enforce it. The plaintiff violated a duty which he owed to his associate stockholders and to the company of which he was a director. Such a contract means only that the price paid to the defendant is added to the contract price of the rink builder. As between the plaintiff and defendant, the plaintiff has paid nothing. Johnson & Co. have paid for the stock subscribed for plaintiff, under this illegal agreement, and have received the stock in question which they paid for. The plaintiff asks that the defendant pay him also for stock which he has not paid for, and for which Johnson & Co. were under no legal obligation to pay and deliver to plaintiff. The plaintiff is not entitled, under the facts as stated, to recover of the defendant the value of the stock in question. Judgment reversed and new trial ordered.—*Jameson v. The Brooklyn Skating Rink Association. Supreme Court of N. Y., March Term*, 1872.

2. **Evidence.**—On the trial the defendant produced, as a witness, one Hervey, one of the firm Johnson & Co., and offered to prove that his firm was the owner of the stock in question, that they paid for it, and that plaintiff did not pay any thing upon it. This proof was rejected. *Held*, that this was error, and was not subsequently cured by permitting the plaintiff to prove the agreement in reference to the stock by other members of the firm. The defendant had the right to have the testimony of Hervey. It may have materially affected the result.—*Ib.*

3. **Acceptance of goods as being according to contract.**—The question in this case is as to the delivery and acceptance of a boiler and engine according to the contract under which they were furnished. These articles were delivered to defendant and were used by him from September, 1868, to March, 1869, without objection or offer to return or request to have any test made. *Held*, under these facts, the defendants must be deemed to have accepted the articles as being equal to the requirements of the contract, and the plaintiff's assignor was entitled to recover the sum agreed on, which was payable when the boiler and engine were tested and found to comply with the conditions of sale. The plaintiff, as assignee, is entitled to the contract price, and the judgment in his favor is affirmed.—*The Washington Iron Works v. Fountain. Supreme Court of N. Y., March Term*, 1872.

Legal Items.

THE Connecticut Legislature has repealed the usury law.

EX Judge Cardozo has resumed the practice of the law in New York city.

THE Chicago Law Institute can now place upon its library shelves some 3,000 books in lieu of the 7,000 that were destroyed by fire.

IN the English House of Commons, the bill of Mr. Bass, for the abolishment of imprisonment for debt, has been defeated by a large majority.

PRINCE Mohamed Wuhidu ldin, a member of one of the most powerful and influential Mohamedan families in India, and a grandson of the famous Tippo Sultan, recently received a call to the English bar.

THE Lord Chancellor of England has conferred the "Silk" upon Mr. Judah P. Benjamin, who was well known in this country as the Secretary of State to the late Confederate Government. He was some time since made Queen's counsel for the County Palatine of Lancaster.

THE statements recently published that Chief Justice Chase's health was in a critical condition, and his intellect seriously impaired thereby, is authoritatively denied by the *Tribune*, which states that his illness is but a slight malaria attack, and his brain as unclouded as ever.

THERE is too much truth in the subjoined paragraph, which we copy from this excellent weekly, "The Albany Law Journal," and the abuse of which it speaks should long since have been checked, for the sake of the poor and ignorant sufferers who are at the mercy of those courts, and the "legal" vampires, the disgrace of our profession, who fatten on the blood of those helpless victims.

Legal Items.

L. H. Roots, recently suspended from the office of marshal of the Western District of Alabama, is charged with having expended, during one year, nearly $240,000 for expenses of the court, or more than the expense attending all the United States Courts in the State of New York. His last requisition was for $25,000. The department of justice ordered $25,000 to be sent to him, but afterward withheld the amount.

A French paper gives the following summary of the result of the trials of the Communist prisoners: sentenced to death, 72; hard labor for life, 212; transportation of the first degree, 894; of the second degree, 2,900; detention, 1,169; imprisonment with hard labor, 60; imprisonment of three months and under, 305; imprisonment of three months and upward, 1,733; imprisonment to periods exceeding one year, 1,138; banishment, 291; total, 8,415; acquittals, 2,112, being at the ratio of about twenty per cent.

UNDER the revised tariff adopted by the last Congress, some important changes have been made of interest to underwriters. After the first of next October, no stamps will be required on notes, contracts, time-drafts, deeds, mortgages, insurance policies, and renewals, bonds of any description, certificates of stocks, or of any kind, custom-house papers, protests of notes, or powers of attorney. Stamps of every kind are abolished after that date, except the two-cent stamp on checks, sight-drafts, and money orders. Mortgage bonds executed before October 1st, but not issued until that date, require no stamps. All other documents executed prior to that time require the same stamps as heretofore.

BY the terms of the new patent law in Canada (taking effect September 1st, 1872) patents are to be granted in Canada to American citizens on the most favorable terms. The patents may be taken out either for five years (government fee $20), or for ten years (government fee $40), or for fifteen years (government fee $60). The five and ten year patents may be extended to the term of fifteen years. The formalities for extension are simple and not expensive. In order to apply for a patent in Canada, the applicant must furnish a model, specification, and duplicate drawings, substantially the same as in applying for an American patent. American inventions, even if already patented in this country, can be patented in Canada, provided the American patent is not more than one year old.

Next to the star chamber, the police court, as it exists in some of our cities, deserves a place in history, as the most arbitrary, irresponsible, and tyrannical of tribunals. But it will probably never get its desert in that direction, nor in any other. It is a perfect embodiment of the one-man power, and that man usually a petty politician, with no knowledge of law and less regard for justice. The victims of his ignorance or caprice are usually poor and friendless, and have no alternative but to work out in silence their "ten days," or "three months," or "six months" sentence. We have frequently watched the proceedings of a court of this kind not far away, and confidently assert that nine

out of every ten convictions therein would be reversed on *certiorari*. Dickens's remark on "Fang's" court is quite as applicable to these police courts in this country: "The presiding Genii in such an office as this, exercise a summary and arbitrary power over the liberties, the good name, the character, almost the lives, of her majesty's subjects, especially the poorer class; and within such walls, enough fantastic tricks are daily played to make the angels blind with weeping."

Book Notices.

REPORTS OF CASES DECIDED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES WITHIN THE SOUTHERN DISTRICT OF OHIO: Edited by Lewis H. Bond, Counselor at Law. Published by Robert Clarke & Co., Cincinnati. Vol. 2. Price $6 00.

This is the second volume of these valuable reports, and contains a series of cases decided in the Circuit and District Courts of the United States within the Southern District of Ohio, commencing with the February term, 1866, and ending with the October term, 1871. Some important questions arising under the Bankrupt Act, have received the attention of this District Court, and are very ably discussed in several of the cases reported. The volume, in addition to these reports, contains the rules of the Circuit Court of the United States, within the Southern District of Ohio, adopted at the April term, 1855, with subsequent orders of the Court; the rules of the District Court of the United States, within and for the Southern District of Ohio, in bankruptcy; the rules for proceedings in *rem;* and the rules in admiralty as promulgated by the Supreme Court of the United States, May 6, 1872. These reports are a valuable acquisition to any library, and of practical utility to every practitioner.

A PRACTICAL TREATISE ON THE LAW OF HORSES, embracing the law of Bargain, Sale, and Warranty of Horses and other Live Stock; the rule as to unsoundness and Vice, and the responsibility of the proprietors of Livery, Auction, and Sales stables, Innkeeper, Veterinary Surgeons, and Farriers. By M. D. Hanover of the Cincinnati Bar. Publishers, Robert Clarke & Co., Cincinnati, O. Price $3 75.

In this handsomely printed volume of 245 pages, the author discusses, with considerable ability, the law of contract and the law of warranty, as applicable to chattels and live stock, but had not a chapter on the rule as to unsoundness and vice in horses been introduced, this treatise would present no features of greater attraction than any of the many text-books treating of warranty and of contract. The chapter referred to, however, is really a very good one, and makes this work of an appreciable value to the party requiring such information. The references to cases, and authorities cited, show great care and attention on the part of the compiler, and in preparing a case, will spare the practitioner from a great deal of labor. Taking this work as a whole, we arrive at the conclusion that the author has done a great service to the profession, and that the publishers could have made a worse investment.

Book Notices.

A MEDICO-LEGAL TREATISE ON MALPRACTICE AND MEDICAL EVIDENCE, comprising the elements of Medical Jurisprudence. By John J. Elwell, M. D., a member of the Cleveland Bar. Third edition—revised and enlarged. Law binding, 8 vol; 600 pages. Price $7 50. Ingham, Clarke, & Co., Cleveland. O.

This work, written by John J. Elwell, M. D., a member of the Cleveland Bar, and professor in the Ohio State and Union Law College—is one that commends itself to every practicing lawyer and physician, being a most valuable treatise on medical jurisprudence in general, and at the same time treating very fully of the important subjects of malpractice and insanity. Containing as it does such a full discussion of the subjects of which it treats, in as concise form as presented in this third edition, it can not fail of being welcomed by the medical and legal professions. The author has expressed his views clearly and without prolixity, and has succeeded admirably in his endeavor to omit what every body knows, and to present what every body wants to know, and can not find in other works, thereby avoiding verbosity, and giving to purchasers of his book the full value of their investments.

This treatise has received the commendation of some of the most eminent jurists and physicians in England and in this country. Dr. William B. Carpenter, the great English physiologist, and professor of medical jurisprudence in the University of London, says of it, "I know of no instance in which the combination of legal and medical knowledge has been so remarkably shown as it has in Mr. Elwell's treatment of the subjects he has undertaken." A testimonial of so high a character from such eminent medical authority, deserves the enconium bestowed upon it by the fit representative of the legal profession, the Hon. John McLean, of the Supreme Court of the United States, which is as follows: "No one who did not unite both professions could have written so valuable a book. I have no knowledge that any one, under similar circumstances, has attempted to do what Mr. Elwell has so well performed."

The author has devoted several chapters to the important topic of Malpractice, one chapter to the subject of the Responsibility of Druggists, and has treated of Abortion, Fœticide, Rape, Poisoning, Infanticide, and other kindred subjects, in a very masterly manner, and has evinced deep thought and great research in his presentation of the subject of Insanity, one chapter of which, "The position of the Courts upon Insanity," is especially worthy of the attention of both professions.

We take pleasure in commending the book to our readers, it being a work which should be in the library of every physician and lawyer. An examination will convince the reader of the truth of the saying of that eminent Philadelphia lawyer, David Paul Brown, that "A doctor who knows nothing of law, and a lawyer who knows nothing of medicine, are deficient in essential requisites of their respective professions."

IN our next issue we intend to review Bigelow's excellent work on ESTOPPEL.

THE

AMERICAN LAW RECORD.

VOL. 1. NOVEMBER, 1872. No. 5.

SUPERIOR COURT OF CINCINNATI.

Special Term, (June 1872.)

S. W. FORDYCE *vs.* ISAAC MARKS.

OPINION OF THE COURT. BY YAPLE, J.

SYLLABUS.

1. If an action be brought upon the record of a judgment of a sister state, the petition must aver facts sufficient to enable the plaintiff to recover upon it, as such record can not be made part of the petition under Sec. 122 of the code; but it should be filed with or attached to the petition under Sec. 117 of the code. If that be not done, the defendant can not notify the plaintiff, under Sec. 361 of the code, to furnish a copy, which, if not complied with, will authorize the latter to have it excluded as evidence at the trial; but he should file a motion requiring plaintiff to file such record, or in default thereof, that the petition be struck from the files.

2. Such records, where it affirmatively appears that the defendant was not served with process but appeared by attorney, is only *prima facie* evidence of such appearance; and the want of authority of such attorney so to appear may, following the rule as settled by the Supreme Court of the United States, be proved to defeat a recovery upon such judgment; but the evidence to disprove such authority should be clear and satisfactory.

3. If, in the state where rendered, such record be *conclusive* of the fact of appearance by attorney, so found or recited, the same effect will not be given to it in Ohio, the constitution of the United States and the law of Congress passed in pursuance thereof, requiring it to be given the same credit as it would receive in the state where rendered, is limited to the credit such state ought to give it according to the general settled rules of law, and not exceptional common or statute law peculiar to that state.

4. Where a partnership business is carried on in one state, by some of the members of the firm, who entirely manage the business, and the other members of the firm reside out of the state and do not actually engage in the firm affairs, if a suit be instituted in a court of record, in the state where the partnership is located, against all the individuals composing the firm, but the non-residents are not served with process, do not appear, or employ counsel to defend, or in any way personally defend against such action, they will not be personally bound by a judgment rendered in such action, though the other partners employ an attorney to, and who does, nominally, defend for all the parties, such judgment will only bind the resident partners; and all the partnership interests which may be pursued under it according to law, any where and against all the partners, served or not served, so far as their partnership interests and property are concerned.

5. But such resident and managing partners have the right to institute and maintain suits involving the partnership interests and property in the name and on behalf of all the partners, who will be personally bound thereby; and if, in an action brought against all the members, the resident and managing partners, on behalf of all, file a counter claim, or set-off, or cross petition, and demand therein a judgment, or relief for all, that is equivalent to bringing an original suit, and all will be personally bound by any judgment that may be rendered in the action, whether in favor of or against them.

This suit is maintained by the plaintiff against Isaac Marks, to recover of him $10,031 89, with interest from December 10, 1870, on a decree of the Circuit Court, of Louisville, Ky., purporting to have been rendered on the 11th day of November, 1870, in his favor, against Bennett Marks, Nathan Bensinger, and the defendant, Isaac Marks, for $7,341 28, with interest from July 1, 1865, $——costs.

The action in the Louisville Court was instituted by the plaintiff against the above-named defendants on December 15, 1865. Isaac Marks was not served with process, the return of the sheriff as to him being that he was a resident of Cincinnati, Ohio; the other two defendants were duly served with process. The suit was brought to compel the defendants to account for the proceeds of some $16,617 of claims—quartermasters' vouchers—placed by plaintiff in defendants' hands for collection, a detailed list of which was set forth in the bill.

On January 12, 1866, O. F. Stirman, a regular practicing attorney and counselor at law, in said court, assuming to represent and act for all the defendants, which he did throughout the whole progress of the cause, filed an answer in their behalf, styling them "partners, under the style of Marks & Company."

This answer set up a counter claim in reference to two of the vouchers—one of $1,140, and another of $1,340, averring that, as to them, defendants were liable to the government on their guaranty of them, and praying that plaintiff be compelled to indemnify them against such their guaranty, and for all proper relief, etc., etc.

Afterward, on June 8, 1866, an amended answer was filed setting up a payment of $2,500, and on April 17, 1868, another amended answer was filed by the attorney on behalf of all the defendants, setting up a set-off in their favor against the plaintiff for $1,129 75, with interest from August 16, 1865, which answer was made a cross petition, and judgment thereon prayed over and against the plaintiff, as for money had and received.

All the affidavits to the pleadings on the part of the defendants seem to have been made by Bennett Marks, who is a son of the defendant, Isaac Marks.

Isaac Marks defends this suit on the ground that he never was served with process in the Louisville Chancery suit, or appeared to that action in that court in person, or by attorney, or otherwise, and that such proceedings and decree were had and rendered without jurisdiction as to him, and are void.

In point of fact, Bennett Marks, the son, and Nathan Bensinger, the brother-in-law of Isaac Marks, and Isaac Marks, were, at the time the Fordyce claims arose, partners in business in Louisville, Kentucky, under the firm name of Marks & Co., Isaac furnishing $10,000 of the capital, but residing in Cincinnati, while the other two partners resided in Louisville and conducted the business of the partnership. They became partners February 2, 1864, to carry on the brokerage and U. S. claim agency business, and they employed Stirman as the attorney of the firm, by the year, and especially employed him to defend the Fordyce suit in the Chancery Court. But Isaac testifies that he was not aware of either fact, and his son swears that he did not advise him of them, though Isaac swears in the fall of 1866, or winter of 1867, he was informed by his partners that Marks & Co. had got into trouble—had a law-suit in court. On February 12, 1866, the partners nominally dissolved their partnership: Isaac Marks took a note from his co-partners for $5,000, as his share of the profits and losses, and his son, Bennet, and

Bensinger assumed the outstanding liabilities of the firm, and were to collect and receive all the debts and claims due it. The other firm effects were not disposed of, and the business seems not to have been fully closed up. The parties had another settlement, and provisions made for closing up their firm business in June, 1869. At this time, June 1, 1869, it was stipulated, among other things, that Bensinger should close out all the firm's property then on hand, as soon as practicable, for the benefit of the firm, except such as it "is or will be necessary to retain for the further continuance of the said firm's business." Provision was also made for paying out of the first moneys, depositors, &c., and then Isaac Marks $9,000, to liquidate the firm's indebtedness in Cincinnati, which amount he had borrowed in banks there for the firm.

Stirman, the defendants' attorney in the Louisville suit, died before his deposition could be taken in this action.

And, in considering the case, the testimony of Bensinger and his wife, and a witness who swears that he saw Isaac Marks at Stirman's law-office, when Bensinger states the first answer in the Fordyce case was read to him, will not be taken into consideration, as it may be doubtful, owing to the testimony in the case going to impeach Bensinger's veracity, and the fact that Isaac Marks was in Ohio at that time, though if true, or if it related to filing a subsequent answer, it would be decisive of the case. The case will be determined upon the law governing the admitted and unquestionably proven facts, though, I may properly say, that, in view of the fact that Isaac Marks appears to be an intelligent and industrious business man; that he was frequently in Louisville; that he knew the firm had a suit in court; that the suit lasted from December 15, 1865, to November 11, 1870, nearly five years; that the sum claimed was large; that the action was most persistently defended by the Louisville partners; that one of them was his brother-in-law, and the other his own son, who is now so alive to his father's interests, that he came from Louisville here to testify for him in this case, and who seems to have verified all the papers at every step of the Louisville case, and who, it is claimed, never let that father, so deeply interested in the result, know a breath of the pendency of that suit, or what he had done, or whom he had employed

as attorney to defend it,—these facts make the claim of this defendant, that he was not advised, did not know, and took no part in the defense of that suit, a tax upon credulity. Neither he, nor his son, nor Bensinger, knew that if he was not served with process and should take no part in the defense, he would, though a partner, not be bound by any decree that might be rendered in the cause; for on this point the law is conflicting and may well be said to be unsettled. The fact may be as the defendant claims; and it may be that what he really knew and did about that suit, his feelings, in view of the great interest he has in this suit, may have caused him to forget. His son and Bensinger are bankrupt, and largely indebted to him.

At the trial, objections were made to the admission in evidence of the certified transcript of the Louisville proceedings and decree, but the same was admitted subject to such exceptions.

The defendants' counsel showed to the court, that they had duly served the plaintiff with notice to furnish them with a copy of such record and proceedings as provided for by the 361st section of the code, which plaintiff and his attorneys failed to comply with, but only permitted them to take the document itself for short periods at a time. I do not think this is such an instrument of writing as is contemplated by that section, of which a copy may be demanded; but that it should have been filed with the petition as required by the 117th section of the code; and, if not so filed, the defendant should have moved to require it to be so filed, or in default thereof, that the petition be struck from the files.

The 122d section of the code requires copies of certain instruments, etc., for the unconditional payment of money only upon which actions, etc., are brought, to be attached to and filed with petitions. Such copies are parts of the pleadings. The 117th section of the code requires certain written instruments, they being mere evidences of indebtedness, to be attached to or filed with the petition; such files become no part of the record. The pleadings must state facts sufficient to make a cause of action or defense independently of them.

The 361st section of the code relates to instruments of writing collateral to the cause of action, but necessary as evidence

to sustain it, and are other than such instruments as are evidence of indebtedness, under the 117th section.

The 360th section of the code relates to the inspection and obtaining copies, etc., of books and writings containing evidence pertinent to the issue, and largely supplies the place of discovery as it existed under former chancery practice.

That such a record as the one here involved is governed by the 117th section of the code, and not the 122d, or the 361st section, see *Memphis Med. Col.* vs. *Newton*, 2 Handy's Rep., 163, opinion by Gholson, J.; *Judds* vs. *Dean*, 2 Disney's Rep., 210, opinion by Storer, J.

In the last case it was held that a *demurrer* would not lie for failure to file or attach such record, and that it could not be made part of the pleading.

The next question presented by the defendant is, that, while this decree is *prima facie* evidence to bind Isaac Marks, and while it appears that the court rendering it found that Isaac Marks appeared by his attorney, Stirman, to the action, yet, as he was not served with process, and did not take, personally, any action in defending that suit, or personally employ or authorize the employment of the attorney, the whole proceedings are *coram non judice* and void as to him, though he may have known the fact that such suit was pending, it being claimed that his co-partners could not bind him *personally*, by any thing they may have done or omitted to do in the premises; that they could not, without his knowledge or consent, authorize an attorney to appear and act for him, or enter his appearance to such action.

Here there is a conflict of authorities. That one partner may enter an appearance for all is decided in

Harrison vs. Jackson, (*arguendo*) 7 T. R., 208.
Bonnett vs. Stickney, 17 Vt. R., 531.
Taylor vs. Coryell, 12 Serg. & R., 243-250.
Saunders vs. Bentley, 8 Iowa R, 516.
Gregory vs. Harmon, 10 *Id.*, 445.
Clark vs. Stoddard, 3 Ala. R., 366.

The contrary is held in

Haslet vs. Street, 2 McCord, 310.
Loomis vs. Pearson, Harper (Law R, South Car.), 471.

Hills vs. Ross, 3 Dal., 331, note.
Bright vs. Sampson, 20 Texas, 21.
DeMoss vs. Brewster, 4 Lane & Marsh, 261.
Moredon vs. Meyer, 6 Man & Gray, 278, and note.
Phelps vs. Brewer, 9 Cush, 390.

It has been decided in Kentucky, (*Southard* vs. *Steele*, 3 Mon. R., 435,) that where an action is pending against all the members of a co-partnership, one partner may submit the cause to arbitration and thereby bind the other partners. The same has been held in Ohio (*Wilcox* vs. *Singletary*, Wright's Rep., 420), and Parsons, in his work on Partnerships, p. 178, says: "And we have some doubt whether any of our courts might not now be expected to sustain such a submission, if it were in itself unobjectionable."

But many authorities deciding, the contrary exist.

See 1 Gale R., 48.
10 Moore R., 389.
1 Pet. R., 222.
13 Barb. N. Y., 660.
15 Id., 224.
1 Wend. R., 326.

Though, in such cases, the partners being all in court, and, in fact, all jointly engaged in defending the suit, one might well be held the agent of all for managing such suit, while no such agency could be implied where one seeks to bring the others into court without their consent, and thus bind them individually by a judgment. Upon the same ground, in *Gilly* vs. *Singleton*, Litt., Ky. R., 259, it was held that one partner could bind his co-partner by acknowledging service of notice to take depositions in a suit pending against them both; that such deposition might be read against both. Upon a review of the cases, and after carefully considering them, I shall hold the law to be: that service of a summons upon one or more partners, in a suit instituted against them all, or the acknowledgment of service by one for all, or the entry of an appearance to an action by one for all, will only bind personally those actually served or appearing, and that those not served will not be bound as individuals, but their interests in the partnership and its property and effects will be bound by any judgment rendered in pursuance of such proceedings.

The case of *Phelps* v. *Brewer*, 9 Cush., 390, is the best reasoned and considered case upon this subject that I have been able to find decided either in England or America, and such is the rule fairly deducible from it.

This will fully account for and sustain the practice that has prevailed in chancery, where, as in all cases at law and in equity, all the partners are necessary parties, plaintiff or defendant. They must sue or be sued individually; but, in chancery, if one or more reside abroad and the resident members of the firm will not enter the appearance of the absent partner, service upon the absent may be made upon the resident partner. But the remedy is obtained only against the partnership effects. This remedy the nature of chancery proceeding readily affords.

See Carrington vs. Cantillon, Bunbury, 107.
Coles vs. Gurney, 1 Madd. R., 187.
Snider vs. Forbes, 2 Bev., 503.
2 Daniel's Chy. Pr. (4th Ed.), Add. vii.
Lansing vs. McKillup, 7 Cow., 416.

But see Young vs. Goodson, 2 Russ, 255, *contra*.

Such judgment, then, as the one mentioned in the case from 9 Cush., would be enforcible, out of the state, against partnership property, by proceedings in chancery, but not individually, against the partner not served with process. Of course, it is not intended to be determined by me, what acts, accompanied with a knowledge of the pendency of a suit, will *estop* a party not served from denying the validity of a judgment rendered against him where he has not been served with process.

But it is insisted by the plaintiff's counsel that, under the Federal Constitution and laws such judicial proceedings are to have the same force and effect and to receive the same credit that they would have or receive in the state where rendered; and that, by the law of Kentucky, it appearing from the record that the defendant appeared to the action by attorney, the record is *conclusive* that he did so appear.

"Full faith and credit shall be given in each state to the "public acts, records, and judicial proceedings of other states. " (*Const.*, Art. 4, Sec. 1.) And the said records and judicial pro-

"ceedings, authenticated as aforesaid, shall have such faith and "credit given to them in every court within the United States, "as they have by law or usage in the courts of the state "from whence the said records are or shall be taken."—*Act of May* 26, 1790, 1 *Statute at Large*, 122.

Under these provisions, it seems to be settled that nothing merely exceptional to the common law or peculiar to the statutes of a state, is entitled to such full faith and credit beyond the state. These enactments relate only to judgments, &c., rendered in accordance with the settled rules and usages of law, as commonly recognized. The decree in question can have, then, no greater effect here as evidence than if rendered in Massachusetts, New York, or any other state, when a different rule as to the conclusiveness of such judgments prevails.

Amer. 2 L. Cas., note to.

Mills vs. Duryee; M'Elmoyle vs. Cohen.

D'Arcey vs. Ketchum, 11 How., 165.

Cheever vs. Wilson, 9 Wal., 123.

The question is, then, fairly presented, whether, in an action upon the record of a judgment rendered by a court of general jurisdiction of a sister state finding that the parties appeared by attorney, it is competent to prove that attorney had no authority in the premises. And here we shall find that, in some states, such proof is rejected when judgments rendered by their own courts are involved and admitted in reference to those rendered by other states. There is, in my judgment, no warrant for the distinction, either in law or reason. Such holding assumes that the proceedings of courts of other states are not entitled to equal credit. But the Supreme Court of the United States is the tribunal authoritatively to settle the construction of the Federal Constitution and the laws of Congress passed in pursuance thereof, while the state courts interpret their own laws in relation to the force and effect of their own judgments within their limits; and thus the two courts may hold differently, as to the right to impeach judgments collaterally for want of jurisdiction of the person or the subject matter, or for fraud, and here lies the apparent contradiction between decisions relating to domestic judgments and those of other states, to be found in our reports.

In Kentucky, such proof in relation to their own judgments is held inadmissible.

Holbert vs. Montgomery, 5 Dana R., 11.

Whiting vs. Johnson, *Id.*, 390.

Roberts vs. Caldwell, *Id.*, 514.

In Ohio, the decisions have not been uniform, or consistent in their reasoning.

Thus, in *Critchfield vs. Porter*, 3 O. R., 519, in chancery, it was held that it might be proved against the record, that the attorney appearing for the party had no authority to do so, but as the party might appear, at a subsequent term, in the court rendering the judgment, and set the same aside upon motion, he had an adequate remedy at law, and relief was denied him. The action was upon a judgment rendered in this state.

The reasoning in *Sheldon vs. Newton*, 3 O. S., 498-9, &c., establishes the same conclusions. The court (Ranney, J.), however, quotes *Voorhes vs. U. S. Bank*, 10 Pet., 473, as sustaining its broad language, when such language is used in the maintenance of a proposition directly to the contrary of that held by our court. In *Anderson vs. Anderson*, 8 O. R., 108, it is held that in an action at law upon the judgment of a court of another state, such judgment can not be impeached for fraud, except in chancery.

In *Callen vs. Edmiston*, 13 O. S., 446, in an action relating to a judgment rendered in this state, our Supreme Court have held that where the record shows that a party appeared by attorney, such party will not be allowed to disprove the fact. This is the last decision by our Supreme Court upon the subject. It fails to notice the prior decisions; but we are bound by it as to all judgments rendered in Ohio, by courts of general jurisdiction, though the reasoning of the court may be open to grave criticism. To allow such proof, it is admitted, would comport with the principles of natural right and justice, but would violate public policy, as though public policy may require the denial of justice and natural right. But it well says, that the conflict of authority arises from different courts adopting the one or the other of these views.

Text-writers, too, seem to be influenced by the law as settled in their own states. 1 *Greenl. on Ev.*, Sec. 548, makes such evi-

dence competent. 2 *Phil. Ev., Cow. & Hill's* notes, 199 and 338; *Cooley's Const., Lims*, 17; 406, and notes denies its admissibility.

The law is settled differently in different states. *Phelps vs. Brewer*, 9 Cush. R., 390, before cited, and *Warren v. Lusk*, 16 Mo. R., 102, may be taken as representative cases upon the affirmative and negative of this question.

But, as the decision of such cases requires a court to construe the Constitution of the United States and the act of Congress passed in pursuance thereof, the rule as settled by the Supreme Court of the United States must govern; and in *Shelton v. Tiffin*, 6 How., p. 186, it is expre-sly held, that such an appearance is the act of the attorney and not of the court, and may be explained by parol and his want of authority shown, it being different from the case of a record showing that the party came personally into court and waived process. This controverts the view taken by that eminent jurist, Chief Justice Robertson, of Kentucky, in *Roberts vs. Caldwell*, before cited, in which he says: "But as the record recites that the parties appeared by "their counsel, that fact, thus certified, must be accredited."

Now, it would seem that a party ought to be really in court to authorize it to find that he appears by attorney, otherwise such finding would be *coram non judice* and void. How can a court find such fact without actual jurisdiction of the person? It is logically what the attempt would be, physically, to lift one's self from the ground by the waistbands.

Many English decisions sustain the admissibility of such proof.

Wright vs. Castel, 3 Mer., 12.

Lord vs. Kellett, 2 My. & K., 1.

Goodman vs. DeBeauvoir, 12 Jur. O. S., 989.

Perhaps the safest rule, and one compatible with justice, would be to require parties in all such cases to go into the courts rendering judgments against them, and there have them set aside, and for every court to hear such applications on motion; but, in cases like this, where the record affirmatively shows that the party was not served with process, but appeared only by attorney, I shall follow the decision of the Supreme Court of the United States in 6 How., and admit evidence upon the ques-

tion of the authority of the attorney assuming to appear for the party, while as to judgments rendered in this state, I shall feel bound to follow the rule laid down in 13 O. S.

It is much to be regretted that the decisions upon this whole subject are so conflicting and confused.

A question is also made by the defendants, whether it can be proved by parol that the defendants in the Louisville action were partners in the matter about which that suit was brought, as they claim the record does not affirmatively show such fact.

I think the record does show they were partners and that the suit was instituted to enforce a claim for which they were liable as partners. By the rules of law all had to be sued individually. The answers are as answers of a partnership, and were taken by the court as regularly responsive to the petition. Had they been in a different right, they would have been stricken from the files.

But the record is full *prima facie* evidence of the fact that Isaac Marks appeared to the action by counsel, and its recitals and findings in this respect are entitled to great weight. He seeks to disprove the fact by parol, and his proof may be rebutted by parol, an important element of which is, that he was a co-partner of his co-defendants, and that they jointly defended the suit.

This leaves but one more question to consider, which is certainly of the greatest materiality. On January 12, 1866, in answer to the plaintiff's petition, in that suit, an answer was filed, purporting to be on behalf of all the defendants, as partners, claiming that the firm was liable upon its guaranty of two of the vouchers, the amount of which plaintiff was seeking to recover from the defendants, and asking to compel the plaintiff to indemnify them against liability on account of such guaranty. This was a counter claim, or cross action.

Now, suppose the plaintiff had not sued, but that these defendants had sued him in that court upon the subject-matter of that counter claim, and prayed for the relief therein prayed for—will it be contended that the partners resident in Louisville could not have instituted such action in behalf of all the partners? Isaac Marks, living in Cincinnati, and having intrusted the business of the firm, the collection of its claims, and the

enforcement of the firm rights to his co-partners, the firm, and each individual composing it, was liable on that guaranty, and the resident partner might sue for all, to protect all. Having done so, suppose Fordyce had set up his cause of action by way of counter claim—as he might under the Kentucky Code—and obtained the decree now and here sued upon, would any lawyer contend that Isaac Marks would not be liable upon it, though he may never have had personal knowledge of the bringing of such suit for him and them by his co-partners? If they could not have sued to recover the rights of the firm, then it will be impossible to carry on business successfully where any of the partners are non-residents and take no active part in the conduct of the firm affairs, but tacitly intrust that to the other members. Fordyce suing first, and then the bringing of this cross suit against him, is the same, in effect, as if the defendants had sued him and he had set up his claim by way of cross petition and obtained this judgment. Again, on April 17, 1868, another counter claim was filed in behalf of all the defendants, claiming a cross judgment against the plaintiff for $1,129 75. In view of these facts, disclosed by the record of that case, and remembering that the record shows that Isaac Marks appeared by attorney and defended that action, which is *prima facie* evidence that he did so, and evidence, too, not lightly to be overcome or disregarded, but evidence, the truth of which should be satisfactorily disproved; and in view of the situation of the parties, that that attorney was hired by the year for the firm; the length of time the suit was pending; that Marks was frequently in Louisville during the time; that the other defendants were his own son and brother-in-law; that he had a deep interest in the affairs of the firm, having invested $10.000 in it, and was liable for it to the banks here for $9,000; that it is scarcely possible to suppose he was in ignorance of it and refrained from encouraging and advising his son in its defense for the benefit of all the parties; and that Stirman, the attorney, whose testimony would be of the greatest importance, is dead, while Marks and his son are vitally interested,—taken in connection with all the circumstances of the case, I am constrained to find that Isaac Marks is liable to the plaintiff upon the decree sued upon in this court.

He appears to be an industrious, worthy man, and the judgment may bear hard upon him; but it is the result of the management of his own son and brother-in-law, whom he trusted, and gave the opportunity to become indebted to the plaintiff; and we must further remember, that it may be as hard upon the plaintiff to lose the amount as for the defendant to pay it.

Judgment will be for plaintiff.

THE GROWTH OF JEWISH LAW.

WHILE the historical study of jurisprudence is still in its infancy, there exists a large class of older juridical speculations, characterized by its utter disregard of all history, and conducted upon a method of investigation, which might conveniently be called *a priori*. The tendency of these speculations, in the attempted elimination of ideal systems of natural law, has been to retard the healthy progress of that science, which has become familiar in Germany at least under the name of the Philosophy of Law. The causes, meanwhile, which gave to these speculations "such overwhelming prominence a hundred years ago," have been held to lie in the rejection by the age of all historical evidence taking the form of *religious* records. The study of religion was in fact despised. To the sceptic, heathen mythology and the Mosaic scriptures were alike unreliable. "Greek religion," says Mr. Maine, "as then understood, was dissipated in imaginative myths. The Oriental religions, if noticed at all, appeared to be lost in vain cosmogenies. There was but one body of primitive records which was worth studying—the early history of the Jews. But resort to this was prevented by the prejudices of the time. One of the few characteristics, which the school of Rousseau had in common with the school of Voltaire, was an utter disdain of all religious antiquities, and more

than all of those of the Hebrew race." Shut out this from the consideration of the philosophic jurist, Hebrew antiquities, it may be said, remained almost exclusively the inheritance of theologians and divines. And while this exclusion has, on the one hand, been the cause of much error in the theories of the scientific lawyer, it has, on the other, left the theologian in the midst of perplexities, which perhaps it was the province of the jurist alone to solve. To those familiar with investigations into the origin and growth of law, there is no theological dispute so full of interest as that concerning the age and authorship of the Hebrew law-books—a dispute caused in recent times, mainly we may say, by the learned investigations of Dr. Colenso. The diversities between the first and second law, Leviticus, Numbers, and Deuteronomy, are variously explained. But in all controversy, the presumption on the one hand is remarkable, not only that the whole Jewish law was from the hand of Moses, but that it was stereotyped in the form in which it now appears, in the approved canonical books. Dr. Colenso, on the other hand, has done much to prove that in Deuteronomy at least we have evidence of a change and development of that law, and that the book itself belongs to a period of Jewish history, decidedly later than the Mosaic legislation. But Dr. Colenso's theory is rejected. The Talmud, again, belonging to a comparatively recent period of Jewish history, but containing a digest of the unwritten or oral law of the Jews, is proscribed. So that while the Mishna and the Gemara (which evidence the growth of Jewish law) are held by the Rabbi in higher esteem than the Mosaic code itself, the Christian teacher regards them in the light of a willful imposition and fraud. Christian and Jewish theology are here irreconcilable.

The code that forms the law of Moses—including in it the compilation of Deuteronomy—belongs to a period of Jewish history which finds a parallel in the primitive history of all progressive communities. The code inscribed on tables is held to be the immediate result of the invention of writing. However this may be, it forms a well-defined era in the history of law. Unwritten law, preceding the era of codes, was, as Mr. Maine holds, mere traditionary custom, assumed to be known precisely by a privileged order, or priestly aristocracy. Starting, however, with the written code of the Hebrews, the important question arises, whether Jewish law was arrested at this stage, or whether it received that development which may be traced in the history of other codes. If Jewish law had its growth, the causes among others lie precisely in those "social necessities and social opinions," which, in certain societies, being always in advance of law, necessitate its progress. Law answering thus to shifting wants and opinions, and marching *pari passu* with them, is an

incident common in the history of all progressive communities. And here it may be remarked, in passing, that there is no written code in the history of the past—no code claiming even a divine origin which has practically met the requirements of a people for all time. Among Eastern communities, where the tendency toward fixed institutions is remarkable, the written code has undergone a process of change and decay. The circumstances which necessitate the growth and change of a language, operate not more powerfully than the exigencies which create new law among a people. If we turn to the code of Menu, claiming a divine origin, we find that the necessity for an interpretation of the text gave rise to various schools of inspired interpreters. Comment followed upon comment, all bearing equal authority, until the text is found enveloped in the folds of a voluminous exegesis. Indeed, the opinion of the learned seems to be, that the Institutes of Menu are applicable only to an age now long past. Among the Romans, the Prætor's edict and the Responsa Prudentum expanded their jurisprudence beyond the limits of the narrow code, called the Twelve Tables. The Hebrew code, meanwhile, is not exempt. Notwithstanding the jealous preservation of the text by the Masorite, and the fencing of the law by the scribe, the Hebrew judge and jurist have left us, in the pages of the Talmud, a body of case-law, and juridicial doctrines, having the obligation of law, powerful enough to have influenced the life and destiny of the chosen people. The moral law, so carefully marked and enumerated in the written code of Moses, is summed up by the later jurists of the schools of Hillel and Schammai, in one comprehensive word—*equity*. Indeed, the moral law as taught by the later Hebrew doctor, does not date from Moses, but is comprised in the seven precepts given to Noah (*Septem præcepta Noachidarum*), the first six having been intrusted to Adam. They are precepts, in fact, which came to be recognised by the learned few, not as belonging to his own exclusive system, but as comprising the law of nature common to all mankind, of which Cicero says: "Nec erit alia lex Romæ, alia Athenis, alia nunc, alia postea; sed et omnes, gentes, et omni tempore, una lex et sempiterna et immutabilis continebit."

How then was it that Jewish law had its growth, and what were the agencies by which it received its development? *Firstly*, we may say that the decisions and dicta of the judges, in process of time, added to the written code a large body of case-law, or binding precedents, answering to our common law; and *secondly*, the teachings of the Hebrew jurisconsult, or Responsa Prudentum, which were held binding, and formed much of the traditionary law which so powerfully influenced the people, and also contributed much toward this growth and development.

First, then, we may remark that the office of judge and the institution of law courts among the Hebrews, are incidents of their early history. Judges, it is well known, were appointed in every city for the determination of minor questions. Whatever be the date of the institution of the Sanhedrim, it is certain that a supreme court, consisting of seventy judges, existed as early even as the time of Moses. To this court were referred matters of difficulty and importance, which were left undecided by the inferior judges. Now, it must be remembered that every judgment or sentence pronounced in the several causes which came up for determination, gained the authority of, and was in fact, binding law, and this by Divine injunction. "Thou shalt come unto the priests, the Levites, and unto the judge that shall be in those days and inquire, and they shall show thee the sentence of judgment. . . . . According to the sentence of the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do; thou shalt not decline from the sentence which they shall show thee, to the right hand nor to the left." Every judgment was inspired. What then were the functions of the judge? He was required (1) to apply the law where it was clearly applicable; (2) to interpret it in cases of doubt; and (3) to provide for cases which were not contemplated by the written statute, or, in other words, for instances in which the written statute was silent. Under such circumstances, cases of considerable doubt and difficulty might have been expected to arise for decision by the courts. Notwithstanding the law was generally well known (children being instructed in it), cases arose in which the judge had nothing to guide him, either in the written statute or the unwritten body of precedents. Of these there are familiar instances. The written code of the Hebrews, it is well known, did not admit females to the inheritance of property. The case, however, of the daughters of Zelophehad, reported in the Pentateuch, as for the first time, introducing inheritance by females into Hebrew law, with its attendant restriction, that the heiress should marry within her tribe, is a valid instance of a judicial decision, founding a rule of law. Here the statute was silent, and circumstances called for a decision, which, when once pronounced, introduced a rule which obtained a force as obligatory as that which attached to the written code of Moses. Again, the original institutions of the Jews, having provided nowhere for the privileges of testatorship, the later Rabbinical jurisprudence is found allowing the power of testation to attach, when all the kindred entitled under the Mosaic system to succeed have failed or are undiscoverable.*

* See Maine's "Ancient Law," p. 197.

But whence did the innovation receive its sanction and binding force?

Probably it will be found that the rule in the later jurisprudence had its origin in very early times, and was introduced as a judicial decision, when the subject first came up before a competent tribunal. There are, again, various provisions made in the Pentateuch regarding marriage, but the law is totally silent as to what constituted a legal marriage. Such cases, it may be said, were to be met by a judicial sentence. Indeed, provision was made in the law to meet the exigency of such cases. "If there arise a matter too hard for thee in judgment between blood and blood, between plea and plea, and between stroke and stroke, being matters of controversy within thy gates, then shalt thou arise, and get thee up into the place which the Lord thy God shall choose. Thou shalt come unto the priests, the Levites, and unto the judge that shall be in those days and inquire, and they shall show thee the sentence of judgment." It can not be supposed that the additions thus made to the written law fell within the category of unauthorized precedents. Every judgment was binding, and every judge was in fact a minor legislator, speaking under direct inspiration. A mass of unwritten law thus originated, and in the course of development, new rules of law took the place of what had become obsolete. But it is difficult to trace the changes which overtook Hebrew jurisprudence. In an age of much writing, we might have expected at times a digest of the *lex non scripta*. But with the exception of the Talmud, which contains much of this law, surviving at the time of its compilation, there seems to have been no earlier attempt at anything like codification. It is not, however, improbable that the book of Deuteronomy embodies in itself some fragments of the unwritten law, current at the time of its compilation. Whether the book of the law found in the temple in the reign of Josiah be the book of Deuteronomy, or whether Jeremiah be the Deuteronomist instead of Moses, are questions sufficiently discussed by Dr. Colenso. It is certain, meanwhile, that Deuteronomy, or the second law, contains several additions to, and modifications of, the older Mosaic statutes, which can only be accounted for by the supposition that the book is a compilation of a date decidedly later than the Mosaic legislation. There is an opposite theory, however, of the critical school, countenanced by Dean Milman, which supposes that the entire Pentateuch is of an antiquity as high as the time of Moses, but that it has undergone many interpolations, some additions, and much modification, extending to the language in successive ages. In any view, it may, firstly, be said of the book of Deuteronomy (in which the additions and modifications mostly appear), that its precepts, in so far as they vary from the provisions of the rest of the Pentateuch, embrace

what was originally mere unwritten law, originating in the decisions and dicta of the judges. Numerous instances of the entire change of law, on a comparison of Deuteronomy with the earlier law books, may be quoted; but it will be sufficient to quote the words of Bleek with reference to the subject of tithes, as they are found provided for in Numbers and in Deuteronomy. "No one," says Bleek, "upon an unprejudiced comparison of the two laws, can mistake the fact that they vary very much from one another, as regards both their contents and character. In the last, strictly speaking, no mention whatever is made of a special *legal* provision by way of tax for the benefit of the Levites, but only of a free-will act of benevolence, which the Israelites are required to show to the landless Levite, just as to other needy persons. Hence they are placed in one and the same rank, with other destitute people, and their whole position is entirely changed. That *Moses himself*, with reference to the maintenance of the Levites, should have delivered two laws, so different from each other, as is their whole character (within the space of a few months), can not well be believed, especially as the former law, just as much as the latter, refers to the time when the tribes of Israel would find themselves in possession of their promised land. We can not but assume, that if the one law is Mosaic, the other belongs to later time; and here there can be no doubt that the law in Numbers is the original, which also has the character of a Mosaic law. On the other hand, in Deuteronomy we probably possess it in a form to which it was changed in a later time—probably at a time when the original law, with so many other Mosaic directions, had long ceased to be followed, and when the relations also had settled themselves, that no more hope could be entertained that they ever would again be followed." It may, therefore, be presumed that Hebrew law did not begin and end with Moses, nor could it. A people, whose condition and relations were ever changing, would find themselves outgrowing their ancient institutions. And though Moses is vested with the dignity of the legislator, he was evidently succeeded by the priest and the judge, who, as administrators and interpreters of the law, were the ordained agents in its growth and development. But it is not only to the judicial tribunals that Jewish law owes its growth. We must not here overlook the labors of the learned—the Νομοδιδασκαλοι, or doctors of the law.

Secondly, the study of law among the Hebrews ranked higher than every other pursuit. At the time of the birth of Christianity, when Greek culture had been already embraced by a large number of Jews, Greek philosophy was proscribed by the Rabbinical leaders of Palestine, and included in the same malediction, "he who rears swine, and he who teaches his son Greek science." "The study of law," says M. Renan, on the authority

of Josephus, "was the only one accounted liberal and worthy of a thoughtful man." Questioned as to the time when it would be proper to teach children Greek wisdom a learned Rabbi had answered, "At a time when it is neither day nor night, since it is written of the law, 'Thou shalt study it day and night.'" And it may be remarked, in passing, that in Greece, where philosophy was nursed, the cultivation of law was so far neglected, that we have nothing of Greek jurisprudence left us worthy of the name. Rome, on the other hand, the birth-place of legal science, spurned philosophy as the "toy of a childish race." With the Hebrew it was a "womanly accomplishment." *He* was the wise man who was skilled in the law. Among those devoted to the study of jurisprudence, the sopherim, or scribe, occupied a prominent position. But they were not mere lawyers. As remarked by a recent writer, the scribes of whom we are accustomed to have so unfavorable an opinion, appear to be not merely well-trained jurists, but scholars of eminence in the mathematics of their day, in natural history, in astronomy, in medicine, in philology, skilled in many accomplishments, masters of many languages. With all his depreciation of the worth of philosophy, it is probable that the scribe was initiated also in the metaphysical speculations of the Cabbala. Indeed, the wide prevalence of its leading doctrines leaves this scarcely in any doubt. But the chief employment of the scribe was the teaching and expounding of the law. The necessity for interpretation arose early among the Jews. After the return from the Babylonish captivity, when the Hebrew became almost a dead letter, an extensive exegesis of the Scriptures became necessary. A class of men soon sprang up, whose office it was to interpret the law to the people.

It must be remembered that their teaching had a vast influence, and carried with it the force and obligation of law. In Roman jurisprudence something of the same kind occurs. The influence of the Responsa Prudentum, in developing that jurisprudence, was extensive. Among the Jews, however, the obligation of the oral law, as taught by the exegetists, rested upon the tradition that God first gave to Moses the text, and then an interpretation of it, which was to be transmitted by word of mouth. It passed from Moses to Aaron, and in an unbroken line reached Hillel and Schammai and Gamaliel, from whom it passed to Simeon, and finally to Judah Hakkadosh, the president of the Academy at Tiberias, by whom it was committed to writing, and forms now the Mishna of the Talmud. The scribes were the teachers of this traditionary law, and were considered to be the successors of Moses. As Moses was the first teacher of this law, so the scribes were deemed to be *in the seat of Moses.* And it is evident that Christ Himself sanctioned the authority

of the teaching of the scribes, when He directed His disciples to do as these teachers bid them. "The scribes and the Pharisees *sit in Moses' seat:* all therefore whatsoever they bid you observe, that observe and do."* The interpretation of the law, as might be expected, excited the mental activity of the lawyers to the utmost. Full of subtilty and logical acumen, they were pre-eminently the casuists of the day. Through their teaching a strange scholasticism had sprung up in the market-place and the synagogue, which whetted the intellectual appetite of the nation. Extreme subtilty and logical refinement characterized the disputation of the scribes, as they did the argumentations of the sophist. All the ambiguity of the law received at the hands of these teachers an interpretation which carried an obligatory force above the law itself. "To sin against the words of the scribes is far more grievous than to sin against the words of the law," says the Talmud. "The text of the Bible is like water, but the Mishna is like wine." "You must not depart from the declarations of the oral law," says the Rabbi Solomon Jarchi, "if they should assert that your right hand is your left, or your left your right." Such was the veneration which was excited by the teaching of the scribes; and as an agency in the growth of Jewish law, *that* teaching was, perhaps, the most powerful and even necessary.

Such are a few hints on a subject of much importance. The existence among the Hebrews of a large body of unwritten law is an historical fact which calls for more attention than has hitherto been bestowed upon it. The law of the Pentateuch, and of the Talmud, claim equally an important place in Jewish history. Indeed, Jewish history is but partially known, without an acquaintance with that body of unwritten law, which has exercised so powerful an influence among the chosen people. And the neglect of it is due only to the prejudice, which claims for the law of Pentateuch that stereotyped and unchangeable character which can suppose no growth or development.—*Law Magazine and Review.*

* Matt. xxiii. 2, 3.

COMMON LAW COURTS.

COURT OF QUEEN'S BENCH.

Thursday, June 6.

Ross (app.) *v.* FEDDEN AND ANOTHER (resps.).

House—Occupier of upper story—Duty of—Negligence—Escape of water.

The plaintiff occupied a shop on the ground floor, and the defendants an office on the second floor of the same house.

During the absence of the defendants one Sunday, water escaped from a pipe in a closet on their premises, and, by oozing downward, did damage to the shop of the plaintiff. This mischief was caused by a valve which was under the seat of the closet, and covered with wood-work having given way. There was no reason to suspect that it had done, or was in any danger of doing so, or that anything was wrong with the closet. An action having been brought in the County Court by the plaintiff against the defendants for the damage sustained, the judge found that there was no negligence on the part of the defendants, and decided, therefore, that, under the circumstances, they were not liable (distinguishing *Rylands* v *Fletcher*, 19 *L. T. Rep. N. S.* 220; *L. Rep.* 3 *H. L.* 330; and likewise *Carstairs* v. *Taylor*, *L. Rep.* 6 *Ex.* 217.) On appeal, the court (Blackburn, Mellor, and Lush, JJ.) approved and affirmed this judgment.

CASE stated on appeal from the County Court of Northumberland, holden at Newcastle-on-Tyne.

The plaintiff brought an action in said court against the defendants, and by his particulars of demand alleged that the plaintiff was the occupier of a certain shop, tenements, and premises situate at No. 2, Queen-street, Newcastle-on-Tyne, and the defendants were the occupiers of certain offices, tenements, and premises adjoining and immediately above the said shop of the plaintiff. Yet the defendants, not regarding their duty in that behalf, took such bad care of their said offices and tenements and premises, and of their water-pipes and water therein respectively, that by reason of the defendants' want of care thereof, on or about the 28th Nov., 1870, divers large quantities of water overflowed, oozed, and escaped therefrom, and percolated, oozed, and ran into the said shop and tenements of the plaintiff, whereby the said shop and tenements of the plaintiff, and goods and property therein belonging to the plaintiff, were greatly damaged and became less fit than they otherwise would have been for the carrying on of the plaintiff's business and trade respectively, and the plaintiff claims 85*l.*

It is unnecessary to set out the case at length, as the facts and arguments adduced at the trial are more clearly stated in the judgment delivered by the learned deputy judge of the County Court (*a*), which was as follows:

"The plaintiff in this case is tenant from year to year of the ground floor of No. 2, Queen-street, Newcastle-upon-Tyne, where

he carries on business as an ironmonger. The defendants are tenants from year to year of the second floor of the same house, which they occupy as offices. Some time between the evening of Saturday, 26th Nov., and the morning of Monday, 28th Nov., 1870, water escaped from a water-closet on the defendants' premises, found its way down through the first floor to the ground floor, and there did damage to the plaintiff's premises and goods to the extent of 79*l.* 5*s.* 3*d.* These damages the plaintiff seeks to recover from the defendants in the present action. The plaintiff's claim to recover is put upon two grounds. First it is said that the mischief arises from the neglect of the defendants. Now, upon this matter the evidence is very slight, and there is no inconsistency in it. The closet was inside the defendants' private office, and no one had access to it except the two partners of the defendants' firm. One of the partners was from home at the time of the occurrence The other partner, who was called as witness, stated that the closet had previously to the Saturday been in good order; that he believed he used it on the Saturday morning, and found nothing astray, and no one could have used it afterward; that on the Saturday evening, at about 6 or 6:30, he washed his hands at the wash-hand stand in the same room with the closet, and nothing then appeared to be the matter with it. He then left the office, and no one appears to have entered it again until Monday morning. On the Monday morning, when the plaintiff came to his shop, he found the damage done of which he now complains. Together with a plumber, whom he had sent for, he traced the escape of water upward to the second floor. They obtained access to the defendants' office and to the closet inside, and found that the water had overflowed the basin. On examination it appeared the cause of this was that the valve procuring the supply of water to the basin had given way, and the overflow pipe had become stuffed with paper. The valve, the defect in which was the real cause of the mischief, was under the seat of the closet, and could only be reached or seen by removing the woodwork. Upon this evidence I think the defendants are not shown to have been guilty of any negligence. Upon the Saturday evening there was no reason to suspect that the valve had given way or was in any danger of giving way, or that anything was wrong with the closet; and I see no negligence in not guarding against a danger which there was no reason to anticipate. Upon the first question, therefore, which is one of fact, my opinion is in favor of the defendants. But it has been argued, secondly, on behalf of the plaintiff, that he is entitled to recover even in the absence of any negligence on the part of the defendants upon the authority *Rylands* v. *Fletcher* (19 L. T. Rep. N. S. 220; L. Rep. 3 H. L. 330) and other cases similar in principle. n that case it was decided that, as between adjoining owners,

one who diverts water from its natural flow, and accumulates it on his own land for his own purposes, is bound at all hazards to prevent its escape, and if it does escape—negligence or no negligence—is responsible to his neighbor for the consequences. It was contended that the same rule applies to this case. On the other hand, the case of *Carstairs* v. *Taylor* (L. Rep. 6 Ex. 217) has been cited. In that case the plaintiff was occupier of the ground floor of a warehouse, and the defendants of the upper part. The water from the roof was collected by a gutter in a box, from which it was discharged by a pipe into drains. A rat made a hole in the box; the water escaped and injured the plaintiff's goods in his warehouse below; and it was held that the defendant was not liable for this damage. That case is not, I think, at all a direct authority for the decision of the present. It differs in two important particulars. The apparatus for conducting the water was there as much for the benefit of the plaintiff as of the defendant, a fact upon which much stress was laid in the judgment of Bramwell, B., while here the water-closet was solely for the defendants' benefit; and further, in that case, the circumstance which caused the damage was one falling under the head of *vis major*, a fact to which much weight is given by the Lord Chief Baron and Martin, B. This can not be used in the present case. I think, however, that the judgment in *Carstairs* v. *Taylor* leaves it very doubtful whether the rule of law laid down in *Rylands* v. *Fletcher*, in the case of adjacent owners, applies to the case of two persons occupying two floors of the same house; but, assuming the rule to apply, is the present case within it? As between the occupiers of parts of a house, a thing wholly artificial, it is rather a straining of language to speak of any one state of things as more natural than another. But I think that, in the words of Martin, B., in the case already referred to, 'One who takes a floor of a house must be held to take the premises as they are.' As far as he is concerned, I think the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water. I think he takes subject to the ordinary risks arising from the use of the rest of the house as it stands, and that one who merely continues to use the rest of the house as it stands and in the ordinary manner does not fall within the rule laid down in *Rylands* v. *Fletcher*, and in the absence of negligence is not liable for the consequences, and in the present case there is nothing to show nor has it been suggested, that the water-closet or anything connected with it has been in any way altered by the defendants since they came into occupation. There is nothing to show, nor has it been suggested that it has been in any way altered since the plaintiff became tenant of the ground floor, or that it

has been used in anything but the ordinary way. The question is one of some difficulty, but my opinion is that, under the circumstances of the case, in the absence of negligence on the part of the defendants, they are not liable for the damage which the plaintiff sustained."

The questions for the opinion of this court were, first, was not the judge wrong in ruling that there was no evidence of negligence on the part of the defendants? Secondly, if negligence was proved, ought not the judgment to have been for the plaintiff? Thirdly, even in the absence of negligence, was it not the duty of the defendants so to use their premises that they should not injure those of the plaintiff, and, therefore, should not the judgment have been for the plaintiff? Lastly, whether or not, on the whole case, the learned judge was not wrong in point of law?

Gainsford Bruce, for the appellant, read the above judgment. [BLACKBURN, J.-- That is very well argued, are you prepared to dispute its correctness? LUSH, J.—A fact is pointed out by the learned judge which seems important, viz., that both parties had taken the lower premises knowing there were water-pipes.] That makes no difference, the water was brought in for the use of defendants. [MELLOR, J.—No, for the common benefit of both parties.] Here were two distinct tenements, and the possessor of one was as much bound to keep water collected thereon from invading the other, as if the premises, instead of being superincumbent, had been adjacent, as in *Rylands* v. *Fletcher* (*sup*). [BLACKBURN, J.—If Rylands, after letting the waters into his reservoir, had kept it tight for a time, and had then let it to an occupier who suffered them to escape, the case would have been more like the present one] *Rylands* v. *Fletcher* (*sup.*) was decided upon *Tenant* v. *Golding* (2 Lord Raym., 1089; Salk. 360.) [BLACKBURN, J.—It was.] And is as near to that case as possible. [BLACKBURN, J.—Not so, for there the defendant had collected the filth, and was bound to keep it in. Here the pipe of the water-closet had by age or ordinary use become defective, and the person liable for the consequences of that was he who was bound to keep it in order. MELLOR, J.—It formed part of a house which had certain conveniences. LUSH, J.—The water may have been collected in a cistern or some other part of the premises, perhaps, for aught we know to the contrary. BLACKBURN, J.—Each took his floor from the landlord with a knowledge of the cistern. Then does each occupier do more than contract that he will not do anything to cause mischief?] The plaintiff must not be assumed to have been aware of a water-closet being above him. There is nothing of the kind stated in the case. The obligation must be independent of knowledge. [BLACKBURN, J.—I think there is a very great difference between two tenants, one occupying an upper and another a lower

story of a house, held under the same landlord, and two holders of adjacent land; and the remedy of the lower against the upper tenant must be the same as if the upper were his landlord.] *Humphries* v. *Brogden* (12 Q. B. 739) decides that there is an implied right of support in the owner of the surface of land against the proprietor of subjacent strata. [MELLOR, J.—But the latter is not liable for the results of an earthquake or some cause over which he has no control. BLACKBURN, J.—Nor for trespassers' acts.] In some of the cases similar to *Humphries* v. *Brogden* (*sup.*) the parties held under the same landlord. [BLACKBURN, J.—No doubt, and their rights were regulated by the terms of the demise; but you seek to establish a duty in the tenant to maintain a thing in its original condition at his own peril. A coal owner must work his mine so as not to bring down the land of another above it; but if by a flood the surface is made to subside, he is not responsible.] This is a new point, like the question in *Rylands* v. *Fletcher* (*sup.*), which had never been decided until the adjudication of that case. [BLACKBURN, J.—I wasted much time in the preparation of the judgment in *Rylands* v. *Fletcher*, if I did not succeed in showing that the law held to govern it had been law for at least 300 years. But can you cite any case analogous to this, in which the parties both held under one and the same landlord, where it was decided that the tenant of the upper floor was bound to keep the water-pipes in good condition?] Nearly all the reported decisions turn on the question of negligence. Will the court establish an exception to *Rylands* v. *Fletcher*? Here is a distinct trespass committed by means of the water. [BLACKBURN, J.—It was not the water of the defendants.] He paid the water-rate for it. [BLACKBURN, J.—Suppose the upper walls of a house, from latent weakness, fell. Would an action lie at the suit of the occupiers of a lower floor against the tenant of the story above him?] An owner who keeps an erection, and allows it to fall on another man's land, is liable. [BLACKBURN, J.—Have you any authority for that?] [*C. Hall* cited *Pomfret* v. *Ricroft* (2 Wm. Saund. *in notis*) to the contrary.] In *Chantler* v. *Robinson* (5 Ex 163, 170) it was held that there was no obligation toward a neighbor cast by law on the owner of a house, merely as such, to keep it repaired in a substantial manner. [LUSH, J.—*A fortiori* none on the occupier. I can not see how that case is in your favor.] The observations of Parke, B., there show that a man is bound to keep his house in such a condition as not to be noxious to his neighbor, and there is no distinction between adjacent and subjacent tenements.

C. Hall for the defendant was not called upon to argue.

BLACKBURN, J.—The court is invited to say that the defendants, being occupiers of the upper story of a house in which

there is a water-closet, with a pipe which had been demised to them along with the rest (or rather they had the use of it), there was an obligation on them at all hazards, at their peril, to keep that pipe from giving way. The consequence of the pipe breaking seems quite clear. The judge, having considered the matter, did not think that any negligence was proved, and therefore the only mode on which the plaintiff could recover would be by showing that while he was occupier below, the defendants being occupiers above, contracted a duty at their peril to keep this pipe from giving way. I do not think there was any such obligation. No doubt the maxim of law *sic utere tuo ut alienum non lædas* might oblige them so to use it as not to make it give way; but here was an utter absence of misuser. The negligence, if any, was in going on using the pipe until it burst; but we can not say that was negligence—there was no duty absolutely to keep the pipe in good repair.

MELLOR, J.—I am entirely of the same opinion, and should have been very much surprised if any authority had been found which laid such an obligation as that suggested on persons occupying a tenement as the defendants did. It seems to me that, short of negligence, there was nothing to make the defendants liable under the circumstances. At first I thought the question extremely doubtful as the case was stated, but on hearing the judgment of the learned Deputy-judge of the County Court read, I am perfectly satisfied with the decision he pronounced, and with the reasoning on which he based it. *Rylands* v. *Fletcher* was a case quite different in its circumstances, and *Carstairs* v. *Taylor* was much stronger in its facts than the present case. I am therefore clearly of opinion that our judgment should be for the defendants.

LUSH, J.—I too am of the same opinion. I agree altogether with the learned Judge of the County Court, and think his judgment sound and well reasoned. *Judgment for the defendants.*

Attorneys for plaintiffs, *Pattison, Wigg & Co.*, for *George Armstrong*, Newcastle-upon-Tyne.

Attorneys for defendants, *Kynaston & Co.*, for *W. C. Bousfield.*

EXCHEQUER CHAMBER.

Monday, June 17.

(Before KELLY, C. B., WILLES, BYLES, KEATING, and BRETT, J J., and MARTIN, B.)

GILL *v.* THE GREAT EASTERN RAILWAY COMPANY.

Negligence—Railway Company—Invitation, to Passengers to alight—Evidence for the Jury.

Plaintiff, who had for many years been a frequent traveler on the defendants' line of railway, on arriving, on a winter evening, at the station at which he was to alight, heard the name of the station called out two or three times, by one of the railway porters. The part of the train, in which plaintiff was, was drawn up at a place about 35 feet from the end of the platform. There were no lights there, and the plaintiff in stepping out fell upon his head and was injured. In an action against the railway company, for negligence, the jury having found a verdict for the plaintiff.

Held (reversing the judgment of the Court of Queen's Bench), that there was evidence of negligence on the part of the defendants to go to the jury.

Bridges *v.* The North London Railway Company (24 L. T. Rep. N. S. 835, Rep. 6 Q. B. 377), commented on and distinguished.

THIS was an appeal from a decision of the Court of Queen's Bench, making absolute a rule *nisi* to enter a nonsuit.

The declaration alleged that at the time of the committing of the grievances thereinafter mentioned, the defendants were carriers of passengers for hire, from Enfield to Edmonton, in carriages on a railway, and used a certain station at Edmonton aforesaid, for the reception and accommodation of their said passengers; and the said station was then in the possession and under the management of the defendants, for the purpose aforesaid, and the defendants received the plaintiff as a passenger to be carried from Enfield to Edmonton for hire, yet the defendants negligently managed the said station and carriages, and placed the said carriages at inconvenient and dangerous places in the said station, and kept the said station in a dangerous state, and omitted to provide sufficient accommodation and facilities to enable their passengers to alight from the said carriages there, and to light the said station in proper places, and in a sufficient manner for the use of their said passengers, during the hours of darkness, and neglected to provide a sufficient number of servants at the said station to receive trains arriving there, and to warn and assist passengers in case of danger or accident; whereby the plaintiff, having been received there by the defendants as, and then being a passenger to be carried from Enfield to Edmonton aforesaid, fell and was thrown down with great violence, at the said station of Edmonton, when alighting from one of the defendants' carriages, whereby the plaintiff was permanently injured and suffered great pain, and was prevented from attending to his business of an innkeeper

and job-master for a long time, &c. Second count: For that the defendants were common carriers of passengers for hire, from Enfield to Edmonton, and received the plaintiff as a passenger to be carried from Enfield to Edmonton for hire; yet the defendants so negligently conducted themselves in and about carrying the plaintiff, that by reason thereof he was greatly and permanently injured, and has been put to expense, &c.

The defendants pleaded not guilty, on which plea issue was joined.

At the trial, which took place at the sittings in Middlesex, after Easter Term, 1870, before Blackburn, J., and a special jury, it appeared that the plaintiff is an innkeeper keeping the "Three Crowns" at Edmonton, and also a job-master; that on the 30th of Nov., 1869, he went to Enfield by the Great Eastern Railway, the train leaving Edmonton about 4 p. m.; that having transacted his business at Enfield, he proceeded to return to Edmonton by a train starting from Enfield at 6:15 p. m., and which arrived at Edmonton a few minutes afterward. According to the plaintiff's evidence, it was very dark when the train arrived at Edmonton; he was in the last carriage of the train next to the guard's box; the train stopped at Edmonton, and some one called out "Edmonton" two or three times, upon which plaintiff opened the door of the carriage in which he was, and put his left foot upon the first step, thinking to go upon the platform. He had traveled on the line for fifteen years, was never set down before except opposite a platform; thinking he was opposite the platform, he stepped out and fell upon his head; it was very dark, so dark that he could not see; could not observe any lamp opposite the carriages in which he was. Other witnesses also proved that a porter several times called out "Edmonton;" that many carriages were drawn up a considerable distance from the platform, and that there were no lights opposite the place where these carriages were drawn up; there being no lights except upon the platform. A surveyor proved that the place where the plaintiff fell was about 35 feet from the end of the platform. No witnesses were called on behalf of the defendants.

The jury returned a verdict for the plaintiff, damages 100*l.*; leave being reserved to the defendants to move to enter a nonsuit. A rule *nisi* having been subsequently granted by the Court of Queen's Bench (Blackburn, Mellor, and Hannen, JJ., *dissentiente* Cockburn, C. J.), the rule was afterward made absolute, Blackburn, J., who delivered the judgment of the court, saying: "The question was whether there was evidence to support the case for the plaintiff, or whether a nonsuit should be entered. We postponed giving our judgment until we had an opportunity of reading the judgments in the case of *Bridges* v.

The North London Railway Company, and after reading the judgments of the majority of the judges who gave their judgments in that case, we are unable to discover any distinction whatever between that case and the present. Agreeing, therefore, with the reasons given by the majority of the judges in that case, for entering a nonsuit, the same rule must be followed in the present case, and consequently the rule which has been obtained to enter a nonsuit must be made absolute." From this decision the present appeal was brought.

Ribton for the plaintiff.—This case is distinguishable from that of *Bridges* v. *The North London Railway Company* (L. Rep. 6 Q. B. 377; 24 L. T. Rep. N. S. 835); for in that case the passengers were distinctly told to keep their seats. Here no such direction was given. The present case is governed by the decision in *Cockle* v. *The South-eastern Railway Company* (Weekly Notes, 1st June, 1872, L. Rep. 7 C. P. (Ex. Ch.) 321), where this court held that bringing a carriage to a stand-still at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without warning of his danger, amounts to negligence, for which, in the absence of contributory negligence, an action will lie. The court distinguished the case of *Siner* v. *Great Western Railway Company* (L. Rep. 4, Ex. 117), on the ground that there, it being daylight, the passenger could estimate the risk of alighting, and that he voluntarily incurred the risk. The court also distinguished the case of *Bridges* v. *The North London Railway Company* (*ubi. sup.*), on the ground that there was no evidence that the train had been finally brought to a stand-still. In the present case there was no doubt whatever that the train was brought to a stand-still, and the name of the station at which the plaintiff was to alight was called out several times. This last circumstance makes the present case a stronger one than that of *Cockle* v. *The South-eastern Railway Company* (*ubi. sup.*), for it does not appear that in this case the name of the station was called out at all

Marriott for the defendants.—The present case is exactly like that of *Bridges* v. *The North London Railway Company* (*ubi sup.*), and the judgment of this court in the case of *Cockle* v. *The South-eastern Railway Company* (*ubi. sup.*) does not profess to alter or affect in any way the law as laid down in the former case. The present case is undistinguishable from that of *Siner* v. *Great Western Railway Company* (*ubi. sup.*), except in the one circumstance that it was daylight when the accident in that case took place. In *Cockle's* case the train was drawn up to within four feet of the platform, where there were lights; under such circumstances the passenger might well think that he was

at the place where he was to alight. In the present case the part of the train in which the plaintiff was, stopped a long way off from the platform, at a place which nobody could think was the place to alight, and which the plaintiff certainly could not have thought to be so, as he had been traveling on the line for fifteen years, and knew it well.

Ribton in reply.

KELLY, C. B.—In this case I think that the judgment of the Court of Queen's Bench must be reversed, and judgment entered for the plaintiff upon the verdict which he obtained. The question, and the only question that is now before us, really is whether there was any evidence of negligence on the part of the defendants; for it appears that not only have the jury found a verdict for the plaintiff, but that they have expressly negatived the existence of any contributory negligence on his part. The facts of the case are these: The plaintiff was traveling at night by the defendants' railway, and the train having stopped at a station at which the plaintiff was to alight, he heard the name of the station—Edmonton—called out two or three times; before that he opened the door of the carriage in which he was, and put out his foot, and, as he had always done before, for he had been traveling on the line for fifteen years, he proceeded to get out He stepped out, as he believed, upon the platform, and in doing so came down upon his head. There were no lights at the place, and he was a considerable distance away from the platform. The question arising on such a state of circumstances is whether, in the absence of any evidence of contributory negligence, and looking at the judgment of this court in the case of *Cockle* v. *The South-eastern Railway Company* (*ubi. sup.*), we are not called upon to hold that there was evidence of negligence in this case. We have only to refer to the language of Cockburn, C. J., in that case, to see that that case and the present are really, in principle, and upon the substantial facts of either as applicable to the judgment which we are called on to pronounce, identical. The judgment of the Court of Exchequer Chamber, in affirming that of the court below in favor of the plaintiff, proceeded on the ground (as stated in the Weekly Notes) that "bringing a carriage to a stand-still at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without warning of his danger, amounts to negligence, for which, in the absence of contributory negligence, an action will lie" (see also L. Rep. 7 C. P. 326). Now I conceive that every word of this is strictly applicable to the facts of the present case. First, was the carriage brought to a stand-still at a place where it was unsafe for the passengers to alight? It came to a stand-still at the

Edmonton station, at the place where the passenger was bound to alight. And what was the nature of the place at which it stopped? It stopped at a place so different from the platform, that the plaintiff, who had been traveling on the line for fifteen years when he had to alight fell upon his head instead of stepping upon the platform. This part of the case, therefore, comes strictly within the words of the judgment in *Cockle's* case: the train came to "a stand-still at a place at which it is unsafe for a passenger to alight." What are the next words? "Under circumstances which warrant the passenger in believing that it is intended he shall get out." What were the circumstances here? Every circumstance concurred to induce the passenger to believe that he had arrived at the place where he was to get out. The station where the train stopped was the Edmonton station, the station where he had to alight. He heard the railway officers call out "Edmonton;" a circumstance which intimated to him that he had arrived at the station where he was to alight. What further is necessary, according to the judgment in *Cockle's* case? The judgment proceeds: "And that he may do so with safety,—without warning of his danger." There was in the present case no warning to the passenger of his danger. The present case seems to me stronger in favor of the plaintiff than *Cockle's* case was, for, so far as I can collect the facts of that case from the brief note of it which is reported, it does not appear that in that case the name of the station was called out; and therefore there was no intimation to the passengers that they had arrived at the station where they were to alight. Again, there was what might have amounted to a warning of danger. There was no such thing in the present case. Nothing was said to the passengers about keeping their seats. The plaintiff had arrived at what he was justified in believing to be a platform. Accordingly, he stepped out of the carriage, and the step of the carriage was such a thing as the jury might have found to be dangerous in itself. Under these circumstances, it appears to me, that as to the question of negligence on the part of the railway company, the two cases are identical. But something further is necessary, according to the judgment in *Cockle's* case. There must be an "absence of contributory negligence on the part of the passenger." The jury in the present case have expressly found that there was no contributory negligence on the part of the plaintiff. This being so, I think that *Cockle's* case is an express authority calling on us to reverse the judgment of the court below in the present case. Reference has been made to the case of *Bridges* v. *The North London Railway Company* (L. Rep. 6 Q. B. 377; 24 L. T. N. S. 835). It is quite true that the majority of the court held, that under the circumstances of that case, taking them altogether, there was no evidence on which the jury would be just-

ified in finding that the railway company had been guilty of negligence. It must be remembered, however, that certain of the judges thought that there was something which amounted to contributory negligence on the part of the plaintiff. The place where the plaintiff was to alight was further on than the place where he did alight. There was no light at all, or none but that from a gas lamp about twenty-eight feet distant. There was certainly no finding by the jury of contributory negligence on the part of the deceased; but still certain of the judges treated it as matter of law, and it is not for me to presume to say that they were wrong, though I can not see how the existence of contributory negligence can be established without the finding of a jury. Certain of the judges, however, thought it contributory negligence to alight at the spot where the deceased got out. That circumstance distinguishes the present case from that of *Bridges* v. *North London Railway Company*, namely, that the existence of contributory negligence on the part of the deceased formed part of the grounds of the judgments of some members of the court, without whom the judgment of the court could not have been pronounced with effect. The jury have expressly negatived all contributory negligence in the present case. Under these circumstances, I think there was ample evidence to go to the jury of negligence on the part of the defendants; and, contributory negligence being negatived, that the rule to enter a nonsuit must be discharged, and that the verdict should be entered for the plaintiff.

MARTIN, B.—I am of the same opinion; I think *Cockle's* case was a stronger one against the plaintiff than this case, and that the argument is, therefore, *a fortiori* from that case.

WILLES, BYLES, and KEATING, JJ., concurred.

BRETT, J.—I am of the same opinion, because I think the jury were justified in finding the affirmative of the proposition stated in the judgment in *Cockle's* case; and that, upon finding the affirmative of that proposition, they were justified in coming to the conclusion that the defendants were guilty of negligence, and that the plaintiff was not guilty of contributory negligence. I confess I find a difficulty in understanding the judgment of the court in the case of *Bridges* v. *The North London Railway Company* (*ubi sup.*), unless it be that, under some very peculiar circumstances, such as were assumed to exist in that case, it may be for the court to determine whether there was contributory negligence. Unless, however, under some very peculiar circumstances, that question is eminently one for the jury.

Judgment Reversed.

Attorney for the plaintiff, *Smith.*
Attorney for the defendants, *Shaw.*

COURT OF APPEAL IN CHANCERY.

May 2, 4, 6, 7, *and* 30.

(Before the LORDS JUSTICES.)

Ex parte Snowball; Re Douglas.

Act of bankruptcy—Assignment of partnership property to secure partnership and private debts—Effect of bankruptcy on power of attorney—Purchaser for value without notice.

It is a fraud upon the creditors of a partnership for a partner, who knows that his firm is insolvent, to transfer partnership assets to a creditor of his own, or to give a security over the partnership assets for his own private debt, or for future advances to be made to himself, and a deed giving such a security is invalid, and the execution of it is an act of bankruptcy.

The fact that such a deed also gives security for partnership debts does not render it partially valid, but it is void in toto, for upon a question whether the execution of a particular deed is an act of bankruptcy, one part of the deed can not be separated from the rest.

As a general rule a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy; but if, after the act of bankruptcy, but before the adjudication, property of the bankrupt is conveyed under the power to a bona fide purchaser who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee under the bankruptcy.

If a person is proved to know facts which constitute an act of bankruptcy, or from which a court or a jury or any impartial person would naturally and properly infer that an act of bankruptcy had been committed, he must be held to have had notice that an act of bankruptcy had been committed, and the court will not inquire whether he believed that an act of bankruptcy had been committed, or whether he drew from the facts the inference that the bankrupt intended to defeat and delay his creditors.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy partly reversing and partly affirming a decision of the Judge of the Sunderland County Court.

The hearing before the Chief Judge is reported in 26 L. T. Rep. N. S. 297, where his Honor's judgment is fully set out.

The facts of the case, which are fully stated in the judgment of the court, were shortly as follows:

Martin Douglas and his son, John Douglas, carried on business in partnership at Sunderland, as wire-rope makers. In September, 1869, the firm being then in difficulties, John Douglas left England for America with the professed purpose of buying land in America with money belonging to his wife, and of returning in two or three months. He had, shortly before leaving, been arrested on an absconding debtor's summons, but had succeeded in raising money to pay the debt.

Before leaving England, he executed a power of attorney, dated the 14th Sept., 1869, empowering one John Anthony Moore to sell certain land and a ship which was being built for

him in the yard of Messrs. Liddle and Sutcliffe, and to manage the private affairs of John Douglas generally; but the power of attorney contained no reference to the affairs of the partnership, though the ship was really partnership property.

In Oct., 1869, Martin Douglas applied to Mr. William Snowball who had for many years acted as solicitor to the partners, and who had advanced large sums to them, to advance them some money to pay wages and certain pressing claims.

According to Snowball's account, he refused to advance anything unless the partners gave him security for the whole of his past debt, which then amounted to nearly 4000*l*.

This Martin Douglas assented to, and on the 17th Nov., 1869, two deeds were executed by Martin Douglas and Moore on behalf of John Douglas, by which all the property of the partnership was assigned to Snowball to secure his past debt, and certain sums then advanced to pay off incumbrancers on the property. One of the deeds was a mortgage by which the ropery, plant, machinery, certain building-society shares, &c., were conveyed and assigned to Snowball to secure the past and present advances, some of which had been made to the partners on their own private account; the other deed was a bill of sale of the ship.

In April, 1870, a petition for adjudication of bankruptcy was filed against Martin Douglas and John Douglas, and they were both adjudicated bankrupts. The act of bankruptcy relied upon against John Douglas was his departure from England in Sept., 1869, and that relied on against Martin Douglas was his failure to comply with a debtor's summons issued against him in Jan., 1870.

On the 24th Oct., 1871, Mr. Joseph Greener, the trustee under the bankruptcy, applied to the judge of the Sunderland County Court, where the petition had been filed, for an order to set aside the two deeds of the 17th Nov., 1869, and that Snowball might be ordered to pay over to him as trustee the value of the building-society shares, and all moneys arising from the sale of the ship, and also a sum of 118*l* 2*s*. 9*d*. received by him from the sale of the stock and materials.

Snowball had sold the shares, the ship, and the stock, &c., under the power given him by the two deeds.

The County Court Judge made an order, declaring that the mortgage on the 17th Nov., 1869 was not void as an act of bankruptcy, nor fraudulent as against the other creditors of the bankrupts, but that so far as it related to the estate and interests of the bankrupt, John Douglas, it was null and void, and that Joseph Greener, the trustee of the bankrupt's estate, and William Snowball, were tenants in common of the premises comprised in the said mortgage, subject to the mortgages and

charges previously existing thereon; that the bill of sale of the ship was valid; that the stock in trade and other articles sold by William Snowball for the sum of 118*l.* 2*d.* 9*s.* were part of the partnership property, and were not comprised in the mortgage, and Snowball was ordered to pay that sum to the trustee with interest.

From this order both Snowball and the trustee appealed, and on the 11th March the Chief Judge made an order, declaring that the two deeds of the 17th Nov., 1869, were both invalid as against the creditors of the bankrupts.

From this order Snowball appealed.

De Gex Q. C. and *T. E. Winslow*, for the appellant.—There was an express promise on the part of the bankrupts, when the previous advances were made, to give Snowball a security upon the ropery and paint works, and that, we contend, was sufficient to render the deed valid.

Mercer v. *Peterson*, 16 L. T. Rep. N. S. 792; L. Rep. 2 Ex. 304; 18 L. T Rep. N. S. 30; L. Rep. 3 Ex. 104;
Ex parte Craven, Re Craven and Marshall, 23 L. T. Rep. N. S. 563; L Rep. 10 Eq. 648; and on appeal, *nom. ex parte Tempest*, 23 L. T. Rep. N. S. 650; L. Rep. 6 Ch. 701.

And *Lomax* v. *Buxton* (24 L. T. Rep. N. S. 137, L. Rep. 6 C. P. 107), shows that the promise, although verbal, was sufficient to support the deed. There was also a present advance sufficient to support the deed, for *Lomax* v. *Buxton* and *Kevan* v. *Mawson* (24 L. T. Rep. N. S. 395) show that an advance to pay off another creditor is an advance sufficient to support a bill of sale executed partly in consideration of a past debt. Here Snowball advanced large sums, amounting to more than 1000*l.*, partly to pay off other creditors, and partly to enable the bankrupts to pay their workmen's wages. Then, we contend that the execution of the deed by Moore, under the power of attorney, was an execution of it by John Douglas, for that the power was intended to extend to partnership property is clear from the fact that the ship, which is admitted to have belonged to the firm, is expressly mentioned in the power. But even assuming the power of attorney not to extend to partnership property, we submit that the deed is nevertheless valid, for a partner has power to pledge partnership property as a security for advances:

Lindley on Partnership, 2d edit. p. 291;
Ex parte Robinson, Re Houghton, 1 Mont. & Ayr. 18;
Ridley v. *Gyde*, 9 Bing. 349.

They also referred to—

Ex parte Bailey, Re Jecks, 25 L. T. Rep. N. S. 918; L. Rep. 13 Eq. 314;
Allen v. *Bonnett*, 23 L. T. Rep. N. S. 437; L. Rep. 5 Ch. 557;
Jones v. *Harber*, 23 L. T. Rep. N. S. 606; L. Rep. 6 Q. B. 77;
Harris v. *Ricketts*, 4 H. & N. 1;
Hutton v. *Cruttwell*, 1 Ell. & Bl. 15;
Graham v. *Chapman*, 12 C. B. 85;

Woodhouse v. *Murray*, 16 L. T. Rep. N. S. 559; L. Rep. 2 Q.B. 634
Morgan v. *Marquis*, 9 Ex. 145.

Little, Q. C. and *Doria*, for the trustee. We contend that the power of attorney did not extend to partnership property. It is true that the ship mentioned in it was partnership property, but it had previously been mortgaged in the name of John Douglas alone, and had been to some extent treated as his separate property. But even if the power should be held to extend to partnership property, we submit that it was revoked by the bankruptcy of John Douglas. Then Martin Douglas had no power to mortgage the partnership property, at least the real estate of the partnership, and the deed is, we contend, void *in toto*, as against the creditors of the firm, inasmuch as it charges the private debts of the partners on the partnership property, which was insufficient to pay the debts of the firm:

Chitty on Contracts, 9th edit., 232;
Dutton v. *Morrison*, 17 Ves. 193;
Harrison v. *Jackson*, 7 T. R. 209;
Bowker v. *Burdekin*, 11 M. & W. 128.

[Lord Justice MELLISH: In his book on Partnership, par. 94 (5th edit., p. 147), Mr. Justice Story says: "The law, however, treats each partner, without any nicety of discrimination of this sort, as possessing a dominion over the entirety of the property, and not merely over his own share, and therefore, as clothed with all the ordinary attributes of ownership. This doctrine, indeed, seems indispensable to the security and convenience of the public, as well as to the facility of transacting commercial business. But in respect to real estate a different rule prevails, founded upon the nature of the property and the provisions of the common law applicable thereto. Each partner is required, both at law and in equity, to join in every conveyance of real estate, in order to pass the entirety thereof to the grantee; and if one partner only executes it, whether it be in his own name or in that of the firm, the deed will not ordinarily convey any more than his own share or interest therein." And he cites in support of that proposition two American cases: *Coles* v. *Coles* (15 Johns. Rep. 159, 161) and *Jackson* v. *Stanford* (19 Geo. 14)]. Moreover, we contend that the mortgage and the bill of sale are both void as acts of bankruptcy, no antecedent promise to give security being proved, or even recited in the deeds, and there having been no substantial present advance:

Ex parte Foxley, Re Nurse, 18 L. T. Rep. N. S. 862; L. Rep. 3 Ch. 515;
Lindon v. *Sharp*, 6 M. & G. 905;
Ex parte Sparrow, Re Fowke, 2 De G. M. & G. 907;
Ex parte Bailey, Re Barrow, 3 De G. M. & G. 534;
Lacon v. *Liffen*, 7 L. T. Rep. N. S. 411, 774

De Gex, Q.C. in reply.—The American cases as to the power of one partner over real estate belonging to the partnership are founded upon *Thornton* v. *Dixon* (3 Bro. C. C. 198), and *Balmain* v. *Shore* (9 Ves. 500), which have been overruled, as Kindersley, V. C., shows in his judgment in *Darby* v. *Darby* (3 Dr. 495). He also referred to—

Juggeewun-das Keeka Sha v. *Ramdas Brijbookun-das*, 2 Moo. Ind. App. 487;
Bank of England case, 3 De G. F. & J. 645;
Cooper v. *Evans*, L. Rep., 4 Eq. 45;
Ex parte Bosanquet, Re Wilson, De G. 432;
Whitwell v. *Thompson*, 1 Esp. 68;
Ex parte Colemere, Re Colemere, 13 L. T. Rep. N. S. 621; L. Rep. 1 Ch. 128.
Bew v. *Bill*, 16 W. R. 760;
Young v. *Wand*, 8 Ex. 221.

Judgment was reserved till the 30th May, when

Lord Justice MELLISH delivered the following written judgment of the court: This was an appeal from an order of the Chief Judge in Bankruptcy, which in part varied an order made by the County Court Judge at Sunderland, and in part confirmed his order. [His Lordship read the orders of the County Court Judge and the Chief Judge, and then continued.] The bankrupts, Martin Douglas and John Douglas, for some years before their bankruptcy carried on the business of wire-rope makers at Sunderland. Mr. William Snowball is a solicitor at Sunderland, and for some years he acted professionally for the bankrupts, both as partners and individually, and also made advances to them and accepted bills for their accommodation. On the 14th Sept., 1869, John Douglas, who was the managing partner in the firm, and the son of Martin Douglas, left England for America. He professed to leave England for the purpose of purchasing land in America with money which belonged to his wife, and told his father and Mr. Snowball that he would return in two or three months. The firm was in difficulties at the time he left. An execution had been levied on the partnership property, and John Douglas was himself arrested on an absconding debtor's summons for a debt of 800*l.* shortly before his departure, though the bankrupts succeeded in raising money to pay both debts. Both the learned judges in the courts below were clearly of opinion that John Douglas committed an act of bankruptcy by departing from the realm with intent to defeat and delay his creditors, and we entertain no doubt that their decisions in this respect were correct. Before John Douglas left England, he executed a power of attorney, by which he authorized one John Anthony Moore to act for him in this country. It enabled Moore to sell lands and receive the price for which the lands might be sold, and to execute conveyances

on his account, and also to sell a certain ship and receive the price, and generally gave very extensive powers for the management of his private affairs, but it contained no reference to the affairs of the partnership. Shortly after John Douglas left England, negotiations were carried on with a Mr. Leadbitter, for a loan of 2500*l.* for the partnership, but these negotiations came to nothing. After this, at the end of October, Martin Douglas applied to Mr. Snowball for further assistance, and borrowed several small sums from him to pay weekly wages. There were, according to the evidence, four matters which pressed upon the bankrupts: First, they were unable to provide money and materials to finish the ship they were building in Liddle and Sutcliffe's yard; secondly, Messrs. Liddle and Sutcliffe's assignees were pressing them for payment of 315*l.* due to them for the purchase-money of the tenancy of the ship-yard, and the fixtures, materials, and timber thereon; thirdly, the Northern Counties Loan and Discount Company, the second mortgagees of the ropery, had threatened to take possession of and sell the same works unless the sum of 400*l.* due on their mortgage was paid; and fourthly, the Phœnix Building Society, in which the bankrupts had sixteen 60*l.* shares, and on which about 180*l.* arrears were then due, were about to forfeit and sell the shares unless the arrears were paid. According to the evidence of Mr. Snowball and Mr. Wright, his solicitor, Mr. Snowball refused to give any assistance to Messrs. Douglas in respect of these difficulties, unless Messrs. Douglas would give him security for the whole of the past debt, then amounting to nearly 4000*l.*, due from Messrs. Douglas to him, but that if they gave him such security he promised to relieve them from the above mentioned liabilities by taking transfers to himself of the mortgages and building shares, advancing money to pay Messrs. Sutcliffe's trustees and purchasing the ship. No such agreement is recited in the mortgage deed or in the bill of sale of the ship, nor is it contained in any written document. The County Court Judge appears to have come to the conclusion that some such agreement was actually made, but the Chief Judge was of a contrary opinion, and thought that the sole real object of the whole arrangement was simply to protect and give a benefit to Mr. Snowball. However this may have been, on the 17th Nov. the two deeds were executed. The first was a mortgage, and it is necessary to state its contents with some minuteness. It was expressly to be made between Martin Douglas and John Douglas of the one part, and William Snowball of the other part. It recited the conveyance of the ropery and paint works to Martin Douglas and John Douglas, their heirs and assigns, in equal moieties as tenants in common, subject to a perpetual ground rent of 70*l.* per annum. It then recited that the mort-

gagors carried on business as rope and paint manufacturers in copartnership at the aforesaid premises, and that they were absolutely entitled as tenants in common to the fixed plant and to divers engines, machinery, utensils, and effects in and about, and upon the said lands, buildings, and hereditaments, or otherwise used and employed in the business. Then followed recitals of a first mortgage of the ropery and paint works, and all the plants, engines, machinery, utensils, and other implements and effects thereon, to Margaret Jane Stack, to secure 800*l.* and interest, and of a second mortgage of the same premises to the Northern Loan and Discount Company, Limited, to secure 1000*l.* and interest, on which the sum of 400*l.* or thereabouts was then due. It then recited that, "whereas the said mortgagors and each of them are indebted to the said mortgagee in various sums of money on account current, the amount whereof has not been ascertained, and he, the said mortgagee, is also likely hereafter to advance other sum and sums of money to and for the said mortgagors and each of them, and hath incurred and may hereafter incur liabilities for them, or both or one of them, and it has been agreed that the payment of all such sum or sums of money now due or hereafter to become due to him, the said mortgagee, shall be secured in manner hereinafter appearing;" then the mortgagors thereby jointly and severally covenanted to pay to the mortgagee, on demand, all the moneys which then were or at any time or times might become due and owing from the said mortgagors or either of them, and they conveyed to Snowball in fee the land on which the ropery and paint works stood, together with the rope manufactory and paint works, and also such and so many and such part and parts of the plant, machinery, and fixtures in, about, or belonging to the said rope and paint works, as were of the nature of real estate, subject to the aforesaid mortgage securities, and to the ground rent, and to the proviso for redemption thereinafter contained. They then assigned to the mortgagee, his executors, administrators, and assigns, all such part and parts of the plant, machinery, and fixtures in, about, or belonging to the said rope and paint works, as were of the nature of chattels or personal estate, and also all those sixteen shares then or lately standing in the names of the said mortgagors in the books of the Phœnix Provident Building Society, established in Sunderland, subject to the proviso for redemption thereinafter contained. The deed then contained a proviso for redemption on payment by the mortgagors to the mortgagee on demand, or within twenty-four hours after, of the moneys for the time being owing from the mortgagors, or either of them, to the mortgagee, with interest thereon, and also of such sums of money as the mortgagee, his executors, administrators, or assigns, should be liable to, or have

engaged or guaranteed to pay for the mortgagors, or either of them, with interest from the time or respective times of advancing or paying the same. Then followed the usual power of sale, &c. The bill of sale was as follows: It was expressed to be made between John Douglas of the first part, Martin Douglas of the second part, and William Snowball of the third part. It recited an agreement dated the 5th Nov., 1868, between Messrs. Liddle and Sutcliffe, shipbuilders, of the one part, and John Douglas of the other part, which provided that Liddle and Sutcliffe should build a ship for John Douglas upon certain terms. It then recited a deed, dated the 1st July, 1869, whereby John Douglas assigned the contract for building the ship and the ship to George Thompson by way of security for 1000*l.* and interest, and a further charge in favor of Thompson for 500*l.* and interest. The deed then witnessed that, in consideration of 200*l.* to John Douglas, paid by Snowball, he, John Douglas, with the assent and concurrence of Martin Douglas, did thereby assign the ship to Snowball absolutely, subject to the two mortgages to Thompson. Both deeds were executed by Martin Douglas, and were also executed by Moore on behalf of John Douglas, under the power of attorney. Mr. Snowball gave Mr. Wright 420*l.*, out of which Mr. Wright paid 220*l.* to Mr. Moore as the price of the ship, which Mr. Moore retained for an alleged debt due to him from the partnership, and paid 200*l.* to Sutcliffe's trustees. It is not clear whether the 200*l.* was to be treated as a loan to the bankrupts or either of them, or was the price paid by Snowball for the ship's stores. After the deeds were executed, Mr. Snowball paid off the prior mortgages on the ropery and the building shares, and procured those mortgages and the shares to be transferred to himself. In Dec., 1869, Mr. Snowball took possession of the ropery, and the machinery and plant therein, and subsequently both the Messrs. Douglas were declared bankrupts. We have now to determine whether the execution of the mortgage deed by either of the bankrupts was valid, and if the deed was a valid deed, so far as regards its execution by one of the bankrupts, but was invalid as respects the other, what interest in the partnership property passed to Mr. Snowball under the deed. The County Court Judge held that the execution of the deed by Mr. Moore on behalf of John Douglas, under the power of attorney was invalid, upon the ground that the power of attorney was confined to John Douglas's private affairs, and did not extend to partnership matters, and we entirely concur in that opinion. It was argued before us that the power of attorney gave express power to sell the ship, and that the ship was proved by the accounts to be partnership property, and that therefore the power of attorney ought to be held to extend generally to partnership matters. The power of attorney, how-

ever, refers to the ship as if it was the private property of John, and there was reason for this, because the ship had been previously mortgaged to Thompson by John in his own name, and we do not think that because the power of attorney gives Moore express power to sell the ship, therefore it ought to be construed in other respects to extend to partnership affairs. The Chief Judge held that the power of attorney was rendered invalid by the act of bankruptcy committed by John Douglas in quitting the kingdom, and that therefore the mortgage deed was never executed by John Douglas. We agree that the execution of the mortgage deed by Mr. Moore, on behalf of John Douglas, was invalid on this ground also, if Mr. Snowball, at the time the deed was executed, had notice that John Douglas had committed an act of bankruptcy, a question we shall subsequently have to consider with reference to the validity of the bill of sale of the ship. The next question to be determined is, was the execution of the deed by Martin Douglas an act of bankruptcy? The County Court Judge held that the advance of 160*l.* by Mr. Snowball to Martin Douglas, between the 20th Oct. and the 17th Nov. to enable him to pay wages on the express promise that he should have a security on the ropery, and should be paid out of the proceeds of the ship when sold, the sum of 400*l.* paid to the Northern Counties Loan and Discount Company, who had threatened to enter upon and sell the ropery, the 420*l.* paid for the purchase of the ship, with all the sails, ropes, timber, materials, and other things prepared for her completion, and 184*l.*, the arrears due to the building society, which had threatened to declare the shares forfeited, making together 1064*l.*, were a present equivalent for the transfer of the property, and, according to the later decisions on the subject, prevented the execution of the deed by Martin Douglas, being an act of bankruptcy. The Chief Judge did not think it was made out that any sum had been advanced by Mr. Snowball upon a promise that he should have a security on the ropery, and appears to have treated the other sums as sums voluntarily paid by Mr. Snowball for protecting his own security, and not as present advances made for the benefit of the bankrupts, and he also points out that the deed is one by which Martin Douglas professes to pledge not only the partnership property for an antecedent debt, but engages the partnership property for the payment of any separate debt of his own then due, or any debt which may become due afterward. Upon consideration we are of opinion that the circumstance of the deed professing to pledge partnership property for the present and future separate debts of Martin Douglas and John Douglas, makes the execution of the deed on the part of Martin Douglas, an act of bankruptcy. It is clear that, at the time he

executed the deed, Martin Douglas knew that both the firm and himself personally were insolvent. The firm owed 5000*l.* to general creditors, in addition to the 4000*l.* they owed Mr. Snowball, and after the execution of the deed they had not at the utmost more than 600*l.* or 700*l.* of assets to pay their debts. Martin Douglas had the same day by bill of sale transferred his household furniture to another son, and after that had no personal property left. We are also of opinion that Martin Douglas must be treated as having had notice that his son and partner, John Douglas, had committed an act of bankruptcy. He knew all the circumstances under which John had left the country and was remaining abroad. We are of opinion that it is a fraud upon the creditors of a partnership for a partner who knows that his firm is insolvent to transfer partnership assets to a creditor of his own, or to give a security over the partnership assets for his own private debt, or for future advances to be made to himself. Such a transfer necessarily tends to defeat the creditors of the partnership, and to prevent the proper distribution of the assets under the bankrupt law. It was admitted in the argument before us that the deed would not give Mr. Snowball a valid security on the partnership property for the private debts owing to him by Martin Douglas, but it was contended that the deed might notwithstanding be valid so far as it gave a security for the partnership debts. We do not see how upon a question whether the execution of a particular deed is an act of bankruptcy, one part of the deed can be separated from the rest. If, by any part of a deed authority is given to apply partnership property transferred by the deed to purposes which are a fraud upon the creditors of the partnership, we think the execution of the deed makes a fraudulent transfer of property, and is, therefore, an act of bankruptcy. We may also observe, that if John Douglas had executed the deed, the partnership property would plainly have been transferred as a security for the several debts of the partners, unless they were held to have committed acts of bankruptcy, and the case of *Bowker* v. *Burdekin* (11 M. & W. 128,) is a direct authority that where a deed to which all the partners in a firm are made parties would operate, if executed by all, as a fraudulent transfer of partnership property, each partner commits an act of bankruptcy at the time he executes the deed, unless he executes the deed as an escrow. Martin Douglas, by executing the deed, did all that could be done on his part to make the partnership property a security for the several debts of himself and his son, John, and as this would necessarily tend, if carried out, to deprive the creditors of the partnership of their just rights to have the partnership property applied in payment of the partnership debts, we think he must be held thereby to have com-

mitted an act of bankruptcy. We, therefore, are of opinion, that the mortgage did not as against the creditors validly transfer any part of the partnership property professed to be assigned by it to Mr. Snowball, and this makes it unnecessary for us to consider what would have been the legal effect of the deed if the execution of it by Martin Douglas had not been an act of bankruptcy. The remaining question to be considered is, whether the bill of sale of the ship was valid. The County Court Judge held that the power of attorney authorized Mr. Moore to effect a sale of the ship, and as he came to the conclusion that Mr. Snowball had not notice that John Douglas had committed an act of bankruptcy, he held the sale of the ship valid. The Chief Judge held that the power of attorney was revoked by the act of bankruptcy committed by John, and that, therefore, the bill of sale of the ship was not validly executed on behalf of John Douglas. In the report of his judgment laid before us it is not in terms stated whether he thought that Mr. Snowball had notice of the act of bankruptcy committed by John, though we have little doubt from the general tenor of his judgment that he would have held, if he had thought it necessary, that he had such notice. We are of opinion that though, no doubt, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy, still, if after the act of bankruptcy, but before the adjudication, property of the bankrupt is conveyed under the power to a *bona fide* purchaser who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee. It is obvious that a power of attorney is not revoked for all purposes by an act of bankruptcy committed by the giver of the power, because, if no adjudication follows, a sale under the power is binding on the giver himself, and wherever a sale would be binding on a bankrupt, if no adjudication follows, it is binding on the trustee under a subsequent adjudication, if the purchaser had no notice of an act of bankruptcy having been committed by the seller at the time of the sale. It appears to us, therefore, necessary to consider whether Mr. Snowball had, on the 17th Nov., 1869, notice that John Douglas had committed an act of bankruptcy. The facts and evidence material to this question are, we think, correctly stated by the County Court Judge in his judgment. The learned judge said: "At the time John Douglas left the country, the firm was insolvent; their joint unsecured liabilities amounted to 8,000*l.* and upward. Mr. Snowball, in his depositions and affidavits, stated that he was not aware that the firm was insolvent at the time the bankrupt, John Douglas, left the country, and that he believed him when he told him that he intended to return to Eng-

land in two months, and that he never suspected that he was going abroad to defeat or delay his creditors. These statements appear to me rather singular, considering that Mr. Snowball had acted as the solicitor of the firm for many years, had been concerned as their solicitor in various transactions, had been in the habit of accepting and indorsing bills for their accommodation, had been applied to about that time to advance them money to pay wages and carry on their business, and at that time the firm owed him a considerable sum of money, and he had accepted or indorsed for them bills for a very large amount. I should have thought Mr. Snowball, from the knowledge he must necessarily have had of their affairs, would have strongly suspected, if he did not absolutely believe, that John Douglas went abroad for the express purpose of settling in America, and thereby defeating and delaying his creditors. Why should he wish to sell all his wife's property in Sunderland and purchase with the proceeds thereof an estate in America, if he did not intend to remove his family and settle in that country immediately, or as soon as he had sold his wife's property in Sunderland, and had purchased an estate in America? At that time his eldest son was only fourteen, therefore it could not be with a view of sending him out alone to settle in America that he was desirous of purchasing property in that country. In the months of September and October, after John had left this country, Martin Douglas called on Mr. Snowball, and told him that he was short of money to pay wages and carry on their business; that they were going to raise money upon the ropery, out of which he should be paid some money, and that the ropery had been valued at 4000*l.*, and he accordingly advanced him various sums of money. As Mr. Snowball has positively sworn that he had no notion that the firm was insolvent, and that he verily believed that John Douglas fully intended to return to this country in a short time, it is not for me to set my conjectures against his positive assertions." And, further on, the learned judge says: "There can be but little doubt, when all the circumstances are considered, that John Douglas did depart out of England with the intention to defeat or delay his creditors. He was the managing partner of the concern; he must have known that their debts and liabilities far exceeded their property. In August, 1869, an execution was levied on the partnership property for 291*l.* 8*s.* 7*d.*, which was paid off by him. In the same month, or early in September, he was arrested, under the Absconding Debtors' Act, for 800*l.*, which was paid as follows: 300*l.* by the bankrupt, John Douglas, 100*l.* by his attorney, Mr. Moore, and the remainder, with the costs of the proceedings, by the promissory note of the bankrupt, Martin Douglas, and his son, Mordey Douglas. On the 14th of

September, he executed a power of attorney to manage his private affairs without any reference to the partnership concerns. By this power Mr. Moore is empowered not only to receive the rents and manage his property, but to sell and convert the same into money. On the 23d of September, he leaves this country for America, saying that he would return in two or three months. On the 5th of November, Mr. Snowball gave to Martin Douglas 1219*l.* 5*s.* to take up his acceptance for that sum which he had given to the bankrupts for their accommodation. On the 17th of November, these deeds were executed. There can be really no doubt that John Douglas went to America to defeat or delay his creditors. Mr. Snowball denied that before the execution of these deeds he had heard that an execution had been put into the bankrupt's premises, or that John Douglas had been arrested under the Absconding Debtors' Act, or that John Douglas had left the country with intent to defeat or delay his creditors. On the contrary, he said that he fully believed that John Douglas had gone to America to buy an estate to settle his son on, and would return in two or three months, but he did not say to continue his business. I have already made some observations upon Mr. Snowball's statement that it never struck him that the bankrupt had gone to America to defeat or delay his creditors. Mr. Snowball and Mr. Wright in their affidavits state that they believed that, if the bankrupts were relieved in the four matters stated or referred to in Mr. Wright's affidavit, they could continue their business. It may be so, but still it is very singular that they should entertain this opinion, seeing that the managing partner, who knew the affairs of the concern, had gone abroad for several months, when he must have known that the firm was very much embarrassed, in fact insolvent. To render these deeds void on the ground that John Douglas had committed an act of bankruptcy, it would be necessary to show, not only that Mr. Snowball was aware that John Douglas had gone to America, but also that he had done so with intent to defeat or delay his creditors. Now, there is no positive evidence to contradict the evidence of Mr. Snowball and Mr. Wright that they believed that he had merely gone to America to purchase an estate with his wife's fortune, or rather with the proceeds of the sale of his wife's property, and would return in a month or two, and that they believed the assertions of Martin Douglas that if the firm were relieved from the four matters which pressed upon them, they could continue their business. I therefore feel compelled to reject this ground of objection to the validity of the deeds." Now, it is clear from the language of the learned County Court Judge that he thought, and in this respect we agree with him, that Mr. Snowball knew facts which were in themselves sufficient to lead his

mind to the conclusion that John Douglas had left England with intent to defeat or delay his creditors, and had therefore committed an act of bankruptcy, but because Mr. Snowball states in his affidavit that he did not in fact draw the inference that John Douglas intended to defeat or delay his creditors, the County Court Judge thought himself bound to find that Mr. Snowball had not notice of an act of bankruptcy. We can not agree that this was a proper mode of deciding the question. It appears to us that if a person is proved to know facts which constitute an act of bankruptcy, or is proved to know facts from which a court or a jury, or any impartial person, would naturally and properly infer that an act of bankruptcy had been committed, he ought to be held to have had notice that an act of bankruptcy had been committed, and that the court ought not to enter upon the inquiry whether he did in his own mind believe that an act of bankruptcy had been committed, or whether he did in his own mind draw the inference that the bankrupt intended to defeat or delay his creditors. A person may be proved to have had notice that an act of bankruptcy had been committed either by proof that he had received formal notice that an act of bankruptcy had been committed, or by proof that he knew facts which were sufficient to inform him that an act of bankruptcy had been committed. If he is proved to have received a formal notice, he is not allowed to escape from the effect of having had notice by saying he had not read it, when he ought to have read it, or that he did not believe it when he had read it, and we think if he is proved to have known facts which were sufficient to have informed him that an act of bankruptcy had been committed, he can not be allowed to escape from the effect of having had notice, by saying he did not draw the natural inference from the facts. We are, therefore, of opinion that Mr. Snowball had, on the 17th Nov., notice that John Douglas had committed an act of bankruptcy, and that, therefore, the bill of sale of the ship was invalid. The result is that the judgment of the Chief Judge was, in our opinion, correct on all points, and that the appeal must be dismissed with costs.

Solicitors for the appellant, *Bell*, *Brodrick*, and *Gray*.

Solicitors for the respondents, *Torr*, *Janeway*, *Tagart* and *Janeway*, agents for *Hodge* and *Harle*, Newcastle-upon-Tyne.

SUPREME COURT OF OHIO.

TO APPEAR IN 21 VOL. O. S. REPORTS.

CONSTRUCTION OF CONTRACT.

Nixon and Nutter vs. John S. Nixon. Error to the Common Pleas of Perry County. Reserved in the District Court.

WHITE, J.

The plaintiff, on the 21st of August, 1866, made a contract with the defendant for the sale of from fifty to one hundred head of hogs, to be delivered at a place named, "between Christmas and New Year's, 1866," the "hogs to weigh from twenty-five to one hundred pounds," and to be paid for at so much per hundred. In an action by the plaintiff against the defendant for refusing to accept the hogs when duly tendered,

Held:

1. The rule of damages is the difference between the contract price and the market value at the time and place of delivery.

2. If the plaintiff had the right to tender the hogs on the contract so that by accepting them the defendant would have acquired a good title, the fact that the plaintiff was the absolute owner of only part of them, the remainder having been furnished to him by third persons for such delivery, would neither constitute a defense nor diminish the damages. It only concerned the defendant to know that the delivery would invest him with a good title.

3. A tender on the last day of December, 1866, was in accordance with the contract.

4. Under the contract the plaintiff could deliver hogs of any weight no heavier than one hundred nor lighter than twenty-five pounds.

5. The plaintiff was not bound to notify the defendant before the time of delivery of the number of hogs he intended to deliver, and the giving of such notice would not preclude the plaintiff from tendering a less number than was specified in the notice, provided there was no fraud, and the notice did not operate to mislead the defendant to his prejudice.

Judgment reversed for error in the charge as to the rule of damages, and cause remanded for new trial.

DIVORCE AND ALIMONY.

Ambrose Broadwell vs. Charlotte Broadwell. Motion for leave to file a petition in error.

By the Court.

By Section 7 of the act concerning divorce and alimony, passed March 11, 1853 (S. and C. 512,) it is provided that when a divorce is granted by reason of the aggression of the husband, the wife shall be allowed alimony out of her husband's real and personal property, which may be allowed her in real or personal property."

Held:

In case it is allowed in real property it is not error to decree to her the absolute title in fee. Leave refused.

DAMAGES RESULTING FROM THE SALE OF INTOXICATING LIQUORS.

Mary I. Mulford *vs.* Abraham H. Crewell. Error to the Common Pleas of Crawford County.

WELCH, C. J.

1. It is no ground of error that the Court ordered stricken from the plaintiff's petition a count containing no cause of action, or to reject testimony tending to prove the same.

2. Where the Court during the trial, and before the evidence is closed, erroneously strikes from the petition one of the causes of action therein contained, the error is not cured by the Court instructing the jury, after the close of the testimony, to consider the matter contained in the count so stricken out, and the evidence applicable thereto.

3. Under the acts to provide against the evils resulting from the sale of intoxicating liquors (S. & C., 1, 431; and 67 O. L., 101,) an action against the vendor for injuries to the "person" of the plaintiff, occasioned by the drunkenness of the vendee, can not be sustained without showing an assault, or some actual violence, or some physical injury, to the person or the health; and it is not sufficient to show mere mental anguish, disgrace, or a loss of society or companionship.

4. In order to sustain her action under said statutes for injury to her "means of support," it is not necessary for the wife to show that she has been at any time, in whole or in part, without present means of support. It is enough that the means of her future support have been cut off, or diminished below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been. And the rule of damage in such case should be, not the amount of loss occasioned to the husband's estate, but the diminution, if any, thereby resulting to her means of present and future support.

5. In an action under said statutes for injury to her "property," the wife may recover, against the vendor of the liquor, damages sustained by her by reason of the sale of her chattels by the husband, without first demanding the chattels of the vendee, or notifying him that she claims them to be her property.

6. The liability of the defendant, in actions under these statutes, for injury in the "means of support," is not confined to cases of injury resulting from drunkenness, immediately, and during its continuance, but extends as well to cases where the injury results from insanity, sickness, or inability, induced by intoxication.

Judgment reversed, and cause remanded for further proceedings.

Supreme Court of Ohio.

EQUITABLE OWNERSHIP OF STOCK.

The National Bank of New London *vs.* the Lake Shore and Michigan Southern Railway Company. Motion for leave to file petition in error to reverse the District Court of Cuyahoga County.

McILVAINE, J.—*Held*:

1. In an action for the recovery of money, jurisdiction of the defendant may be acquired by service; by publication, when the action is brought against a non-resident of the State having property in this State sought to be taken by process of attachment. (Section 70 of Code.)

2. A private corporation holds its corporate property in trust for the benefit of its stockholders. Hence, a non-resident stockholder in a corporation in this State, has property in this State, within the meaning of section 70 of the Code.

3. By force of our Statute Code (sections 194, 200, 205, 214, 218, and 219, such stock is taken in attachment when a notice of garnishment is duly served upon the corporation.

4. The jurisdiction of the Court in such a case is complete when such property has been so attached, and can not be ousted by the subsequent answer of the garnishee, denying any knowledge of such property, or by denying that the defendant in attachment is a stockholder therein.

5. For the purpose of ascertaining its jurisdiction in such a case, it is competent for the Court to hear testimony, having found the fact in favor of its jurisdiction, its final judgment and order in the case are not void.

6. The plaintiff was the equitable owner of forty shares of the capital stock of the defendant. Certificates of stock for those shares were outstanding in the name and possession of a third person, who claimed to be the absolute owner thereof. The books of the company showed the certificates to be in the name of such third person. The plaintiff, without returning the certificate, made demand of the defendant for the transfer and delivery to it of the stock, and, upon the defendant's refusal to do so, brought its action against the defendant, on the value of the stock, making the holder of the certificates a party defendant.

Held: That upon such a state of facts the plaintiff was not entitled to a judgment for the value of the stock. Motion for leave overruled.

FIRE INSURANCE.

Lorillard Fire Insurance Company *vs.* Lucius S. McCullock. Error to the District Court of Cuyahoga County.

WELCH, C. J.—*Held:*

1. Where a policy of insurance is issued upon a written application containing questions which are left unanswered by the applicant, the underwriter thereby waives the answers to such questions.

2. A party in possession of real estate under a contract of purchase, having paid only part of the purchase money therefor, has an insurable interest in the property.

3. A party having such interest and possession, in his written application for insurance on the property, answered questions propounded in the application as follows: Question—"Is the property owned and operated by the applicant?" Answer—"Yes." Question—"Is any other person interested in the property? If so, state the interest." Answer—"No." Question—"Incumbrance—is there any on the property?" Answer:—"Held by contract."

Held—That the answers were substantially true, and that there was no breach of warranty in that respect which would avoid the policy. Judgment affirmed.

GENERAL AUTHORITY OF A NOTARY PUBLIC.

The State *ex rel* the Attorney General *vs.* Rufus S. Lee, *et al.*

By the Court.

By Section 8 of the Act of March 13, 1856, "concerning notaries public and commissioners, and prescribing their duties" (S. & C. 875), it is provided that "each notary public duly appointed, commissioned, and qualified, shall have power, within the county in which he may reside, * * * to take and certify to all acknowledgments of deeds, mortgages, liens, powers of attorney, and other instruments of writing," etc.

Section 63 of the General Corporation Act of 1852, as amended April 12, 1858, provides, in regard to the creation and regulation of manufacturing companies, that the certificate certifying the amount of capital stock, name, etc., "shall be acknowledged, certified, etc., * * * * as is provided in the second section of the act to which this is an amendment," etc. (S. & C. 1, 301-2.)

That the second section provides that "such certificate shall be acknowledged before a justice of the peace, and certified by the clerk of the Court of Common Pleas," etc. (S. & C., 272.) On July 25, 1867, the defendants and others, nine in number, undertook to become a body corporate by the name of the "Ohio Machine Works," in Hamilton County, and made a certificate specifying the several things required by the statute, but acknowledged the certificate before a notary public of the county, who certified such acknowledgment under his official seal; and the official character of the notary was certified to by the clerk of the Court of Common Pleas.

On proceedings in *quo warranto*, charging the defendants with usurping the liberties and franchises of a corporation, held: That the acknowledgment of the certificate of incorporation before a notary public instead of a justice of the peace, is not in conformity with the statute. The general authority of a Notary, under the act of 1856, "to take and certify to all acknowledgments," etc., can not be taken as applicable to acknowledgments of certificates of incorporation which a subsequent statute provides shall be made before a justice of the peace.

Judgment of ouster.

Supreme Court of Ohio.

INDORSEMENT.—ADMISSIBILITY OF PAROL EVIDENCE.

Joseph Morris *vs.* B. C. Fourot *et al.* Motion for leave to file a petition in error.

McILVAINE, J.—*Held:*

1. A brings an action, as indorsee, against B and others as indorsers upon a blank indorsement of a non-negotiable promissory note, made after maturity. The defense is, that the plaintiff, who is a stranger to the note, at the request of the makers and for the makers, paid the amount of the note in full to the defendants as holders, and thereby discharged the same; that after such payment the defendants, without indorsement, delivered the note to the plaintiff for the use of the makers, that after such delivery the defendants, at the request of the plaintiff, wrote their names on the back of the note (the indorsement sued on), with an express understanding between the parties that such indorsement was to be used by the plaintiff as evidence to the makers that he had paid the note for them, and for no other purpose. *Held:*

That the admission of parol proof of such defense is not a violation of the rule of evidence; that parol testimony is inadmissible to explain, contradict, or vary the terms of written instruments.

2. If a motion to rule testimony from the jury embraces competent as well as incompetent testimony, it is not error to overrule the same.

3. Evidence of facts which are first introduced in a case by way of rebutting testimony, may be rebutted by other proper evidence.

4. When all the testimony in chief has been introduced by the parties they "will then be confined to rebutting testimony, unless the Court for good reasons, in furtherance of justice, permits them to offer evidence in their original case." (Code, Section 2, 661.) But judgment will not be reversed for permitting evidence in the original case to be offered under such circumstances, unless it appears affirmatively that good reasons in furtherance of justice were not shown.

Motion overruled.

MUNICIPAL ELECTION.

The State *ex rel* the Attorney General vs. George Donnenwirth. *Quo Warranto.*

WEST, J.—*Held*:

1. The original tally-sheet of a municipal election duly certified by the officers thereof, is, on a proceeding in *quo warranto, prima facie* evidence of the election, to the office of Mayor, of the person for whom it shows a majority of the ballots cast for said office was given.

2. The officers of an election board, after its regular dissolution, are *functi officio*, and their subsequent acts in that character unauthorized. Hence, where a municipal election board had regularly dissolved, and the box in which the canvassed ballots were replaced had remained five days in an exposed place of easy access, a subsequent tally-sheet, made on the fifth day on a recount of the ballots then found in the box, by four officers of the munici-

pality, some of whom were members of the election board, will not be received to impeach the original canvass and tally-sheet. Judgment of ouster entered.

NEGLIGENCE OF AGENT.

Pickens & Plummer *vs.* Diecker & Bro. Motion for leave to file petition in error to the District Court of Auglaize County.

WHITE, J.

In an action to recover for the negligence of W., who was a traveling agent of the defendants, to solicit orders for goods, it appears that he, without disclosing his employers, hired of the plaintiffs a team and buggy to go to a neighboring town in the prosecution of his business. After arriving there, and while the horses were standing in front of the store in which W. was doing business, they took fright and broke the bridle by which they were hitched, but were caught before any damage was done. The horses were then tied up by a halter which was fastened around the neck of the near horse. W. took the broken bridle to a shop to be repaired, and, after finishing his business at the store, he undertook to lead the team to the repair shop by the halter around the neck of the near horse. On the way, one of the buggy wheels striking a stone, some boxes were thrown from the buggy, which frightened the horses, and W. not being able to hold them by the halter, they broke away and caused the damage sued for. *Held:*

1. That W. was guilty of negligence in attempting, under the circumstances, to lead the horses with no other means of guiding or holding them than the halter.

2. That in the hiring and use of the team he was the servant or agent of the defendants, and for the damages resulting from his negligence they were responsible. Leave refused.

REFORMATION OF POLICY OF INSURANCE.

The Globe Insurance Company *vs.* Elizabeth W. Boyle, *et al.* Motion for leave to file a petition in error to the Superior Court of Cincinnati.

DAY, J.

In a fire insurance policy, a property devised to the testator's children and E. W. B., his widow and executrix, the party insured was described as "MRS. E. W. B., executrix." In an action by the widow and children to recover the amount of the policy, it was averred in the petition that the insurance was intended and understood by the parties to the policy to be for the benefit of the owners of the property, and with the prayer for judgment asked that, if necessary, the contract might be reformed.

Held:

1. That evidence of the conversation of the agent of the insured and the underwriter, in relation to the object of the policy and the interest to be insured, was admissible, with a view to the reformation of the contract. But whether admissible not to vary the contract, but merely to aid the court in interpreting its true meaning, *quere.*

2. When an instrument by mutual mistake of the parties as to the legal effect of the terms used, fails to carry out their intention, it may be reformed in a proper proceeding for that purpose.

3. Under the code a contract may be reformed, and final judgment thereon may be rendered in the same action.

4. When in such a case the record shows that the petition and the facts found by the court warrant an order of reformation, and that without such formal order the proper final judgment has been rendered, it is not an error in a reviewing court to affirm the judgment.

5. Objections to the preliminary proofs as to loss will be considered waived if not made when proofs are presented, and insured is informed by the underwriters that the claim is rejected entirely on other grounds. Motion overruled.

DIGEST OF RECENT DECISIONS.

ADMINISTRATOR.

Counsel.—An administrator of a decedent's estate has a right, and it is ordinarily his duty, to employ competent counsel for the management of adversary suits, in which the estate under his charge is involved.—*Estate of Bezar Simons, dec'd*, 4 *Pacific Law Rep.* 44.

Counsel fee.—Such counsel is entitled to a reasonable fee from the estate for his services.—*Id.*

Commissions.—An administrator is entitled to commissions on only so much of a decedent's estate as actually comes into his possession.—*Id.*

CONTRACTS.

1. **Work properly done: Damages resulting therefrom**—In an action to recover the price for threshing a lot of clover seed by the plaintiff for the defendant, it was held if the plaintiff was employed for that purpose he was bound to execute it in a workmanlike manner, and if, through his negligence, want of skill, or defective machinery, the work was done in such manner that the defendant suffered damage thereby, the amount of such damage should be deducted from the price agreed to be paid for the work.—*Garfield v. Huls et al.*, *p.* 427, 54 *Ill.*

2. And though the defendant may have accepted the work done without complaint at the time, but without having an opportunity of inspection, still it was competent for him to show the defective character of the machinery, and of the work done, and his defense could be made available to the extent of the damage suffered by him on account thereof.—*Id.*

3. **Question of law or fact: Waiver**—Where the defendant in an action for work and labor, seeks to defend on the ground that the work was so unskillfully and negligently done that he has suffered damage by reason thereof, it is improper for the court to instruct the jury that the presence of the defendant

while the work was being done, and his failure to complain at the time, amounted to a waiver of such defense. The effect of those facts, if they existed, should be determined by the jury, not by the court.—*Id.*

CONFEDERACY.

Not a treasonable measure.—An act of the legislature of South Carolina, passed after that state had seceded, entitled "An Act to charter a Cotton Planters' Loan Association," provided that the capital thereof—cotton—should not be sold until after the removal of the blockade, that its bills, based on the cotton, should be redeemed in gold, and be receivable for taxes and as much of the war tax of the Confederate States as the state had assumed. *Held*, not a treasonable measure, to aid the state in rebellion against the General Government.—*Morgan v. Keenan*, 1 *So. Car. N. S.* 327.

CONFEDERATE MONEY.

Decree to sell land void.—Land was sold under a decree of a probate court in a rebel state during rebellion; the purchaser paid in Confederate currency; the court exceeded its jurisdiction. *Held*, that the decree was void; the purchaser and his vendee should be charged with notice; and that the cash value of the Confederate notes, at the date of the sale, should be allowed him if they were of any benefit to the heirs.—*Mosely v. Tuthill*, 45 *Ala.* 621.

CONFEDERATE MONEY.

Relation of attorney and client suspended.—G., as attorney of record, brought a suit for A., and obtained judgment. After the rebellion broke out, G. went within the rebel lines, while A. remained loyal, and the judgment debtor paid the amount of the judgment in Confederate money to G., who accepted it in satisfaction. *Held*, that the relation of attorney and client was suspended by the rebellion, and that the payment was not good.—*Harker v. Harvey*, 4 *W. Va.* 539.

EMANCIPATION.

Neither slaves nor their value can be recovered.—Detinue to recover certain slaves, and damages for their detention. Special plea, emancipation since the date of the writ, by which plaintiff lost the property and the defendant the possession. *Held*, that neither the slaves nor their value could be recovered, but that the plaintiff was entitled to damages for the detention up to the time of their actual permanent freedom.—*Whitfield v. Whitfield*, 44 *Miss.*, 254.

CONFEDERATE MONEY.

A breach of trust.—A trustee held bonds secured by mortgage of real estate in South Carolina, on trust to invest the proceeds when received in such manner as he should think best on consultation with the *cestuis que trust*, etc. During the rebellion, the *cestuis que trust* then living in New York, the trustee, without communication with them, collected the bonds in Confederate money, and invested it in Confederate bonds. *Held*, a breach of trust.—*Mayer v. Mordecai*, 1 *So. Car. N. S.* 383. *See also Fitzsimmons v. Fitzsimmons*, *ib.* 400; *Sanders v. Rogers*, *ib.* 452.

Confederate bonds not considered safe securities.--The will directed the executor to invest the money received "in some safe public securities." *Held*, that he was accountable for an investment in 1863 in Confederate States' bonds.--*Womack v. Austin*, 1 *So. Car. N. S.* 421.

EVIDENCE.

Of a deceased witness: in what manner it may be proven.—The testimony of a deceased witness at a former trial can not be shown by the bill of exceptions taken at that trial, but may be proved by any one who heard and could remember his evidence. -*Roth vs. Smith*, *p.* 431, 54 *Ills.*

EVIDENCE.

Legislative journals as evidence.—The journals of the two houses of the General Assembly are public records, of which the courts will take *judicial notice*, and if it appears from said journals that an act was not passed according to the forms of the constitution, it will be declared not to have the force of law.—*Opinion by Beck, C. J. Moody v. State of Alabama.*

Signing of bill.—Where a bill originates in one house of the General Assembly, and is there passed and sent to the other house, and is there materially amended, and said amendments are concurred in by the house in which it originated, but when prepared for the signatures of the presiding officers of the two houses, the said amendments are omitted, and it is signed by the presiding officers, and approved by the governor without said amendments, such bill does not acquire the force of law, and as an act of the legislature is wholly void.—*Ib.*

Void statute.—The act entitled "An act to regulate elections in the State of Alabama," approved the 26th of February, 1872, as the same is published in the book of acts of 1871-1872, p. 15, never acquired the force of law, as a constitutional enactment of the General Assembly of this State. The said act, as published, was never passed by the two houses of the General Assembly, and is, therefore, without any validity as a law of this State, and imposes no legal obligation on any body.—*Ib.*

Requisites of a bill to acquire the force of law.—The bill, having the same title, which passed the two houses, was never signed by the presiding officers of the two houses, and was never submitted to the governor for his approval, and for these reasons never acquired the force of law.—*Ib.*

POLICY OF INSURANCE.

Construction of.—Prohibition in a policy to use kerosine oil save for lights in a dwelling, can not be held to permit its use as a light in a store where the policy mentions that it may be kept for sale in limited quantities in a store, but omits to mention as to its use as light save as to a dwelling.—*Cerf v. Home Ins. Co.*, 4 *Pacific L. Rep.* 46.

The use of the kerosine light in a small room of the store where the assured and his clerk slept, can not be said to be used in a dwelling, under the terms of the policy.—*Id.*

SALE OF LANDS.

Parol sale of land.—Under the Mexican law in force in California in 1848, parol sales of real estate when fully executed, were valid and binding between the parties, and passed the title to the vendee.—*Cook v. Frink*, 4 *Pacific L. Rep.* 45.

SLAVES—CONTRACTS.

Voluntary act of a State.—The constitution adopted by Georgia, A. D. 1868, by which it was provided that "no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof," is to be regarded by the court as voluntarily adopted by the State named, and not as adopted under any dictation and coercion of Congress. Congress having received and recognized the said constitution as the voluntary and valid offering of the State of Georgia, this court is concluded by such action of the political department of the Government.—*White vs. Hart, Supreme Court of the United States*, 13 *Wallace.*

Can not pass a law to impair obligations.—At no time during the rebellion were the rebellious States out of the pale of the Union. Their constitutional duties and obligations remained unaffected by the rebellion. They could not then pass a law impairing the obligation of a contract more than before the rebellion, or now, since the ideas of the validity of a contract, and of the remedy to enforce it, are inseparable; and both are parts of the obligation which is guaranteed by the constitution against invasion. Accordingly, whenever a state, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the Constitution, and to that extent void.—*Id.*

Said clause unconstitutional.—*Held*, therefore, that the clause of the constitution of Georgia, quoted in the first paragraph above, had no effect on a contract made previous to it, though the consideration of the contract was a slave.—*Id.*

Note given for a slave is valid.—A note of which the consideration is a slave, slavery being at the time lawful by the law of the place where the note was given, is valid.—*Id.*

Contract for slaves valid and binding, if made at the time and place when and where slavery was not forbidden. A person in Arkansas, one of the late slave-holding States, for a valuable consideration, passed in March, 1861, before the rebellion had broken out, sold a negro slave which he then had, warranting "the said negro to be a slave for life, and also warranting the title to him clear and perfect." The Thirteenth Amendment to the Constitution, made subsequently (A. D. 1865), ordained that, "neither slavery nor involun

tary servitude * * * * shall exist within the United States, or any place subject to their jurisdiction." *Held*, that negro slavery having been recognized as lawful at the time when and the place where the contract was made, and the contract having been one which, at the time when it was made could have been enforced in the courts of every State of the Union, and in the courts of every civilized country elsewhere, the right to sue upon, it was not to be considered as taken away by the Thirteenth Amendment above quoted, and passed only after rights under the contract had become vested; destruction of vested rights by implication never being to be presumed. *Osborn v, Nicholson et al. Supreme Court of the United States*, 13 *Wallace.*

CALIFORNIA DECISIONS.

Head Notes of Decisions of the Supreme Court of California, to appear in 40th California Reports.

Action for damage against Railroad Co.—Negligence.—Where an unfenced line of railroad passes through a field in which the live stock of the owner or occupier of the field is running, and the stock of the occupant stray into the road and is killed by the train, these facts unexplained, make a *prima facie* case of negligence against the railroad company—*McCoy v. Cal. P. R. R. Co.*, 532.

1. Constitutional construction—Competency of witness in State courts.—The State Legislature has the power to declare who shall be competent to testify, and to regulate the production of evidence in the courts of the State—*People v. Brady.*

2. Idem—Fourteenth Amendment—Chinese testimony—The Fourteenth Amendment to the Constitution of the United States does not conflict with the power of the Legislature in the exercise of its discretion to exclud Chinamen from the right to testify in the state courts.—*Id.*

The case of The People *v.* George Washington (36 Cal. 658), reviewed and overruled.—*Id.*

3. Idem—Reserved powers of the State.—To the extent of the powers not granted to the General Government or denied to the States, the power of the State is Supreme.—*Id.*

4. Idem.—The State Government is complete in itself, so far as matters of internal government are concerned, and contains in its own constitution every necessary safeguard against improper use of its powers, and every protection for individual rights which the people thought necessary.—*Id.*

5. Idem.—The General Government has no authority to interfere with the means a State may adopt to enforce a law which it had a right to pass.—*Id.*

6. Idem.—Fourteenth Amendment.—The Fourteenth Amendment to the Federal Constitution was not intended to authorize the Federal Government to supervise the State in the exercise of its undoubted powers.—*Id.*

7. Idem.—Thirteenth Amendment, Section 1.—The first section of the Thirteenth Amendment, which is a mere limitation upon the powers of the State, was directed to the States in their sovereign capacity as law-makers, and was not intended to afford relief to individuals unlawfully deprived of their liberty. Its purpose is satisfied when such restraint is rendered illegal.—*Id.*

8. Idem.—Section 2.—The second section of the Thirteenth Amendment authorizes Congress to pass only such laws as would be appropriate to enforce a limitation on the legislative power of the State.—*Id.*

9. Idem.—It confers upon Congress no power to establish a police system for the internal government of the State, or by its laws to annul the laws of a State, or to control their operation in any way whatever.—*Id.*

10. Idem—Laws of a State—Constitutionality of.—The constitutionality of the laws of a State must be tried by the language of the constitution, and not by the laws of Congress.—*Id.*

11. Idem—Limitation upon the power of the State—Power of Congress.—The power to enforce a limitation upon the power of a State, can not be construed to authorize Congress to enlarge the limitation if necessary to render it effectual.—*Id.*

12. Idem—State Laws—Congress no power to nullify.—Congress has not the power to nullify a law of the State, either directly or by preventing its execution.—*Id.*

13. Idem.—State laws, Constitutionality of.—A State law can be nullified only when unconstitutional; and to determine that question is the province of the judiciary.—*Id.*

SUPREME COURT OF ILLINOIS.

ACTION.

1. Whether trespass or an action on the case.—Where the owner of goods has sold them and received a part of the purchase money, and the sale has been rescinded by the vendee by reason of the inability of the vendor to deliver the goods, such inability being occasioned by the forcible and wrongful seizure of the property by a third person, after the sale and while it was still in the possession of the vendor, it was held a consequential injury resulted to the latter in the loss of his sale, for which he could maintain an action on the sale against the wrong-doer.—*Frankenthal et al. v. Camp*, p. 169.

2. And as the goods were forcibly and wrongfully taken from the vendor's possession, he might have brought trespass and recovered their value.—*Id.*

ASSIGNEE BEFORE MATURITY.

Alteration of note.—If a person signs a note written partly in ink, but containing a material condition qualifying his liability written only in pencil, he is guilty of gross carelessness; and if the writing in pencil is erased so as to leave no trace behind, or any indication of alteration, an innocent holder, taking the note before maturity, for a valuable consideration, will take it discharged of any offense arising from the erased portion, or from the fact of alteration.—*Harvey v. Smith, p.* 224.

KENTUCKY COURT OF APPEALS.

APPEAL.

An appeal to the Court of Appeals dates from the filing of the record and not from issuing of summons.—Appellees recovered a judgment against appellants in May, 1866, and no appeal was granted by the lower court. In January, 1869, a copy of the record was filed with the clerk of the Court of Appeals, indorsed with the name of the appellants and appellees therein, which included the appellees herein. The judgment was reversed, but afterward that decision was set aside, because appellees were never summoned nor never appeared in this Court, and the appeal was set for hearing at the next term thereafter. It is now insisted that the appellants did not appeal within three years from the rendition of the judgment in the lower court, and can not now maintain an appeal.

Held: An appeal to the Court of Appeals is not analogous to the institution of a suit in a lower court. A civil action in a lower court is commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to issue thereon. Whereas, the mode of prosecuting an appeal to this court when not granted by the court below, is to file with the clerk of this court the record with the names of the parties, appellants and appellees, and as a matter of right the clerk must grant the appeal. (Sec. 876 Civil Code.) The sueing out of a summons is not made a requisite to the granting of the appeal. The appeal was therefore granted against the appellees in January, 1869, though they were never served with summons, and the appeal was not barred by limitations.

Judgment reversed.—*Jones' Executor, etc., vs. Finnell & Winston. To appear in* 8 *vol. Bush's* (*Kentucky*) *Reports.*

ADMINISTRATION.

Jurisdiction to grant administration on estate of non-resident intestate, who owned property in this State.—Thos. James died intestate, in Memphis, Tennessee, where he resided, and Crawford was appointed his ad-

ministrator by the County Court of Jefferson County, Kentucky, where debts were owing him, and where he owned valuable real estate. He also owned real estate in another county in Kentucky, but how much is not shown. The only question is, whether the Jefferson County Court had jurisdiction to grant the letters of administration, which the court below adjudge in the affirmative.

Held: (sec. 1, art. 2, chap. 57,) Rev. Stat. provides that when any person shall die intestate, that Court shall have jurisdiction to grant administration which would have had jurisdiction to grant a certificate of the probate of his will had he died testate; and sec. 27, chap. 106, that the will shall, where the testatory does not reside in the state, and has not devised land in it, be admitted to record in the county "wherein his estate, or the greater part thereof, shall lie, or where there may be any debt or demand owing to him." The word "Estate" in the latter section evidently means real estate, and the Jefferson County Court has jurisdiction to grant administration, inasmuch as it was neither alleged nor proved that the greater part of the real estate of the intestate did not lie in Jefferson County. There being debts due the intestate in Jefferson County, its County Court had jurisdiction to grant administration; nor could this jurisdiction be defeated by the fact that those debtors had claims against the estate which might be set off against the amounts they owed.

Judgment affirmed.—*Hyatt vs. James' administrator. To appear in 8th Bush's (Kentucky) Reports.*

CONDEMNATION.

The Louisville bridge—Condemnation of the necessary land for depots, road-beds, etc.—The Louisville Bridge Company, by the act of its incorporation, was invested with the right "to purchase or condemn by writ of *ad quod damnum*, and hold as much real estate as may be necessary for the site of said bridge, or the sites for the piers, abutments, toll-houses, and suitable avenues leading to the same, and such other lands as may be necessary;" also the right to extend a railroad over their bridge with as many sets of tracks as may be deemed expedient. The company filed a petition in the Jefferson Common Pleas Court against the owners of certain lots in Louisville, and alleging that the lots were necessary for the "erection of toll-houses, depots, and the opening of avenues to the bridge, and the advantage and convenience of the public."

Before a trial of the issues made up by the pleadings, a writ of *ad quod damnum* was awarded, directing a jury to be impanneled to ascertain the value of the land; and a jury impanneled in accordance therewith, assessed the value of the land at $27,984, and adjudged that it was necessary and requisite for the purpose of the company. A judgment was thereupon rendered, vesting the title to the land in the company on the payment by them of the amount assessed.

Held: The Jefferson Court of Common Pleas had jurisdiction of the case. The right to have and operate a railroad necessarily implies the right to keep the necessary depots for the transaction of the business of such roads;

and such lands as may be necessary for the erection of the depot houses can be acquired by condemnation under the act of incorporation. But the company can acquire title, by condemnation, to no lands except such as are "necessary" for the erection of their bridge, the construction of their railroad, and the transaction of such business as legitimately grows out of these two improvements, and for such avenues as are designated in their charter. This necessity must exist as a condition precedent to their legal right to resort to the remedy given them to be enforced by the writ of *ad quod damnum*. Of the existence of this necessity the company is not to be the judge, but a competent tribunal before which the owners of the land, as well as the company, can be heard. The court heard no evidence as to such necessity before awarding the writ, nor did it authorize the jury to inquire into it. The finding of the jury thereon, not being responsive to the writ, was entitled to no consideration by the court, and the judgment vesting the title in the company was erroneous, and reversed.—*Reed, &c., vs. Louisville Bridge Company. To appear in* 8 *Vol. Bush's* (*Kentucky*) *Reports.*

Legal Items.

Joaquin Miller, the "poet of the Sierras," was once a county judge in Oregon.

A French court has a case before it involving the question whether false teeth are personal property.

A commissioner in the Irish high court of chancery has taken depositions in support of a claim against the United States for a quantity of tobacco destroyed during the late war, valued at $60,000, and the property of Valentine D. O'Connor.

Mr. J. B. Barnet, a Hebrew scholar, contends that the prophet Jeremiah, with the remnant of the tribe of Judah, migrated to Ireland, and was no other than the celebrated Irish reformer and law-giver, Ollam Foda.

The statement that Hon. E. Peshine Smith, formerly reporter of the Supreme Court of New York, who went to Japan as one of the legal advisers of the emperor, has been dismissed from the service of that government, is pronounced untrue by Mr. Mori, the *charge d'affaires* of the Japan empire at Washington. Mr. Mori says that Mr. Smith went to Japan under contract for a fixed number of years, at a stipulated salary, and can therefore remain, if he so desires, until the expiration of the term.

At a recent meeting of the New York bar association, resolutions were adopted providing a new building for the wants of the association. After remarks by S. Tilden and others upon recent judicial investigations, a report

was adopted thanking both branches of the Legislature for their action. A resolution was also carried providing for the selection of suitable candidates for judgships at the approaching election, and for the punishment of any of the profession implicated by the investigation of last winter.

Attorney-General Williams has decided that, under the statutes establishing the money-order system, the remitter of a money order can not stop the payment of it after it has passed into the hands of the payer, and can not demand the repayment of the amount deposited without, at the same time, returning the order. This decision, which is of great practical importance, is based upon the special provisions of our statute, which differs in this respect from the provisions of the English statute on the same subject.

Dr. Francis Lieber, the distinguished author and publicist, died suddenly on the 2d ult., at his residence in New York. As a philanthropist and a liberal in the days when it was dangerous for a European to hold, much less to express, liberal opinions, Prof. Lieber throughout his long career had been held in high esteem by his fellow-countrymen in America, whether native-born or naturalized citizens. His life was an unusually varied one. Born in Berlin, in the year 1800, he joined the Prussian army while a mere boy, as a volunteer, just before the great series of battles which ended in the downfall of Napoleon in 1815. He took part in the fight which ended in Blucher's defeat at Ligny, and in the very effective pursuit of the French from the field of Waterloo, two days later, and was wounded at the assault of Namur. His open expression of liberal opinions after the peace of Paris led to his arrest, and on securing his release he studied for a while at the University of Jena, and then joined Byron's sentimental expedition for the independence of Greece. As a friend and guest of Niebuhr, the great Roman historian, as a prisoner at Kopnick, as a private tutor and journalist in London, Lieber passed the six years of his life after returning from Greece. He then determined to shake the dust of tyrannized Europe from his feet, and to seek literary fortune in free America. In 1827, he took up his residence in Boston, where he occupied himself in editing the *Encyclopædia Americana*, afterward published in Philadelphia. In 1835, he was appointed Professor of History and Political Economy in the South Carolina College at Columbia, a position which he held till he accepted the same professorship in Columbia College, in New York City, in 1858. Prof. Lieber, while holding his chair in Columbia College, was a constant contributor to magazines and periodicals, and published many essays, especially in connection with the subject of prison management and punishment. Among his more striking publications are his translations of De Beaumont and De Tocqueville on the Penitentiary System of the United States, "Reminiscences of Niebuhr," "A Manual of Political Ethics," "Essays on Property and Labor," "Civil Liberty and Self Government," "Essays on Subjects of Penal Law and the Penitentiary System," "Abuses of the Pardoning Power," and many others on kindred subjects. Prof. Lieber was

familiar in all literary circles, and though far advanced in years, will leave a vacant place which will not be easily filled—*Times.*

Book Notices.

A DIGEST OF THE LAW OF PARTNERSHIP, AS PRESENTED IN THE REPORTS OF THE ENGLISH AND AMERICAN DECISIONS. By CHARLES FOX, late Judge of the Superior Court of Cincinnati. Published by Diossy & Co., New York, 1872.

Judge Fox, for the past fifty years, a leading member of the Cincinnati Bar, and for some time a Judge of the Superior Court, has, in the above mentioned work, discharged a debt which, it is said, every eminent lawyer owes to his profession, and, in doing so, has laid the latter under obligations of gratitude to him. As its title imports, the book is but a digest, but it is a digest in the proper sense of the term—not a mere index, or compilation of legal matter so thrown together as not to be readily available to the legal practitioner. From its table of titles and subdivisions, its index, and its distribution and classification of the decisions digested, the entire contents are displayed in the front windows, not hid away in secret drawers. The entire volume contains fewer than four hundred and fifty pages, but is a digest of some one thousand four hundred cases. The table of titles and subdivisions embrace some thirty pages. Each subdivision is really a comprehensive index to its title, indicating clearly what the reader is to look for under such title. This, with the index at the end of the volume, renders every part of the contents readily available. In the list of cases will be found a reference to the pages of the work on which they are given.

The law relating to partnership is now second in importance to no other branch of jurisprudence, while the questions therein arising are often difficult and intricate. No work extant will so readily enable the lawyer to know what cases bear upon any given legal question concerning partnerships, and to prepare himself properly to advise his client or try his cause.

The nature of the work is truly and well stated in the author's preface. "The scope of the work embraces not only the cases which fix the duties, "rights, and liabilities of partners, as between themselves, but also decisions "affecting the rights and obligations of third parties in relation to copartner- "ships, or to the individuals composing them, whether as creditors or other- "wise. The compiler has examined all the cases in the reports of the Courts "of the United States and of the several states, and those of England, includ- "ing the reports of the House of Lords, down to the year 1871; and he has "cited no case which he has not personally examined."

In conclusion, we may say that the work is one that no lawyer in active practice should fail to obtain.

We are in receipt of the "*Report of the Horace Hawes Will Case*, and shall speak of it in our next issue.

THE

AMERICAN LAW RECORD.

VOL. 1. DECEMBER, 1872. NO. 6

THE PHILOSOPHY OF LAW.

By J. H. BALFOUR BROWNE, Esq., Barrister-at-Law.

WE are for the most part content at the present time to make up our minds to the inevitable. We regard that as true wisdom. To do what is possible, and to refrain from attempting to do what is impossible, are regarded as equally wise. Thus to know all things capable of being known is not more commendable than to desist from vain seeking after empty knowledge, or obstinate questionings about things that knowledge can not compass. These are the prudential rules of a very practical age; but prudence, although a worldly wisdom, is often a contemptible meanness. Prudence is to the palace of thought, which is builded by philosophy, what the cellars are to a house.

Still the fact remains, and it is thought to be a most excellent maxim, "know what you can not know!" The most fashionable theory is that which ascribes very narrow limits to philosphical inquiry; and on the side of this peddling narrowness Socrates, who, according to Xenophon, would not speculate as to the cause of existence, is always quoted. The maxim in many aspects recommends itself. The proposition that it is well to know only what is capable of knowledge, does not require argument to support it. The maxim is deleterious in its application, not in its simple statement. The criterion capacity of knowledge is only too often judged of by those who enunciate the maxim by their own subjective feeling of capacity. Hence the error. "I do not know," is an excellent admission in many cases, but the very fact of this admission of ignorance proves the impossibility of such a subjective negation being the ground of predication of others knowing.

This preliminary consideration was not unnecessary, for it is not unusual for people in these days to smile at what they con-

sider the windy throes of metaphysicians, as they would at the pranks of a child who thought to catch a rainbow. But there is an echo in time that will throw their empty laughter back upon themselves. The trees which think themselves so much better than the hill they grow upon are not seen a mile off; but the mountain towers into the sky, a monument of creation, a mound and gravestone over some dead cataclysm. There is no more excellent method than to judge of things by one's own criterion. If we could all buy as well as sell by our own scales we should all be rich. The trick could not exist a day where pounds of sugar were concerned. In matters of truth and fact, it has existed for years, and that only because so few people know what these are.

The best way to meet an argument you can not answer is to call the man who advances it a fool. A shrug will often prove more than a demonstration. That seems to be the position of many persons at the present time; but their shoulders will rot down out of their ears, and the truth will grow and bourgeon. One of our best thinkers believes that the direction of its advance may be predicated with some certainty, and that the only advance at the present time possible is through an explication of the philosophy of Hegel.

Dr. Hutchison Stirling* has undertaken to tell lawyers the basal principles of their science, and he must, when he undertook the task, have been prepared for some criticism at the hands of members of the legal profession; how well he was prepared a consideration of these lectures will show. When a man has grasped a truth it seems to him impossible but that otherm inds should grasp it too. It compels its own recognition. A man has no power to shut his eyes to it. And in all Dr. Hutchison Stirling's explanation of the Hegelian philosophy, he possibly trusts more to the force of the truth than to the mitigation of friction. His style is Hegelian. It is rugged and forcible; and through it one can discern the intolerance of strength. He *will* reveal Hegel, but he himself requires a revelation! God's truth is open, but men's eyes are not! And so it is, Dr. Stirling's admirable expositions are "*caviare* to the million." And his intolerance of the numskulledness of other people is rather a disadvantage, und renders much that he says almost as obscure as the author he so thoroughly understands, and means so amply to explain. If there is one part of Hegel which may be taken exception to, it is his great respect for men as men. He argues,

* Lectures on the Philosophy of Law. By James Hutchison Stirling, LL. D. Published in the *Journal of Jurisprudence and Scottish Law Magazine*, January, February, March, and April, 1872.

with his iron logic, that slavery is impossible, as a subsumption of free-will by free-will is wrong, and could not be right. So far he is correct. But he almost seems to go too far when he supposes all men to be endowed with free-will. Their needs and their greeds *have them*. They have not their needs and their greeds. This, then, is the distinction between thinghood and manhood; and if Dr. Stirling would recognize this element in men, he would be content to make his expositions more expository, and he would by such means command a much larger number of readers than he can hope for in his present form.

It is almost hypercriticism to call attention to such a defect in such a writer. Criticism is suitable in the case of small gifts. When the donation is beneficent, gratitude should make us oblivious to the form of the gift. If we get gold, it is not necessary to insist upon its being the newest mintage. When we finger copper we look askance at the far traveled coin, which has the grease of the counter and the dust of the market-place upon its mulatto face. It is only our desire that Dr. Hutchison Stirling should be of wider benefit that induces us to dwell upon what, amid so many merits, is scarcely a fault. Let us have a great estate, and we will take it with mortgages; let us have a great man, and we will take him with his faults, which are the mortgages of spirit.

One more preliminary word. Dr. Hutchison Stirling is not simply a hose. He has not simply conveyed the contents of Hegel from German into English. True, he has got into all Hegel's thoughts, and has made them his own; he has become possessed of Hegel's secret, and he has endeavored to make that secret an open secret to all. But such a task is not to be accomplished by a mere translator. It required, in the first instance, an explorer, and an intrepid explorer, who was ready to give years of quiet labor to thankless work. But it required above all a philosopher. To enter into Hegel's thought one must almost be a Hegel. To wear the mantle of Elijah one must be an Elisha. The philosophy of Hegel is not to be entered into by dilettante research; his system is not to be understood by amateur survey. It is for great thought to receive great thought, and for like spirits to carry on noble work. There is a kinship in great minds. The same blood of truth runs through them. Their intent is so much the same, that they have even the same superficial trick of features. Now, we believe Dr. Hutchison Stirling has understood Hegel's position, and is capable of advancing it. After all, much in Hegel is only in the seed-form of thought, hints; much is, to use Dr. Stirling's favorite phrase, simply implicit. That has to be made explicit, and as he himself thinks that the explication of these wells of truth is to be the work of

philosophers for many years to come, we may confidently expect much more from that clear intelligence, that subtle force, that polemical ability, and that dialectical skill which has already given us "The Secret of Hegel," and these "Lectures on the Philosophy of Law."

These lectures do not come too soon. The fact that there is a philosophy associated with law—that there is some principle which makes so-called justice just—a law which makes all our law legal, is apt to escape the memories of those who receive their law through long generations of precedent, and whose thoughts never go deeper in a search for principles than the ordinary habits and customs of the mass of mankind. That that philosophy is not a wisdom of makeshifts, that that principle is not a principle of expediency, and that that higher law is really a law and not a selfish maxim, requires to be stated and inculcated in England, where the shallow and external philosophy of a certain school of indigenous thinkers has been for many years paramount. What is the reason of law? What makes law possible? What makes property a fact? What makes penalty allowable? These are questions which we would find answers for. If we are answered that "Expediency" is the answer to each, we would still have to ask: What is the reason of expediency? It requires some sanction, and that can only be given by thought! It is evident, therefore, that a satisfactory answer to any of these questions can only be given after we have arrived at a satisfactory conclusion as to some preliminary matters.

All science is an explanation. When we associate certain phenomena with their causes, we explain. An event seems only half itself unless its reason is known; and so all science is a kind of natural history of causes and effects. But scientific explanation is always explanation within conditions; the facts to be explained are the conditions of the explanation. But these very conditions require some explanation, and in order to answer the final questions which haunt humanity, those whences? and whys? and whithers? we must have an explanation of explantion, or know explanation as explanation. "The physical pursuits," says Mr. Martineau, "followed into their farther haunts rapidly run up into a series of notions common to them all, expressed by such words as law, cause, force, which at once transfer the jurisdiction from the provincial courts of the special sciences to the high chancery of Universal Philosophy." But we have seen that all explanation is conditioned; and if we would have an ultimate explanation, it is evident that thatmust be self-conditioned. Any final explanation which will explain the existence of conditions, and therefore existence as existence, must bring its own reason for its own self, its own necessity and its proof that it is, and that it alone is. Let us put

this again concisely. All explanation is a taking possession of by mind The ultimate explanation is the taking possession of all explanation by mind, and therefore of *all* by mind. We have, therefore, nothing but self-consciousness. Everything is reduced into it, and to understand *all*, must simply mean to understand self-consciousness. It is to understand the self-conditionedness of self-consciousness that Hegel sets himself, and he finds that the constitutive process of self-consciousness is the *notion*. That process is the idealization of a particular through a universal into a singular; or otherwise, the realization of a universal through a particular into a singular. Now, I confess that at first this act of self-consciousness is a little difficult to understand, but it was scarcely to be expected that this creative effort would be readily intelligible. It is easy to see that two and two make four; but what a great empty void lies before one when one turns to the question why two and two should make four! But although the notion may be a little difficult to appreciate at first, it will be seen to be the radical of thought, and therefore the radical of all, in the long run. Now, it is by the march of this notion, by the continuation of these acts of self-consciousness, that the ego is developed into its own categories, which, in their concreteness, are externalization. We should wish to dwell longer upon Dr. Stirling's first lecture. It is devoted simply to an explanation of the notion, and of the historical position of Hegel in relation to Kant. It is in every respect most thorough. Hegel's whole inner contents are contained in these fifteen valuable pages. We may say without a careful study of these the subsequent lectures would be unintelligible, and for the reason that Hegel is an evolutionist. He is not an evolutionist who believes that mind was evolved out of matter, which is absurd; but he is an evolutionist in a truer sense: he sees the notion evolved into logic, into nature, and into spirit (which is again only the universal, the particular, and the singular); and to understand any part of his system you must know the whole. Still, as every necessary explanation can be gathered from the lecture itself, we pass on to that portion of the evolution which has more particularly to do with the objective spirit, in its moments law, morality, and observance.

This subject may be introduced by explanation of Hegel's transition from intellect to will; from what he calls the theoretical spirit to the practical spirit; from thought as thought, to thought as act.

It is to be remembered that as the categories, self-evolved by self-consciousness, have resulted, necessarily, in externalization, there exist not only infinite differences between the subject and object, but at the same time absolute identity. Consequently, the reduction of and object into the subject is perfectly possible,

as in reality it thereby only reduces itself to itself. Now, the transition from the thinking idea to the acting idea is easy. When we theorize, we think about something external to ourselves. But theory, when complete, converts its object into itself. It has possessed itself of all that the objects really are. It has reduced them from their externality into itself; "it has determined their *its*." But that is will! Will is just kinetic thought, thought is just potential will.

But the great object of the Germans, Kant and Hegel, was to establish the truth of the freedom of the will. Their humanity felt insulted by the notion of necessity. They felt themselves, by the admission of compulsion, things and not men; things made in the image of a stone rather than men made in the image of God. They could not rest under the imputation of being shuttle-cocks between the battle-doors of events, and they were resolute to find some truer and better means of escape than some of our so-called advanced thinkers of the present day would find, who from the Fate of knowledge would be rescued by the Fetish of ignorance,* and they set about the labor of proving will free.

In England, free-will is laughed at; and Dr. Johnson, who said, "We feel that we are free, and that is all about it," is laughed at too. Dr. Johnson's argument was perhaps as excellent as any that has been urged against it, for any philosophy which would command respect must guard against being repugnant to common sense. Reid's demand was founded upon an excellent notion, but he had not the metaphysical acumen to perceive what was and what was not repugnant to common sense. It is not to be the cry of the rabble that is to decide what is true in philosophy, but if when a truth has been discovered and brought under the cognizance of ordinary men, they fail to appreciate it, or find it repugnant to all their conceptions, there is strong reason for suspecting the philosopher to be in the wrong. But the idea which has found favor in England is, that freedom means motivelessness! They would argue that becaus a man can not act without a motive he is a slave, and the whole error has lain there. Hegel, on the other hand, asserts that to act by motive is to act freely; to act without motive is to act under necessity. Surely freedom is to obey oneself, rather than to yield obedience to something external to oneself. If that is so,

* Mr. Huxley finds satisfaction in the thought that there are things we can not know, such as cause, substance and externality; and upon the strength of such belief claims to be regarded as orthodox; and Mr. Herbert Spenser, looking upon "the materiali-tic interpretation utterly futile," finds some remarkable satisfaction in feeling that he can not find any interpretation of the mystery of subject and object, and his inability to understand the power manifested in them.

motived action is free, because the motives are my own, so that moral necessity is freedom.

I wish I could go at greater length into this question, which is admirably, and for the greatness of the subject succinctly, treated in these lectures; but I feel that although the idea of free-will in the basal notion of the whole of the externalization of spirit in law, I am to some extent only dealing with a preliminary, and I must content myself with these very imperfect utterances while I point out the ingenuity of Hegel in his distinction, in so far as the law of causality goes between the phenomena of nature and the phenomena of will. His metaphysical ability is gigantic, but his ingenuity and tough hard-headedness are no less remarkable. In nature, he points out that the cause repeats itself in the effect. The spark is repeated in the explosion; the motion of the hand is repeated in the motion of the stick; but in will the motive is not repeated in the act. It is the nature of the agent that is in the performance, and not the nature of the motive. Our language has a corroboration of the truth of this. With regard to physical nature we use the word *cause;* in reference to will we use the word *motive.* The first emphasises the absolute identity in the process, the second the indefinite difference. But it is to be remembered that it is only moral necessity that is freedom. A man may be a slave to his appetites, and then he is not free. True it may be argued that just as higher motives are one's own, so are one's desires and appetites, and that if obedience to the one is freedom, it would be utterly erroneous to call obedience to the other slavery. But to understand this subject thoroughly it is important to mark the two meanings of the word mine. Subjectivity is mine; but objectivity is doubly mine. In one sense, subjectivity might seem to belong to the inner me; but in another and truer sense, it is objectivity which belongs to my inmost me, is of my very essence, and that essence realized. Hence, one is truer to oneself when one is true to the universal mine, than to the particular mine. But it may be objected, with some plausibility, that these very particulars which one obeys are externalized and realized. One's desires are the out-comes or the between-comes of nature and spirit, and nature is itself only the realized idea. But although there would be plausibility in such an argument, there would really be no logical weight. We are dealing with free-will, and free-will can only be free in that it wills its ownself. Will must be an end to itself. One feels that one's motives have that kind of externality to oneself to which we have alluded. But to be free one must obey one's motives; will must will itself; just as the end of reason is reason, the object of will is will, and therefore it is free. Hence it is that the ordinary opinions of mankind, with reference to the freedom and slavery which a man

may undergo in himself, have a deep foundation in actual fact. Each one feels that he is less a man when he is dragged at the heels of the senses; more a man when he frees himself from that democracy, and is under the restraint of monarch reason. Each one stands with graceful pride in the freedom of that restraint which is imposed by the universal reason; each one lies in chains who yields to those natural motives which are the sole lights, the sole guides, of animals and things. Such lights are like the stars, particular and sparse, while the light of reason is like the day, universal and wide. It is the object of each brave man, then, to conform his will to the universal will, for in that way only can he become free; can he become in the true sense a man; can the evolution of nature from thinghood to manhood be effected. Now free-will is the root of law. At the present time most of our so-called philosophers scout the idea of free-will. Men, they say, are ruled by their organism. Their organism is a thing just as a cabbage is, and is influenced entirely by its externals. There is nothing but one sequence of events and men are only causes in the same sense that a cue that drives a billiard-ball is a cause, but the force was not in the cue, nor in the arm, nor in the man, nor in the food, nor in the sun and salts that made it grow. Before Abraham was, that force existed; it has undergone more curious exigencies in its day than Cæsar's clay. About its beginning we know nothing; it and matter are the twin Melchisedecs.

Does it ever occur to such people to consider what then is the meaning of law? Can it have any? If there is no free-will, why should we make Acts of Parliament? Why should there be penalties for theft, and civil action for breaches of contract? People appreciate now, that the reason that insane persons are regarded as irresponsible for their acts, and allowed to escape punishment, is because they are not free agents; but to our modern thinkers no sane man is free, and why should the latter under these circumstances be held liable to punishment if the former are to be exempt? But men will not believe these advanced thinkers; and Dr. Johnson's argument is as good as theirs. We are free, otherwise law has no meaning.* It is free-will that is the root of law; it is free-will that constitutes the contents of right or law.

But free-will is at first abstract. That is abstract which is isolated self-identity. If two things, parts, constitute a thing, one of these parts separated, isolated from the other, and looked

* Since the above was written, I have seen the portion of Mazzini's article on *The International*, in the July number of the *Contempotary Review*, in which he argues the impossibility of any rightful government if there is a denial of God, and an ascription of all that is to blind chance, or to the inexorable force of things.

at in itself is abstract. Now, as we have seen, the constitutive process of self-consciousness is a concrete. The notion is the very concreteness of the universal, the particular and the singular. And its process is the idealization of a particular, through a universal into a singular. Now free-will, as it first emerges, has the character of singleness, abstractness. That is, it is abstract. It is like one leg of a pair of scissors. In that singleness, however, and by that very oneness, it is constitutive of the person, is a person. But that person's personality must be realized, for it has in it implicitly the notion, because it is thinking will. But realization is always through something other than itself, and as free-will as the person, is an abstract inner, and its immediate order will be an abstract outer, it can only be realized through an external thing. And in this we have property. In this we must only see the same attitudes of thought. The will in the person is the undeveloped universal which passes forward into its particular, with the resulting concreteness in the singular. This then gives us the notion of person and property which are in the words of Hegel, the abstract self-internal immediate, and the abstract self-external immediate.

It is beyond our purpose to follow Dr. Stirling into the exposition of the manifestation of the notional evolution into Abstract right, Morality, and *Sittlichkeit* (or, as he translates it, observance), in which we again find the universal, the particular and the singular. For the will, which was universal in law, passes into a particular phase, and becomes inner as conscience, in morality, and finds its true concreteness in observance. We must, however, confine our attention to the philosophy of law, and while those others are intimately associated with it, and their exposition admirably illustrate the inner motions of the notion in the philosophy of abstract right, the consideration of them would require too much time and too much space to be profitable in this reference. All we hoped to do was, to give some indication of Hegel's philosophy of law, and a detailed account of these sister subjects would compel us to give only a step-child's share of attention to that which is primarily our object.

Legality, then, or abstract right, is divided, or rather divides itself into property, contract, and penalty; and here again, as ever, we have the singular, the particular, and the universal. For in property we find the single will, in contract we find several or particular wills, and in penalty we find the will of the whole, the universal will.

First, then, of property. We have seen that will is realized through or by means of an abstract self-external, a thing without will, a thing; and if will is manifested through it, it in its

turn has its meaning only in will. This is the concrete, and from this very nature certain things evidently follow. A man can, being in his personalty single, be possessed only of the singular. That only would be his immediate *other*. The universal could only be the other to the universal, therefore it can not be the subject of private property. Property thus has its sanction, its meaning only in spirit, in the nature of the person. From the very statement of the nature of the concretion it follows that it is a man's duty to possess, or be a proprietor, as it is only in that way that this objective spirit can be thoroughly realized; a person who does not possess still remains in his abstractness implicitly, but not explicitly, concrete. But it does not follow that it is a man's duty to be rich. The notion does not dictate as to how much or how little a man shall own; all it dictates is its own evolution into the idea, into the objective spirit The man who makes a life subservient to a banking account is not making his humanity an end in itself, but is making it a means to a wretchedly trivial end. Such an end, if it is made a ruler, will misrule. The man whose aim and object is a triviality, will become trivial. A life with external motives will become an external life, will become deformed, one-sided. It is only by noble ends that a man can do nobly. "Let him who would write heroic poems," says Milton, "make his life a heroic poem!" Like master, like man, is true of the (master) end, and the (men) means which are taken to attain it. The meaning of the necessity is not vulgarity, but a fuller life, a completer being; in that sense it is a man's duty to be an owner. But will even when it is set in the object requires to be enunciated, and that can only be by act. That act is seizure. "Seizure," says Hegel, "is the enunciation of the judgment that a thing is mine. My will has subsumed it, given it the predicate mine." The very immediacy of the body to the mind is a sufficient enunciation of property in that, and injury done to that in which I have set my will is injury done to my will. Seizure, then, is a bringing a more external property into relations to that less external property, my body. Of course, the mode of occupation or seizure varies. I may go into a house, but I can hold a coin in my hand. Hegel, as Dr. Stirling points out, treats the whole subject of possession under three heads, and sees in that tripartite division again a necessary conformity to the moments of the notion; while he divides seizure itself into bodily seizure, formation, and designation. Here we find a rise in generalization, from individuality to universality. In this connection we could have wished that Dr. Stirling had been a little fuller than he has been in his lectures. He has evident satisfaction in discovering that Hegel was right after all with reference to occupancy, by means of designation being the most perfect means

of occupancy, and quotes several passages to show the difficulties his master fought through before he arrived at the real truth of the matter; but he passes over somewhat briefly the questions of occupancy by bodily seizure, and by formation, upon the ground that it is so easily understood as to suggest itself to everybody. That thought has possibly misled him throughout. He was not in the main speaking to or writing for metaphysicians when he wrote and delivered these lectures, but he was writing for and speaking to lawyers. Their whole training had made them unfamiliar with the kind of thought that he introduced to their notice; and here in this question of occupancy, when he had an opportunity of making himself understood in his main thoughts in relation to familiar subjects, he is almost silent, upon the ground, as we have said above, that all these suggestions will suggest themselves to his reader, and because concerning what is referred to as "connections," are decided by the understanding upon grounds and countergrounds, and not by the notion with its moments of reason. But what Dr. Stirling has forgotten to point out to those persons who are simply his readers in so far as these lectures are concerned, is the relation of that very understanding with its grounds and countergrounds to the notions with its moments of reason. The exposition without some such reference seems to us defective. And just when Dr. Stirling was in a position to give some such explanation, he turns from it because it is too easy. To teach, one must sometimes be content to stoop. Not only, then, is possession shown by bodily seizure, but by formation. Instead of taking a thing into relation to his less external property, he can place his less external property in it. He who bestows labor on a thing, also enunciates possession, and lastly, by naming, labeling, or the employment of signs, one can demonstrate appropriation, or prove that he has set his will in it.

But by seizure one demonstrates proprietorship roughly; that is, that one has set one's will in it; and even this is a kind of designation, for that is only another name for a sign, and the whole of the forms of occupancy are only less general instances of this ultimate import, the demonstration of the fact that a thing is willed mine.

But possession is in itself treated of under three heads, and these are not arbitrary divisions, according to Hegel, but necessary moments of the same notion. The one of these is, as we have seen, *seizure;* the second of these *use;* and the third *alienation.* But these are not stereotyped in their separateness, but are known in their transitions The evolution of *seizure* into *use* will illustrate this life-flux of the notion. All seizure is appropriation by will. Will makes the object its. But in so doing the will is to be regarded as positive, while the thing determined

is negative. The will, then, being particularly determined by the thing, is particular will in a desire, and the thing or negative being particularly determined, is only for the will, and is consequently serving it, which is the whole meaning of use; for Hegel's definition of use—and it is one which will be accepted even by those who may differ from him in most matters—is, "Use is this realization of my desire through the alteration, destruction, consumption of the thing, the selfishness of whose nature is thus manifested, and which accordingly accomplishes thus its destiny." He has an intelligence that makes the rotten jaws of silent facts to open and gives them a voice. What could be more excellent than his explanation of prescription? It is as follows: Use is the real side of property, and it is often used as an argument by those who have wrongly taken possession. They say the thing was of no use to the man I took it from. Yet such argument is bad against the actual assignment of will. If will is in it, use can give no title to another whose will is not in it. But seizure may become an empty symbol. The will which made occupation or designation a force may have passed away, and the property is then really without an owner, and thus property may be acquired or lost in lapse of time by prescription. The very necessity of such enunciation as bodily seizure, formation, and designation, shows the necessity for continued manifestion. It is in this way that prescription has a meaning. In one particular it is difficult to see that Hegel is right, although he seems to be followed by Dr. Stirling. "Mere *land*," the latter remarks, "as burying-ground, or otherwise privileged to non-use, involves a simply arbitrary, unactual will, by infringement of which no veritably real interest is injured, and respect for which can not be guaranteed." But surely respect for such mere land can be guaranteed just so long as the will of the living is set in it. Its privilege to non-use can not affect the validity of that guarantee, and as real interests may be injured by an infringement of the rights to such property, as in the case of any dwelling or garden. The clever phrase that use is the "real side of property" has, to our thinking, misled our author into the supposition that there was an unreality in property that was not used.

It is true that non-use does in some cases negative the fact of appropriation in time, but that is very readily compensated for by the other means of enunciating will. And all that is necessary is the headstone or railing, which will show that will is still in the land. True, it will lapse like copyright; but it is as stable, as guaranteeable as any other kind of property, for it is to be looked at not in relation to the dead desires of the dead, but to the positive will of the living.

But as will can lapse in time for want of enunciation, so can it be withdrawn by negation. If a thing is mine when I have

willed it mine, it is evidently not mine when I have willed it *not* mine. But in the very act of willing it not mine we have alienation. But when two wills will at the same time proprietorship and alienation, we find ourselves in the presence of what lawyers have called consent, and therefore we have that which has been designated a contract. By this method we have arrived at the second moment of the notion of abstract right. In this connection it may not be out of place to remark that, although much of this evolution may seem unfamiliar, much of it is really sanctioned by men's ordinary experience, and such an explanation of consent as that given by Hegel is in perfect conformity with the definition which has been in use among lawyers.* There is much drift truth in the world, and the philosopher only collects that, and makes a whole out of these isolated parts. This we believe to have been Hegel's merit. He was a seer in a true sense. He saw into the wells in which truth lies; he collected these scattered ears of sporadic truth, and has formed them into a lasting and complete system, nobler in its proportions and more harmonious in its details than any that the world has seen since the days of Aristotle.

It is in this unity of different wills then that property reaches or appears in its highest manifestation. In this we find the notion again prominent. In this eternalization of will we have a unity of different wills, or a unity in which difference is at the same time negated and affirmed. But as we have seen, the very essence of the notion is the identification of differences, and the differentiation of identity. In this act, then, Hegel sees a proprietor with his own will, and with the will of another ceasing to be, remaining and becoming a proprietor; and from these principles he deduces the cancellation of the contract in case of a *læsio ultra dimidium vel enormis.*

The historical progress of law through many of its simplifications, the extinction of many of the sense symbolisms, and the actual change in the signs of possession, is a subject of interest to the lawyer, as it is in the growth of an institution that we must seek a key to wards of an exegesis of the present condition of that embodiment. The conversion of subjectivity into objectivity, which we discover in passing from property to possession, requires some formalities to effect itself; for possession is the expression of will, and expression is just particular externalization. The history, then, to which we have above alluded must be studied in relation to the question of expression, and its progress in time will be found to be regulated by the advance of the possibilities of expression, or the facility for the passage of the subjective into the objective.

* *See* Grotius, De Jure Belli, et Pacis, Lib. 2, ch. 11, s. 4; Story's Equity Jurisprudence, sec. 222; and Wharton's Law Lexicon.

But it will be clear to any one who has followed us so far that contract is not will manifested as will. The very statement that possession is the objective side of subjective will, shows that contract, after all, is only individual will, or self-will. The act of contract, in that it is particular, is a manifestation of wills in community, but not of will in universality. The element of universality is not in it, but in its sanction by the absolute will, its prescription by the universal will. It is impossible in this place to enter upon a consideration of the remedies under contract, which are indications of this sanction, in relation to the particular condition of the will in the breach. These, as every one knows, are two. There is the civil action, where the will of the individuals differs through mistake or misunderstanding; and criminal prosecution, where the will of the individuals differs through the fraud or misrepresentation of one of the parties. But this leads us to the consideration of the third head under our general division, and that is Penalty. As contract is under the sanction of the universal will, it follows that any one who intentionally negates the community of wills, in such a case negates by his act the absolute will, and affirms in its stead his own particular self-will. That is crime.

Now, the remedy under such circumstances is to reposit or reaffirm the universal will, and that must be by a negation of the particular will. That is penalty. The criminal's resort has been to force, for a negation of the absolute will is force; and the reaffirmation must be by a negation of his self-will. We know the effect of a double negative, and that will illustrate to some extent this process of thought. The criminal, then, must consequently be subsumed under his own law, force. He must, in other words, be compelled to undo his own compulsion, which is evidently to restore to him his own right. But this can only be efficiently done by a disinterested representative of right. Mere individual counterassertion would, as Dr. Stirling points out, be interminable; and the restoration of the true inmost will of the criminal himself can, therefore, be effected only by means of a judge, who is universal, or a representative of the universal, because his feelings are apart from the inquiry, and he has to decide in conformity with objective standards of right. The relation of justice can only be made actual through the knowable existent, and, therefore, punishment relates either to the person or property of the criminal. The criticisms by Hegel upon the theories of the Stoics, which were realized in the laws of Draco, of the arguments of Beccaria with relation to capital punishment and the like, are in every way admirable, and the fact which he sets against these, that punishment is an idea on its own account, and has its foundation in the very nature of will, is evidently true from the very nature of the case.

A more thorough appreciation of these inexorable facts of thought—for it is thought that is the only fate—would do much to bring back a better understanding of the true position of the criminal in relation to society, and to show the absurdity of many of the current platform notions of humanity, which really means a snivelling sentimentality, and not a manly regard to the true ends of being. In one sense, the judge is only there to sanction the criminal's conviction of himself. It is the universal that he has outraged, and that universal is his own, in a truer and deeper way than the appetites and desires he hoped to gratify by his crime. He has given his consent to the very law which punishes him. It is his inner self that tries, and convicts, and condemns his outer self.

But looked at in this light all punishment may be regarded as education. Training is the counteracting of the passive force of nature by wise restraint and discipline. It is this that we mean when we speak of education in children. We have got beyond the idea that education is teaching a child to read; we have come to perceive that it is the elaboration of that cosmos, character, out of that chaos of nature; we understand, at last, that it is the subjection of nature in man, the subordination of his senses and his appetites, that is the object of education, and that that is possible only through the negation of the mechanical necessity of nature, the position of the universal and the consequent freedom of the will. Thus we find that all punishment is educational, and that the infliction of penalty is no wrong, as some would have us think, but a right which conduces to the freedom of the individual, to the welfare of the community, and to the absolute attainment of justice.

We wish we could enter into some of those delightful digressions which form so large a part of these lectures, and yet even while we must forego that pleasure, our minds misgive us that we have applied a misnomer to them. They are only half-digressions, for in one way they are departures from the main drift of meaning, and in another way they are not. Although some of the considerations, such as the deep glances into the present vapid cry for equality which, to twist a quotation, "is the cry of all, but the *game* of a few;" into the superiority of Hegel's conception of the philosophy of marriage to that of Kant, are to some extent divergences; they rather tend to make the whole progress more rapid and more agreeable. A journey seems shorter if one can fathom the vistas on either side of the way; and when these vistas, as in the present case, tend to give us a greater insight into that which we are attempting to comprehend, our side-gaze is not lost. We only regret that we are unable to do justice to any of these delightful episodes, as they show Dr. Hutchison Stirling in his very best form, and are in

themselves at once deep and perspicuous. One other subject we should have desired to bring before our readers in this connection, and that is the Hegelian idea of the connection between free-spirit and Christianity. "This idea" (the abstract notion of freedom), he says, "came into the world through Christianity, in which it is that the individual, *as such*, has an *infinite* worth as being the aim and object of the love of God, and destined consequently to have his absolute relation to God as spirit, to have this spirit dwelling in him. Christianity it was, namely, that revealed man in *himself* to be destined to supreme freedom."

In no connection are Hegel's words so admirable as in their reference to Christianity; and in no connection is it so important that he should be at the present time explained, as he has been almost invariably misunderstood. Another subject which we should have desired to touch on, as being intimately connected with the very life of the age in which we live—so much so, that no one who has not recognized this as its life-blood, who has not felt this, its pulse, can understand the strange pathological conditions of the time—was the relation between *Vorstellungen* and *Begriffe*, or, as Dr. Stirling seems inclined to call them, thoughts and vicarious thoughts. To understand these is to understand history, is to understand that picture of the notion that we discover in the pseudo-evolutions of our times, and to have a broad light, as our author himself points out, cast upon the different creeds of the ignorant and the learned, the wise and the simple. But all these things we must content ourselves simply by alluding to. A thorough investigation of any one of them would require more time and space than is now and here at our disposal. Only one subject demands recognition, and that is an answer to an objection which has been urged against Hegel, namely, the suggestion that there is nothing progressive in his system; that it is limited; that it is, because limited, narrow, and that the evolution once made, thought is in a *cul-de-sac*, and can go no farther. But this is due to a misconception. There is a something beyond; there is a possibility of progress; for Hegel holds that a man may get him new categories. In one of Voltaire's works there is a consideration of the different world, that the inhabitants of another planet—supposed to have a thousand senses—must enjoy, from the empty universe which we have with our five; and the followers of physical science are never tired of thinking of some new instrument which farthers sight, or does away with the inaccuracies of that wide sense of touch, as another sense. And truly how the universe expanded in extent with the invention of the telescope, and in intent by the invention of the microscope!

But, after all, these growths are external in comparison with the real inner growth, which would result from the evolution of

another category. Such a growth would be a deepening or widening of spirit, and from that again, the world, as the objective idea, would expand and grow in richness and in fulness. It is not another sense we want, but another category. It is in this direction that advance is possible to humanity; and that is only possible if humanity is true to itself, true to its higher law and to that law which results in the realization of the true, and the necessary destruction of the false.

On the whole, then, we must express our gratitude to Dr. Hutchison Stirling for these admirable lectures. He who interprets a great man's thought is almost as much of a benefactor as the thinker; he who gives us the means of distinguishing the true doctrine from the false, as Dr. Stirling does in the fourth of these lectures, by means of his excellent and acute criticisms upon Roeder, Hildenbrand, Lassalle, and Austin, deserves our gratitude almost as urgently as he whose intelligence first gave us the real facts of existence, of thought, and of law. Dr. Stirling has our gratitude, and we are convinced that any one who will take the trouble to get at the real meaning of these lectures will feel an indebtedness to this author. At the same time, they will feel somewhat surprised to find the comfortable and easy philosophy of our own Austin so hollow and empty as it undoubtedly is, and as it has, to some thinkers, seemed for a very long time to be. Dr. Stirling has done another good service to philosophy by his Lectures on the Philosophy of Law.—*Law Magazine.*

NISI PRIUS.

COURT OF SESSION, SCOTLAND.

FIRST DIVISION.

July 24 *and* 25.

(Before the LORD PRESIDENT and a Jury.)

FERN *v.* THE NORTH BRITISH RAILWAY COMPANY; McCORMICK *v.* THE NORTH BRITISH RAILWAY COMPANY.

Negligence—Liability of railway company—Credibility of witnesses—*Onus probandi.*

Two passengers raised actions for compensation for injuries alleged to have been received by them in a railway accident. The railway company denied liability, on the ground that the cause of the accident was unknown, and that there was neither fault nor negligence on their part. The jury found that it was not proved that the accident was caused by the fault or negligence of the railway company, and returned a verdict for them.

Ferns and McCormick *v.* The North British Railway Company.

It was contended for pursuers that they were only bound to prove an accident, and that the *onus* of proving that it was caused by no fault or neglect of the railway company, rested on themselves.

Held, that the *onus* of proving fault or negligence lay with pursuers.

Pursuers adduced a servant of defenders as a witness for them. In cross-examination witness made an important statement bearing on the defence. Pursuers contended that he was not a credible witness as to that particular statement.

Held, that when a pursuer puts a witness in the box, he necessarily accredits him, and desires what he says should be believed.

The liabilities of railway companies as carriers of passengers, are different from their liability as carriers of goods. In the first case they are only liable in cases where fault or negligence is proved against them, but in the second case they are insurers.

These were two actions for damages, at the instance of the pursuers, for injuries said to have been received by them in a collision on the North British Railway, near Sunnyside (Coatbridge) station, on 28th Dec., 1871. The statements of facts as to the cause of the collision, were the same in both cases, and they were, at suggestion of the Lord President, tried together.

The admitted facts were that a collision took place between the train in which the pursuers were passengers, and some wagons of a goods' train proceeding in the opposite direction, on another line of rails. The passenger train was going from Glasgow to Airdrie, and the goods' train from Airdrie to Glasgow. The line on which the goods' train was traveling, was on a falling gradient of 1 in 83 from Kipps to the point where it crosses under the Caledonian Railway. The line is level for a few yards under the Caledonian Railway, and then there is a rising gradient of 1 in 105. While on the falling gradient, and quite near to the level, the engine-driver noticed, from the additional weight he was drawing, that something was wrong with his train, and, looking back, he saw a wagon or two near the center of the train was off the rails. At the same moment a passenger train was coming from Glasgow on the other line of rails, and, before anything could be done to stop it, it came into collision with the wagons of the goods' train. The shock of the collision was slight, and the damage done to plant trifling. The pursuers were the only persons in the train who alleged they had received any injuries.

The leaving of the rails by the goods' wagons, no doubt was the cause of the collision, and pursuers' averment of the cause of their so leaving the rails was, that "by the gross and culpable negligence of the defenders, or of the guard, or other servant or servants for whom they are responsible, a wagon or wagons were allowed to be attached to the said luggage or mineral train, which were not inspected before being so at-

tached, and were not properly or securely attached, and were not railworthy. The axles and springs of the said wagon or wagons were in a faulty and dangerous state. The said luggage or mineral train was thus allowed by the defenders to proceed in an unsafe condition, in consequence of which one or more of the wagons belonging to said luggage or mineral train broke off from their own train and line of railway, and went on or near the line on which the said passenger train from Glasgow to Airdrie was running. The engine of the passenger train consequently struck the said wagon or wagons, and was thrown off the rails, dragging the whole train after it, the footboards on one side being completely stripped from all the carriages. The engine was only brought to a stop by coming in contact with a strong wall at the bridge, within a short distance of where the accident took place, the piston being twisted and broken by the collision. There is a very quick curve at or near the spot where the occurrence took place, and one or both of said trains were being driven at the time at an excessive rate of speed.

The pursuers, in opening their case to the jury, further alleged that a wagon belonging to the Glasgow Police Board, which formed part of the goods' train, was lower in the buffers than the defenders' wagon immediately behind it (and which was the first wagon to leave the rails), and that owing to the rear portion of the train being heavier than the front, the defenders' wagon was pressed forward and caused to jump on to the buffer of the police wagon, or, in other words, to become what is known as buffer-locked, so that when the engine put on more steam when coming near the change of gradient, the defenders' wagon was jerked off the rails. In support of this theory, the pursuers further alleged that the buffers of the two wagons did not properly correspond to one another, the higher buffer only touching the lower to the extent of an inch and a half.

The defenders denied that the collision arose from any of the causes alleged by the pursuers, that the wagons were examined previous to being placed in the train by the defenders' inspectors, in the usual method adopted by railway companies, by tapping the wheels, and making a close inspection of the springs, drawbars, and coupling-chains, and that this method was found effectual and satisfactory in detecting defects in wagons.

They further averred that, at the time of the collision, both trains were running at a very reduced rate of speed, and the shock of the collision was very slight, and that their officials made an inspection of the *locus* immediately after the accident,

and they could find no cause to which they could attribute it. The wagon-wheels, springs, drawbars, and coupling-chains, were all found in good order. The railway itself, where the accident took place, was in first-rate order, having been only opened for traffic in 1870. The line of rails upon which the goods' train was running, was also found, after the accident, to be uninjured, so that the defenders were unable to trace the cause of the accident, which arose solely from causes beyond their control.

In answer to the pursuers' statement made at the opening of their case, that the buffers of the two wagons only touched one another to the extent of 1½ in., the defenders explained that they touched one another to the extent of 4½ in., and it was proved in evidence that they touched to the extent of 6 in., in the event of one end of the police wagon being opposite the defender's wagon, and 4¾ in. in the event of the other end being opposite.

The issue sent to the jury was the same in both cases, and will be found quoted in the Lord President's charge.

The evidence for pursuers and defenders was concluded on the first day, and on the second, after *Scott* had addressed the jury on behalf of both pursuers, and the *Solicitor-General* (Clarke) on behalf of the defenders, the LORD PRESIDENT charged the jury as follows:

Gentlemen of the jury, this case belongs to a class of not very infrequent occurrence nowadays, and though it may seem at first sight to be a case of not very great importance, I am bound to say that it is a case requiring your minute attention, because there are some of the inferences from the evidence which have been drawn upon both sides of the bar which may be justifiable, and may be sustained by you, but which, if they are to be sustained, must certainly be so after a very minute examination of the evidence. I shall do my best to aid you in performing that duty, and I trust to be able to do so within a very short space. I shall, in the first place, read the issue, in order that we may see exactly to what points the controversy has been narrowed. It is—"Whether, on or about 28th December, 1871, the pursuer, while traveling as a passenger in a train run by the defenders between Glasgow and Airdrie, sustained serious bodily injuries by a collision occasioned by the fault of the defenders—to the pursuers' loss, injury, and damage." Now, there is no doubt that both of the pursuers were traveling as passengers in a train which left Glasgow at 5 o'clock in the afternoon of the 28th of December last, and there is just as little doubt that a collision occurred about half-past five, as the train was approaching the Sunnyside station. The only points, therefore,

in the issue, which admit of controversy, are, in the first place, whether that collision was occasioned by the fault of the railway company; in the second place, whether the pursuers were thereby injured; and if so, then, in the third place, what is the extent of the injury that they have sustained respectively? Now, in order to appreciate the evidence bearing upon the first of these questions, viz., the fault of the defenders, it is desirable to ascertain precisely, in the first place, what it was that occurred at the time of the collision. [His Lordship fully stated the facts, and continued:—] Now, gentlemen, there are two ways of dealing with this matter. The pursuer says that he has proved how this came about, and the defender says—"It is not proved, nor is it capable of proof, for, after all the investigation that we have been able to bestow upon the matter, we can not find out the cause of the accident." Now, gentlemen, as to the law of the matter, it is very clear. It lies upon the pursuer to prove that this collision took place through the fault of the defenders, and if the pursuer does not prove that, he can not recover damages. It was very well explained to you yesterday, by Mr. Asher, that the obligations of a railway company, in conveying passengers, are quite different from those that belong to them as carriers of goods; and the reason of distinction, in point of law, is this: When goods are handed over to a carrier for conveyance from one place to another, the goods are entirely in the power of the carrier; nobody else sees what is done with them, or can know what is done with them; and, therefore, according to the custom of mercantile countries, and the law thence arising, the carrier is made answerable for the safe delivery of the goods at the point of destination; and if he does not so safely deliver them, he is liable, without any inquiry at all as to the cause of their destruction. But in the case of passengers it is quite different. To a certain extent passengers can take care of themselves, and, at all events, they are intelligent beings, present upon the scene of any accident that occurs, and capable of giving an account of what occurred. And, therefore, they are not entitled, according to the legal rule, to recover damages for any injury done to them in the course of their journey, unless they can prove that it has occurred through the fault of the carrier who is carrying them—be he a railway company, or be he a coach proprietor, it matters not. The law is not peculiar to the case of railways, for the same law prevailed in old days, before railways were known; for a coach proprietor was answerable if an accident occurred from his using horses of vicious temper, or from his having a careless driver, or an ill-constructed coach; but he was not liable for a mere accident that could not have been foreseen or prevented. Now, that being the state of the law, it is only

necessary to add further, that in some cases to which Mr. Scott referred, the railway company will easily be presumed to be in fault, without the necessity of much evidence. Thus, for example, if two trains meet each other on the same line of rails, it is impossible that that could have happened without the fault of the company—that is to say, without the fault of some people in their employment, for whom they are answerable; because nothing can justify the running of two trains upon the same line of rails, in opposite directions, at the same time; and, therefore, very little evidence would be necessary there to prove the fault of the company. But when trains are running upon opposite lines as here, and the accident occurs through some of the wagons upon the one line getting suddenly off that line, and coming in contact with the train running upon the other line, it must be obvious to you that that may have occurred either through unaccountable accident, or through the fault of the company, and that is just the kind of case that you are trying now, and in which, as I told you before, it lies upon the pursuer of the issue, who is claiming damages, to prove that the accident occurred through the fault of the railway company. Now, the fault is said to be this—that two of the wagons in the goods' train stood in such a relation to one another, in respect of height, that their buffers did not properly correspond to one another, and that the consequence of that most probably was, that the buffer of the one got above the buffer of the other, the effect of which, nobody doubts, would be to throw off the rails the wagon that was hindmost of the two. The wagon that was the hindmost, was one of the North British Company's own wagons, which is said to be of a certain height, and the wagon that was in front was one of the Glasgow Police Commissioners' wagons, which is ascertained to be of a less height. I need not trouble you with the details of the calculation, for I think we have quite come to this, that if one end of the police wagon was next to this North British wagon, then the buffer of the one would come opposite to the buffer of the other to the extent of a space of 6 inches; in the other case the space would be $4\frac{3}{4}$ inches. Now, gentlemen, the witnesses of skill who were examined for the defenders, say that was sufficient, but it would have been better if it had been more. You can quite appreciate the sort of opinion that is expressed in these words. Everybody feels that though it may be sufficient, it is narrow. And, therefore, that is a point in favor of the pursuers' case. But then, on the other hand, the witnesses seem to be all pretty well agreed—both pursuer's and defender's witnesses—that without something more than that, that is not sufficient to account for the accident. In short, with that amount of correspondence between the buffer of the one wagon and the other, there

would be no danger unless something else were added, and that something must be a sudden stop or jerk. There was a witness examined for the pursuers, who struck me as being a very intelligent witness. He was not present, and saw nothing of this particular accident; but he was called as a witness of skill for the pursuers. I refer to Mr. Paterson, the superintendent of locomotives of the Calodonian Railway Company; and he says, after describing the way in which the buffer of the one wagon would correspond to the other, and the extent of space that they would meet each other—"In case of a sudden stop, the higher wagon behind the lower one is apt to overlap the other. If the train were going round a curve, the higher wagon would have a tendency to go off the rails. Without a sudden stop or jerk, the one wagon would not readily overlap the other. If the engine is steaming, and the brake hard on in the end van, the thing would not happen, for in that case the wagons would be kept separate as far as the couplings would stretch. There are twelve to fourteen inches or more between the buffers when the couplings are on the stretch. The loaded wagons behind would not press on the empty wagons in front, going down the incline, if the brake was properly attended to. If the brake was not properly attended to, the heavy wagons would follow up harder than the empty ones," and so be likely to produce the result which he had before spoken of. Now, according to that evidence, everything really depends upon the question of fact, whether, in this goods' train, when it was coming down the incline, and at the point where these waggons went off the line, the engine was steaming—that is to say, was actively drawing the train after it—not merely going down with a momentum, but actively drawing the train, and the brake in the last carriage was hard on—that is to say, resisting the dragging of the engine, and so acting as a drag upon the whole train behind the engine. If that were so, the couplings of the wagons being stretched to the full extent, the buffers could not come in contact with one another, as this witness says, and as one sees, must be the case. But then, on the other hand, Mr. Crichton, another witness called for the pursuer, and who is inspector of permanent way on the North British Railway at Coatbridge, says this, after identifying the two wagons in question: "18,575 (that is what we call the North British wagon) was the one that left the line first. The cause of the accident, I thought, was that the wagons had become buffer-locked—that is, that the buffer of the wagon that first left the rails (18,575) overrode the buffer of the other wagon in front, which would have the effect of throwing the wagon 18,575 off the rail. It was part of my duty to examine and report upon the accident, and to give my opinion as to the cause of it. I did

not see anything to suggest that the one wagon had overridden the other. There was a curve in a falling gradient where the trucks left the line. That made it more probable that the trucks had left the line in consequence of getting buffer-locked." And, in connection with that, there are two other witnesses connected with the Police Board—one of them, Duncan Livingstone, who says that he noticed that the buffer-hook of one of the buffers of the wagon 161 was crushed up on the top, "but when it was done, I can not tell. I saw nothing particular about the wood of the buffers." Robert Risk, who is a wagon repairer in the same employment, says that that wagon came to be repaired, and he put four new bearing springs upon it, which made the wagon higher. "I noticed that the top of the edge of one of the buffers was curved, like as if another wagon had been on top of it." Now, that is evidence corroborative of the suggestion or conjecture of Mr. Crichton. You will consider what weight is due to it, and what weight is due to the evidence which goes to establish the fact that at the time when these wagons went off the rail, the engine at the one end of the train was steaming and dragging the carriages after it, and the guard's van at the other end had the brake hard on, and was so resisting, and, as it were, dragging in the opposite direction. The evidence of that fact depends entirely, I think, upon the witness Crawford, who was the guard of the goods' train, and who positively asserts that he had his brake hard on during the whole time that they were coming down that quarter of a mile descent. Now, that man is a witness for the pursuer, you will observe, and that is not to be overlooked in judging of the weight of his testimony; because, when the pursuer puts a witness of that kind into the box, he necessarily accredits him, and desires you to believe what he says; and he is perfectly positive upon that matter. While, therefore, you have the suggestion of Crichton on the one hand, with the corroboration of Livingstone and Risk, you have on the other the statements of the pursuer's witness, Crawford, as to the brake being hard on; and the inference deduced from that, established by evidence of skill, but really obvious to one's own mind is, that if the brake was hard on, and the engine was steaming in front, the buffers of the wagons could not come in contact with one another unless there had been some sudden stop or jerk; and that there was not that, you have the additional evidence of the driver of the goods' train. Now, gentlemen, that seems to me to be the substance of the case as regards the main question, whether this collision took place through the fault of the railway company, and you must make up your minds upon that question before you proceed further. If you are satisfied that it did not occur through the fault of the railway company, you will at once

find a verdict for the defenders. There can be no liability in that case. On the other hand, if you shall be of opinion that it was through the fault of the defender that this collision occurred, or, in other words, that the collision occurred by the one wagon overriding the other, and so being driven off the rails, then you will proceed to consider whether and to what extent the pursuers were injured. But just let me warn you on this point, that you must not allow yourselves to come to any general and vague conclusion that upon the whole matter probably the railway company were in fault. You must be satisfied how it was that they were in fault. You will see at once that you will not be doing justice to them unless you face the question in that light—how it was, and by what means, that their fault produced this collision. If you are satisfied that they were in fault, and that their fault produced the collision, then you will consider whether the pursuers were injured, and to what extent.

The jury returned a unanimous verdict for the defenders.

Counsel for pursuers, *C. Scott* and *J. Rhind.* Agent, *W. S. Stewart*, S.S.C.

Counsel for defenders, *The Solicitor General*, and *Asher.* Agents, *Hill*, *Reid*, and *Drummond*, and *Adam Johnstone.*

COURT OF EXCHEQUER.

May 30 *and* 31, *and June* 12.

Smith *v.* Fletcher and others.

Trespass—Adjoining mines—Surface water—Overflow from one mine to another—Artificial reservoirs—Liability of mine owner for escape of water—Negligence—Use of own property—Duty of owner in respect of—Consequential damages.

The plaintiff and the defendant were the lessees of adjoining mines, between which there was an underground communication, the level of the plaintiff's mine being below that of the defendants', so that water coming from the defendants' mine by natural gravitation, flowed thence into the plaintiff's mine. On the surface of the defendant's land, above their mine, there were various hollows and openings, in part the consequence of, and in part made for the purpose of facilitating, the defendants' workings. There was also a water-course which ran across their land, the course of which they had for the like purpose recently diverted, and caused the stream to run in a new channel.

In Nov., 1871, in consequence of extraordinarily heavy rains, an unusual amount of surface water had been collected together in the above-mentioned hollows and openings, and from the same cause the banks of the newly-made water-course, which were sufficient for all ordinary occasions, burst, and the water escaped therefrom into the said hollows and openings, which formed a sort of reservoir for its accumulation, and thence it passed

by percolation, through the soil, and by the fissures and cracks caused by the defendants' workings, into the mines of the defendants, and so into the plaintiff's mine, which it flooded. It was proved that if the surface of the land had remained in its normal and original condition, the water would have been dispersed over the surface, and have gradually escaped without doing any injury, and also that the defendants were not personally or actually negligent in the management of their mine. The plaintiff brought an action to recover damages from the defendants for the injury which he had thus suffered, and it was

Held, by the Court of Exchequer (Martin, Bramwell, and Channell, B. B.), that although the defendants had not been guilty of any personal negligence, and although the damage complained of arose from an exceptional state of circumstances, yet the defendants were liable, on the principle of the case of Rylands and another *v.* Fletcher, in the House of Lords (19 L. T. Rep. N. S. 220; L. Rep. 3 Eng. & Ir. App. 330; 37 L. J. 161, Ex.), that one who though not guilty of personal negligence, yet for his own purposes brings upon his land an abnormal and unnatural quantity of anything which, if it escapes therefrom, is calculated to be productive of injury to any other person, is liable in damages for such injury.

This was an action by the plaintiff, a mine owner, to recover damages from the defendants, who were the owners of mines adjoining that of the plaintiff, for the flooding of the plaintiff's mine by water, coming from the defendants' mines under the following circumstances:

The declaration contained four counts; and by the first count the plaintiff charged that the defendants broke and entered a certain close of the plaintiff's, and certain mines of the plaintiff's being under the surface of the said close, and with divers large quantities of water flooded the said mines, whereby the plaintiff was put to and incurred great costs and expense in pumping the water out of the said mines, and in putting the said mines into a fit state for working, and was hindered for a long time in working the said mines, by reason whereof he had lost large gains, etc., and been otherwise injured and damnified. The second count charged that, at the time of the committing of the grievance, etc., the plaintiff was possessed of the land in the first count mentioned, and of certain mines lying thereunder, and the defendants were possessed of certain other land, and of certain mines thereunder, adjoining to and in communication with the said mines of the plaintiff, but being on a higher level than the said mines of the plaintiff, so that the water introduced into the defendants' mines would, by reason of the floor of the defendant's mines being impervious to water, and of the dip or inclination, necessarily run down from the same, and pass into the plaintiff's mines, as the defendants well knew; yet the defendants, for the purpose of causing the water to flow, and be removed from the surface of their said land, and from certain hollows in the same, caused by former workings of the defendants, into which the water flowed, and from time

to time accumulated, wrongfully and improperly made certain holes or openings in the surface of the defendants' said land, and in the said hollows, and thereby wrongfully introduced and turned into their said mines great quantities of water, flowing on to, and being in and upon the surface of the defendants' said land, which said water ran down the said mines of the defendants, and so into the mines of the plaintiff, and flooded the same, by means of which said premises the plaintiff was damnified, as in the first count mentioned. The third count, which contained introductory averments similar to those in the second count, charged that the defendants wrongfully, negligently, and improperly permitted certain holes which had been in the surface of the defendants' said land, down to and opening into their said mines, for the purpose of working the same, to continue and remain open after the said holes had ceased to be used and required for the working of the said mines, contrary to the usual, proper, and skillful mode of working the said mines. and by reason of the said holes great quantities of water flowing over the surface of the defendants' land, and collecting in the said holes, were thrown and introduced through the said holes into the said mines of the defendants, and so into the mines of the plaintiff, and flooded the same, whereby, etc. The fourth count, which also contained similar introductory averments, charged that upon the said land of the defendants there were certain holes passing into and communicating with the said mines of the defendants, yet the defendants wrongfully, negligently, and improperly diverted a water-course flowing through the said land of the defendants, without making a proper and sufficient channel for the said water-course to flow in, and proper and sufficient banks to prevent the said water-course from flooding the adjacent lands, and by reason of the said wrongful, negligent, and improper conduct of the defendants, the said water-course burst and overflowed its said banks, and flowed over the lands of the defendants, into and down the said holes, and by reason thereof large quantities of water were thrown and introduced through the said holes into the said mines of the defendant, and so into the said mines of the plaintiff, and flooded the same, whereby, etc.

The defendants pleaded, first, to the declaration, not guilty; secondly, a denial of the plaintiff's ownership of the said lands and mines; thirdly, leave and license; fourthly, to so much of the second, third, and fourth counts as relates to the defendants being possessed of lands and mines, a denial thereof; fifthly, to so much of the said counts as relates to the said water running down the defendants' mines and passing into the plaintiff's mine, a denial of the several allegations respectively; sixthly, to so much of the same counts as relates to the defendants' knowledge

as therein respectively alleged, a traverse of such knowledge; seventhly, to the second, third, and fourth counts, that the grievances therein respectively mentioned were caused by the acts, neglects, and defaults of the plaintiff, and not otherwise; eighthly, to the declaration, the Statute of Limitations.

Issue was taken and joined on all the said pleas, and there were also demurrers and cross demurrers. The trial of the action took place at the last Spring Assizes for Cumberland, at Carlisle, before Lush, J. and special jury, when the following facts were either proved or admitted in evidence.

The plaintiff is the lessee of a certain mine of iron ore called the Crossgill Mine, under an estate called Crossgill, in Frizzington, in the county of Cumberland, and the defendants are the lessees of other mines immediately adjoining the plaintiff's mine to the east, and called the Parkside and Goose-green Mines. The "dip," as it is technically termed, of the strata and deposit of the iron ore in all these mines, is from east to west, and the level of the plaintiff's mine is below that of the mines of the defendants, so that the flow of water is naturally in the direction from the defendants' mines to that of the plaintiff, there being also an underground communication between the respective mines. The plaintiff is, of course, under these circumstances, subject to bear the burthen of the water *naturally* arising on and coming from the defendants' mines to his mine. On the surface of the defendants' land there are, in various parts of it, rough and uneven places, and broken ground, and hollows, caused by the sinking of the ground above these parts where the mines have been worked out underneath, and these uneven surfaces form channels for the rain and surface-water to run in, and the hollows act as reservoirs for its collection. In 1863, the defendants, for the purpose of better carrying on their mining operations, made a cut from the bottom of one of these hollows to a part of their land where the iron ore cropped up to the surface, and commenced getting this ore by quarrying or open working, instead of underground mining, by which means a large pit or hole was formed. Between this cut and the defendants' mines there is a direct communication. In 1865, the defendants diverted the course of a stream or brook which ran across their land, and carried it further eastward. In Nov., 1871, there occurred several unusually heavy rain-storms, the consequence of which was, that this diverted water-course overflowed its banks, and ran thence into the hollows and uneven surfaces of the defendants' land, and into the cut or pit above mentioned, in addition to which a large quantity of surface-water, caused by the heavy rainfall, had already been collected there. Had the surface of the land remained in its natural condition, the water would have gradually passed away and escaped,

without doing any appreciable damage; but, in consequence of the broken, hollow, and uneven condition of the ground, caused by the defendant's workings, the water which had thus been collected in the large pit, found its way either by forcing an entrance through the floor or bottom of the pit, or by percolation through the broken and displaced strata, into the defendants' mines, whence it flowed into and drowned out the plaintiff's mine, which was worked close up to the boundary between it and the mines of the defendants. To recover damages for the injuries thereby sustained, the plaintiff brought the present action. The above facts having been proved at the trial on the part of the plaintiff, evidence was tendered on behalf of the defendants to show that they had worked their mines in the usual and proper manner, and had taken all reasonable precautions sufficient for any ordinary casualities or emergencies; that the new channel or course which they had formed for the brook was better and larger than the old and natural one, and had lessened very considerably the chance of any escape of water from their land into their own mines, and from them into the plaintiff's mine; and that they had made due provision against any flooding from ordinary rainfall, and that, but for the exceptional and extraordinary storms which occurred on the occasion in question, for the consequences of which they contended they were not to be held liable, no damage would have been done. Evidence was also offered to show that the defendants had not worked their ore quite up to the boundary between them and the plaintiff, but had left a barrier of ore sufficient to have prevented the plaintiff's mine from being flooded, and that the plaintiff himself had encroached on the defendants' mine, and had worked out this barrier.

It was admitted that there was no personal negligence on the part of the defendants. The learned judge ruled that the defendants having, by means of the hollows and the cut, made as it were an artificial reservoir on their land, and suffered water to accumulate there in large quantities, and to a greater extent than would have happened had the surface of the ground remained in its normal and ordinary condition, were liable for any damage which resulted in consequence of their having so done; that they were bound, at their peril, to keep the reservoirs in a sound and safe condition, and to prevent a dangerous accumulation of water there, by any means, and under all circumstances whatever; and he refused to receive the evidence tendered by the defendants, of the precautions taken by them to guard against ordinary casualities, holding that it was immaterial, as it made no difference with respect to the liability of the defendants, that the overflow in question was caused by an extraordi-

nary flood; for, though unusual, it was not unprecedented, and might happen every year.

A verdict, therefore, was entered for the plaintiff for the amount of damages claimed in the declaration, leave being reserved to the defendants to move to enter a nonsuit, if the court should be of opinion that there was no evidence of their liability. The damages, if the verdict should be allowed to stand, to be assessed by an arbitrator.

A rule was accordingly subsequently obtained by *Holker*, Q.C. in Easter Term last, calling on the plaintiff to show cause why his verdict should not be set aside, and a nonsuit be entered pursuant to leave reserved, on the ground that there was no evidence of the defendants' liability, or why a new trial should not be had, on the ground that the learned judge misdirected the jury in telling them that the defendants were liable, under the circumstances, for the damage done by the water getting through the broken ground of the defendants, and so into the mines of the plaintiff, and that the evidence tendered by the defendants was immaterial, and why, if the court consider the defendants liable, the damages should not be assessed by an arbitrator upon the principles to be laid down by the court.

Herschell, Q.C. and *C. Crompton*, for the plaintiff, now showed cause against the above rule. They contended that the case came directly within and was governed by the principle of the case of *Rylands and another* v. *Fletcher*, in the House of Lords: (19 L. T. Rep. N. S. 220; L. Rep. 3 Eng. & Ir. App. 330; 37 L. J. 161, Ex.) In that case Bramwell, B., in the Court of Exchequer, alone dissented from the judgment of the rest of the court; (13 L. T. Rep. N. S. 121; 3 H. & C. 774; 34 L. J. 177, Ex.) On appeal to the court of error, the decision of the court below was reversed (14 L. T. Rep. N. S. 523; L. Rep. 1 Ex. 265; 35 L. J. 154, Ex.), and the House of Lords subsequently affirmed that reversal (*ubi sup.*). In that case it was held that one who, though not guilty of personal negligence, yet brings upon his land any thing not naturally coming or arising there, and which is productive of injury to another person, is liable in damages for such injury. The plaintiff can not and does not complain of the natural flow of water by gravitation from the defendants' mines to his mine; but he contends that in consequence of the manner in which the defendants worked their mines, and dealt with the surface of their land, that natural flow of water was greatly and unduly increased, and that for the consequences of that increase—namely, the flooding of the plaintiff's mine—the defendants are liable. The extent of the plaintiff's servitude is to receive the water *naturally* arising on and coming from the defendants' mines, and not the water *artificially* brought there by the defendants. The defendants have no more right thus

to bring down upon the plaintiff, through their mines, all this surface-water, and to flood his mine with it, than they would have to flood with it the surface of the plaintiff's land. The damage was the result of the combined acts of the defendants in making the cut or hole in their land, and in altering the water-course, and sending the stream through a new and insufficient channel. The new channel may have been as good as the old one; but the old one would never have brought the water where it came after the new channel was made. They cited also—

Baird and others v. *Williamson and others*, 9 L. T. Rep N. S. 412; 33 L. J. 101, C. P.; 15 C. B., N. S., 376;

Bagnall and another v. *The London and North-western Railway Company*, 5 L. T. Rep. N. S. 621; 7 H. & N. 423; 31 L. J. 121, Eq.; affirmed in error, 9 L. T. Rep. N. S. 419; 1 H. & C. 544; 31 L. J. 480, Ex.;

Williams v. *Groucott and another*, 8 L. T. Rep. N. S. 458; 4 B. & S. 149; s. c. *nom. Growcott and another* v. *Williams*, 32 L. J. 237, Q. B.;

Ruck v. *Williams*, 3 H. & N. 308; *Hodskinson* v. *Ennor*, 8 L. T. Rep. N. S. 451; 32 L. J. 231 Q B.; 4 B & S. 229.

Holker, Q.C. and *Kay*, Q. C., for the defendants *contra*, supported their rule, and contended that the case of *Fletcher* v. *Rylands*, and the previous decisions on which that decision rested, were not applicable in the present instance, because the injury that occurred here was caused, not by any ordinary casualty, against which the defendants might and ought to have provided, but by an unusual and extraordinary emergency, which could not reasonably be foreseen, and against the consequences of which, therefore, they were not bound to provide. It may be that more water was brought upon the surface of the defendants' land by what they had done there, than would, in its normal condition, have come there; but the learned judge was wrong in refusing to receive evidence which they were prepared to give, to show that they had made all due and reasonable provisions against all ordinary casualties, and that the new water-course was in fact an improvement upon the old one. The defendants were not, as the learned judge ruled them to be, bound to provide against the occurrence of damage *in all events*, even though they had brought more water on their land. They were not liable for the consequences of an exceptional and extraordinary storm which could not be foreseen. The maxim, "*Sic utere tuo ut alienum non lædas*," goes not to forbid *damna* generally, but only *damna injuriosa*. *Smith* v. *Kenrick* (7 C. B. 515; 18 L. J. 172, C. P.), is an authority in favor of the defendants, and shows that each adjoining mine owner has a right to work his own mine in the manner he deems most convenient and beneficial to himself, although the natural consequences may be that some prejudice accrues thereby to the adjoining

owner, *so long as such prejudice does not arise from negligent or malicious conduct* on the part of the owner so working his mine. In the present case there was no actual negligence, and none suggested on the part of the defendants. The case of *Williams* v. *Growcott and another*, cited by the plaintiff, is distinguishable, as there the defendants' mode of working their mine was dangerous and imprudent in itself. *Hodgkinson* v. *Ennor*, again, was a case which turned upon questions and principles applicable only to the cases of riparian proprietors. In *Rex.* v. *The Commissioners of Sewers for the Levels of Pagham* (8 B. & C. 355); s. c. *nom. Rex.* v. *The Commissioners of Sewers for Bognor* (6 L. J. 338, K. B.), Lord Tenterden, C. J., in his judgment at p. 361 of 8 B. & C., says: "I am of opinion that the only safe rule to lay down is this, that each landowner for himself, or the commissioners for several landowners, may erect such defenses for the land under their care as the necessity of the case requires, leaving it to others in like manner to protect themselves against the common enemy," which, in that case, was the inroad of the sea. And in Gale on Easements, (4th edit. p. 404), the author, after stating all the authorities, thus comments on them: "The result of the above cases is that there is no duty on the occupier of a mine to prevent the water there from natural causes from flowing into the mine of his neighbor. It is not his water, but a *common enemy*, which he is at liberty to get rid of." They cited also *The Scotch Mining Company* v. *The Lead Mills Company* (34 L. T. Rep. 39.

Cur. adv vult.

June 12.—BRAMWELL, B., now delivered the written judgment of the court (Bramwell, Martin, and Channell, BB.), as follows: I am of opinion that our judgment must be for the plaintiff. I can not distinguish this case from *Fletcher* v. *Rylands*. The defendants have, for their own purposes, caused water to come to, collect, and stay in a place where, by their operations, also, it would sink, and has sunk into their mine, and then get, as it has got, into the plaintiff's mine, and damage it. The defendants have artificially caused foreign water to get into the plaintiff's mine—water which did not arise there, nor get there by merely natural means—water which got there, not by the defendants not preventing, but by their causing it. I have no desire to quote my judgment in *Fletcher* v. *Rylands*, but I abide by what I there said. It seems applicable to this case, and I do not know how to mend it. But I will examine this case more particularly. The defendants are the owners of land in which there is or was iron ore, a portion of that ore came to the surface, a portion was subterranean. The latter was got by mining, the former by quarrying. The quarrying caused a large

hollow of various depths. Whether this hollow ever communicated with the underground works, I know not. The underground works, by removing the support of the surface, caused, as I understand, a subsidence, and so cracked the surface of the hollows, and made fissures down which water could escape, as I understand. Be this as it may, the result of the defendants' operations was a hollow, to the lowest part or parts of which water, if it got into the hollow, would flow, and which lowest part or parts was and were not water-tight. A flood came; a brook—I omit here to notice its diversion by the defendants—overflowed, and instead of the water passing over the surface and getting away, as it should have done, it got into the hollows so made by the defendants, and of course could not escape except through the fissures or cracks; and of course did escape through them into the defendants' mine, and thence into the plaintiff's mine. How does this differ from *Fletcher* v. *Rylands?* The defendants here did not, indeed, make a reservoir. But suppose they had made the hollow, originally excavated for other purposes, into a reservoir, or fish pond, or ornamental water, would the fact that it was originally made for another purpose than holding water have made any difference? That can not be. But it is said that they did not bring the water there as in *Fletcher* v. *Rylands.* Nor did they in one sense; but in another they did. They so dealt with the soil that if a flood came the water, instead of spreading itself over the surface and getting away innocuously to the proper water-courses, collected and stopped in the hollow, with no outlet but the fissures or cracks. Suppose the rain, without a flood, falling in this hollow, had made, as it will, pools in the lower part, and the water so collected had gone through the fissures and cracks into the mine, instead of being left on the surface to evaporate and percolate naturally, and that the damage to the plaintiff had been sensible, could the defendants say that they were not liable, because they did not cause the rain to fall? So, can they say that they did not cause this flood water to collect where it did, with no outlet, except to the mines, because it came there by the attraction of gravitation? It is said that the flood was extraordinary, and that they could not foresee it. I repeat my remark that that may take away *moral* blame from them, but how does it affect their *legal* responsibility? If, for their own purposes, they had diverted this flood into the hollow where it came, though not knowing what would happen, it is clear that they would be liable. Why are they not, if it comes, because it must come, from natural causes? It is to be observed that the mischief which the defendants have done is not merely in causing the water to come, but to stay, and to stay in a leaky hollow. If it had come and could have got away before the hol-

low existed, there would have been no harm. So, if the hollow had been water-tight, Lord Cairns says, in *Fletcher* v. *Rylands* (L. Rep. 3 Eng. & Ir. App. at p. 338), "The defendants, treating them as the owners or occupiers of the closes on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used, and if, in what I term the natural use of that land, there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. On the other hand, if the defendants, not stopping at the natural use of the close, had desired to use it for any purposes which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water, either above or below ground, in quantities, and in a manner not the result of any work or operation in or under the land, and if, in consequence of their doing so, water came to escape and pass off into the close of the plaintiff's, then it appears to me that that which the defendants were doing they were doing at their own peril." Surely in this case the accumulation of water without its natural outlet, is not by the natural use of the land, and it is not by the operations of the laws of nature *alone* that water has passed into the plaintiff's mine. And though what the defendants have done was not for the *purpose*, yet it had the result of introducing water in quantities, and in a manner not the result of any work or operation on or under the land. So, Lord Cranworth, in the same case, speaking of *Smith* v. *Kenrick* (*ubi sup.*), with which I wholly agree, says (at p. 341): "The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata." The water was only left by the defendant to flow in its natural course. And at page 342, he says: "If water *naturally* rising in the defendant's land had by percolation found its way down to the plaintiff's mine through the old workings, that would have afforded ground of complaint." If it should be said that this water *naturally came* to the defendant's land, the answer is that it did not *naturally* come to the lowest parts of the hollow, and that it did not *naturally* stay there, except by reason of the defendants having artificially made that hollow, and that it did not *naturally* escape, except by the hollow not being water-tight. If the similitude to responsibility for a dangerous animal is looked for in this case, it will be found. The defendants did not indeed keep, but they created one for their own purposes, and let it go loose. It is as though they had bred a savage animal, and

turned it out on the world. I have hitherto dealt with the case without mentioning the fact that the defendants had diverted the brook, and that the water escaped from the artificial channel which they had made, and so got to the hollow, and thence to the mines. Such are the facts; and the defendants, therefore, for their own purposes, brought the water to the place whence it escaped, and did the mischief. They brought it there without providing the means of its getting away without hurt. This, undoubtedly, makes a case against them that calls for an answer. The answer which they make is this: they say, "we brought the water there, indeed, and did not provide sufficient outlet for it; but, had we not altered the right course of the stream, it would have escaped in greater quantities, and done more mischief." My brother Lush held this to be no answer, and I agree with him It may seem strange that if the results of acts as a whole have done no harm to a person, he should nevertheless have a right to complain of the result of one-half of those acts. But the plaintiff has a right to say: "You have caused this; had you left nature to itself, worse might indeed have happened, but that would have been my misfortune; perhaps it would not have happened; perhaps I could have guarded against it. I decline to discuss this. You may, indeed, have done me good; if so, you should have done me more good." What in effect is the answer of the defendants but a kind of set-off, that is, set-off the mischief which we have done you against the good we did you, at the same time. Suppose there had been two brooks, one diverted from and the other into the plaintiff's mines, and the latter overflowed, would it be an answer to an action for damages arising therefrom, that the other brook, unless diverted, would have overflowed in greater quantity, and done more mischief in the same place? Obviously not. Yet how does that differ from the present case? Or suppose the diversion flooded the plaintiff's mine A., and the original brook would have flooded the plaintiff's mine B. In fact the defendants have done that which injured the plaintiff, and of that the latter is entitled to complain, and the defendants have no right to set-off a benefit which they were not asked by the plaintiff to confer upon him. Upon this ground, also, I think that the ruling complained of is right. But of course the whole case must be taken together, and on that whole case my judgment is for the plaintiff. In this my brothers Martin and Channell concur. The rule, therefore, will be discharged. We are to say on what principle the arbitrator is to assess the damages. It is impossible to lay that down with precision. He may well take into account the shortness of the plaintiff's term, if by reason of that the plaintiff will lose some of the minerals. He may well also take into account in favor of the defendants, if

the term is so short that it would not pay the plaintiff to remove the water; or, otherwise, he might receive the damages, and leave the defendants subject to an action by the plaintiff's lessor or reversioner. So also he may see if the mine is worth unwatering. If any more precise direction is required of us, the matter must be mentioned particularly to us.

Rule discharged.

Attorneys for the plaintiff, *Helder* and *Roberts*, 2, Verulam-buildings, Gray's-inn, W. C., agents for *Brockbank* and *Helder*, Whitehaven.

Attorneys for the defendants, *Gregory*, *Rowcliffe*, *Rowcliffe*, and *Rawle*, 1. Bedford-row, W. C., agents for *J. Musgrave*, Whiteen.

UNITED STATES DISTRICT COURT, N. D. ILLINOIS.

In re ESS & CLARENDON.

The suspension by a merchant or trader of payment for fourteen days of his commercial paper, which is afterward paid and taken up, is an act of bankruptcy of which any creditor may avail himself to have the debtor adjudged a bankrupt, if all the debtor's liabilities were not paid or settled at the commencement of the bankruptcy proceedings.

Opinion by BLODGET, J. July, 1872.

On the seventh of March last, the firm of T. B. Webber & Co. of the city of Chicago, filed their petition in bankruptcy, alleging that Jacob Ess and William Clarendon, doing business as copartners in the city of Peoria, in this state and district, under the firm name of Jacob Ess, were indebted to the petitioners in a sum exceeding two hundred and fifty dollars, to wit, in the sum of twenty-seven hundred and twenty-four dollars and twenty-eight cents, for goods sold said firm in due course of their business as merchants and traders, at Peoria aforesaid; that said Jacob Ess and William Clarendon, as such partners, within the six calender months next preceding the filing of said petition, being merchants, had stopped and suspended payment of their commercial paper, and did not resume payment thereof for fourteen days, to wit, that they did suspend payment upon a promissory note for the sum of five hundred dollars, dated April twelfth, eighteen hundred and seventy-one, payable to the order of Mabie, Murray & Morgan, two months after its date; also of another note of the same date, payable to the same parties five months after date, and another note of the same date and amount, payable to the order of the same parties in three

months after the date thereof, which said notes were the commercial paper of said firm of Jacob Ess.

Ess appeared and confessed the acts of bankruptcy alleged, and consented to an adjudication of bankruptcy. Clarendon appeared and answered, denying that he was, or had been at any time within the six months preceding the date of the filing of the petition, a partner of the said Jacob Ess, under the style of Jacob Ess, or under any other name; also denied that he had been engaged in business within the period aforesaid in said district in any manner whatever, and denied that he was in debt to the said petitioners in any sum whatsoever, either individually or as a member of the firm of Jacob Ess; also denied, that he had committed any act of bankruptcy, as alleged in said petition.

The trial was had upon the issue made by the denial of Clarendon, on which it appeared in evidence that some time in the year eighteen hundred and sixty-six, Clarendon, who was then a resident of New York city, and engaged in the wholesale boot and shoe business in said city, wrote to Jacob Ess, who was at the time living in Memphis, proposing to unite with Ess in business; Clarendon to furnish the goods, and Ess to manage the business of a retail store in some place which they might select in the West. After some correspondence it was agreed that Ess would start the store at Peoria, and that Clarendon should furnish him the goods for stocking the store. In a letter of December twenty-six, from Clarendon to Ess, Clarendon uses this language: "Now, I have to say to you, that if you act to me like a brother, I will do as well for you as I have done for my brothers. The way I have always done with them was, that I bought the goods and they sold them, and they took half the profits, and I took the other half. If this meets your ideas, we will put the thing through." In a letter of January twenty-third, eighteen hundred and sixty-seven, Clarendon writes: Don't be afraid of any of them in the shoe business, for I know I can skin them on buying. I will make the profits right. You need not let on that your partner is in the shoe business until you see how it will work. I think you had better make the name of the concern Jacob Ess & Co., and if you will only sell the goods I am certain I can buy them, and if you are going all right I may come out to see you next summer." Again, in the same letter, he says: "If you could send the money when you order the goods, it will give my folks here a better opinion of the business. I am not going to let them know that I am in with you; but I guarantee that you will pay for them, and I will see that the goods are charged to you at small profits." Under date of February ninth, eighteen hundred and sixty-seven, Clarendon writes to Ess: "In writing, let me know every day's

sales. I will do the very best I can to put the goods at low figures. I have put the most of these at cost." This was after Ess had opened the store at Peoria. On March second, Clarendon writes to Ess: "Write to me twice a week, and at the end of the month send me a statement of what you have sold during the month, and what you have done with the money. Keep your books straight." In a subsequent letter, Clarendon writes to Ess: "If you have not got your sign yet, have it Jacob Ess. I will send the goods in your name from here."

A large number of other letters were introduced and read upon the trial, but the quotations I have made already show clearly enough to my mind that a partnership was entered into between Ess and Clarendon, and that, by Clarendon's especial request and direction, the business was to be done in the individual name of Jacob Ess. Ess testifies that, sometime in eighteen hundred and sixty-nine, Clarendon told him that he thought they had now got on far enough so that he (Ess) could pay him (Clarendon) fifty dollars per month for the profits of the concern. Ess demurred to this, stating that they had not yet reached the point where Clarendon's share of the profits would amount to that, but agreed to send Clarendon all the money he could spare from the business; and accordingly, during the year eighteen hundred and sixty-nine and part of the year eighteen hundred and seventy and eighteen hundred and seventy-one, Ess remitted to Clarendon various sums of money, amounting in all to between seven and eight hundred dollars, to apply upon the profits of the business. During this time, Clarendon changed his business relations in New York, the firm of which he had been a member having dissolved, and sometime in eighteen hundred and seventy, Clarendon commenced purchasing goods on account of Jacob Ess from the firm of Mabie, Murray & Morgan, in New York, Clarendon guaranteeing the payment of the bills. It also appears, however, that Ess purchased of other dealers in the same line of goods, and it does not appear that Clarendon in all cases guaranteed the payments, although Ess testifies that he notified his creditors and those with whom he dealt, as a rule, that Mr. Carendon was his secret partner. Ess also testifies that the notes described in the petition were given in due course of business to the firm of Mabie, Murray & Morgan, and that at the time mentioned in the petition, to wit, as those notes respectively fell due, the said firm suspended payment thereof, and that on or about the first of March last, all of said notes remained unpaid. There was no evidence of a dissolution of the firm, or of any change in the relations of the partners.

The only evidence interposed on the part of the defense is

that of the respondent, William Clarendon, who testifies that about the first of March last, he paid the notes to Mabie, Murray & Morgan, described in the petition, and took them up, he being liable thereon as guarantor.

The evidence on file in the case and on which the rule to show cause was granted, shows that Jacob Ess was indebted to the petitioning creditors for goods sold them in the due course of their business, of the amount named in the petition, to wit, two thousand seven hundred and twenty-four dollars and twenty-eight cents.

It is contended on the part of the respondent, Clarendon, that inasmuch as he had paid the commercial paper described in the petition prior to the filing of said petition, that this proceeding can not be maintained.

Assuming, as I do, that the proof shows that Clarendon was a partner with Ess in business at Peoria, the question is, have the petitioners, Webber & Co., the right to avail themselves of the act of bankruptcy, which was committed by said firm by suspending payment of its commercial paper, to wit, the Mabie, Murray & Morgan notes, and to have the firm and its members declared bankrupts, notwithstanding said paper had been paid and taken up prior to the filing of the petition in this case?

There can be no doubt that the suspension upon this paper for fourteen days was an act of bankruptcy, and as much against Clarendon as against Ess, if Clarendon was a member of the firm. And if it were an act of bankruptcy, is that condoned or so far defeated as to prevent any other creditor from availing himself thereof by the mere payment of the suspended paper?

If a merchant or trader suspends payment of his commercial paper for fourteen days, that is an act of bankruptcy of which any creditor may avail himself. The act of suspension raises a presumption of insolvency and makes the party guilty thereof a proper subject for proceedings in bankruptcy.

It is not enough that the debtor shall pay his suspended paper alone. He must pay or settle all his debts and satisfy all his creditors, if he would wipe out the offense against his commercial standing, committed by the suspension. Otherwise a trader might, although hopelessly insolvent, avoid adjudication as a bankrupt by the payment of a tithe of his indebtedness, because, as a rule, but a small portion of a trader's indebtedness is evidenced by commercial paper. I conclude then that William Clarendon and Jacob Ess, were, at the time, in business under the firm name of Jacob Ess, at Peoria, in this district; that they were guilty of the act of bankruptcy charged in the petition, and that the petitioning creditors had the right to avail themselves of the act of bankruptcy, although the suspended paper

had been taken up by one of the partners at the time of the filing of the petition.

The finding of the court, therefore, is that William Clarendon was guilty with the said Jacob Ess of the act of bankruptcy charged in the petition, and that he and the said Jacob Ess must be adjudicated bankrupts.

STATE OF PENNSYLVANIA.

COURT OF COMMON PLEAS.

IN EQUITY.

Thomas Bromley *v.* The Commercial National Bank of Pennsylvania.

1. "A check is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and is therefore an appropriation of any smaller sum which may be in his hands, if there be not sufficient to pay the amount of the check."
2. In such a case, if the holder of the check is willing to receive the smaller sum, he is entitled to it. The bank should retain the check, indorsing on it the amount paid, and give a certificate thereof to the holder.
3. Or, the holder may deposit a sum sufficient to make the check good, and then demand payment.
4. Where a check is duly presented and the drawee wrongly refuses payment, the subsequent death of the drawer can not affect the holder's right to payment.
5. In the absence of proof of a want of consideration, even if payment of a check were countermanded, the holder is presumed to hold for value and is entitled to the sum named in it, by virtue of the appropriation of the same to his use.

STATEMENT OF CASE.

Plaintiff was the holder and payee of a check for $725, drawn by "William P. Rayfield, agent," upon the Commercial National Bank, defendant, dated October 20th, 1866. In the month of January, 1867, plaintiff presented the check to defendant for payment. The paying teller took the check, examined, filed it, and counted out and laid down on the counter the amount for which it was drawn. Before the money was received by plaintiff, the teller, stating there was not sufficient balance to the account, took back the money and returned the check to plaintiff. There was at the time $229.92 held to the said account, and plaintiff offered to deposit a sum sufficient to make the account good for the check, in case the bank would then pay the check. This the bank rejected. William P. Rayfield, the drawer of the check, died about the time of the presentation, and demand was afterward made upon the bank by the administrator of his estate for the payment of the said $229.92. The bank refused,

giving as a reason that the money was deposited to the account of "William P. Rayfield, agent." Plaintiff then filed his bill and prayed an account and a decree for payment to him of the amount of the accounts. Defendant's answer admitted the material allegations of the bill.

ON BILL AND ANSWER.

Opinion by PEIRCE, J. Delivered October 12th, 1872,

The complainant is the holder of a check drawn to his order by "Wm. P. Rayfield, agent," on the Commercial National Bank of Pennsylvania, for the sum of $725, dated October 8th, 1866.

In the month of January, 1867, the plaintiff indorsed the check and presented it at the bank for payment. The paying teller was about to pay it, when on examination of the account of the drawer, he discovered that there was a balance of but $229.92 to his credit in the bank. The plaintiff then demanded the payment of this balance to him on account of the check, which was refused by the bank. The plaintiff then offered to deposit to the credit of the drawer a sufficient sum of money to make the check good, if the bank would then pay the amount of said check. This was also refused by the bank. The plaintiff again made the said offer in 1869, and was again refused by the bank.

Wm. P. Rayfield, the drawer, died about the time of the presentation of the check, but whether before or after, does not appear; and his account was never made sufficient to pay said check; and the sum of $229.92 has remained to his credit in the bank ever since. The balance in bank was afterward claimed by Daniel K. Arbright, as administrator of Rayfield, but the bank declined to pay him, because Rayfield's account was as agent.

The bank avers in its answer, that it has always been ready and willing and desirous to pay the balance in its hands to the proper party entitled to receive the same, and is still ready to pay the same according to the order of the court.

A check on a banker is similar to an inland bill of exchange. It passes by delivery when payable to bearer; or if made payable to the order of a particular person, and indorsed by him, it seems to have the same quality of negotiability. It differs, however, from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance distinct from prompt payment. Chancellor Kent (3 Kent's Commentaries n. 7th edition) says, it is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for; and the drawer has no reason to complain of delay, unless upon the intermediate failure of the banker. It is the tacit, if not the express understanding, be-

tween banks and their customers, that they shall have the right to draw for the whole or a part of the funds deposited with them. The cases treat a check on a banker as an equitable assignment or appropriation; and if the holder is a holder for value, as to whom the drawer can not revoke rightfully the power which he holds coupled with an interest, why should not the banker upon distinct claim and notice be held bound by the equity? Byles on Bills, 15, note.

It follows as a consequence, that if such a check is an appropriation of the whole sum for which it calls, if so much is in the hands of the banker, it is an appropriation of any smaller sum which may be in his hands, if there be not sufficient to pay the amount of the check. In such a case, if the holder of the check is willing to receive the smaller sums, as the bank is entitled to retain the check as evidence of payment and of the holder's right to receive the money, it should indorse the contract of its payment on the check, and issue to the holder a certificate of having received the check from him, and of having paid so much on account of it.

In this case, the plaintiff offered to deposit to the credit of the drawer, a sufficient sum of money to make the check good, if the bank would pay to him the amount of the check when so made good. This was all that the bank in reason could ask, and would have been a sufficient protection to it from any demand which the drawer could make for the money.

It seems that the death of the drawer of a check is a countermand of the banker's authority to pay it. But that if the banker do pay the check before notice of the death, the payment is good. Byles on Bills, 17. In this case there is no statement of the time of death of the drawer of the check, and as there is a presumption that a person is living who has been heard of as living within seven years, to rebut the presumption that the drawer was living at the time of the presentation of the check for payment, it should have been shown affirmatively that his death occurred before that event.

The case stands then, as if the drawer of the check were living at the time of the demand of payment of it, and there was then no countermand of the authority of the plaintiff to receive the money. And as the rights and duties of the parties were fixed at that time, it is not perceived how the subsequent death of the drawer of the check can affect the holder's right as a holder for value to receive the money. And as the presumption is that the holder of a check as against the drawer holds it for value, in the absence of proof of a want of consideration for it, even if payment of it were countermanded, the holder of it, by virtue of the appropriation of the sum named in it to his use, would be entitled to receive it from the bank.

Let a decree be entered in favor of the plaintiff for the sum of two hundred and twenty-nine dollars and ninety-two cents, the amount admitted by the bank to be in its possession, and interest from the 18th of February, 1867, with costs.

LEGAL EPIDEMICS.

READERS of the newspapers must often have been struck by the way in which particular forms of crimes or eccentricity seems suddenly to become prevalent. Now there is a series of peculiarly brutal murders; then all sorts of imbecile and incapable people go out in boats in squally weather and get drowned; for the next few weeks drunken husbands take to setting nagging wives on the fire to cool their tempers; and after that, by way of a change, we are horrified by the news that our neighbors on all sides have acquired an uncomfortable habit of filling their houses with large pythons, boa-constrictors, apes, baboons, ourang-outangs, and other ugly or malicious monsters, who occasionally get tired of domestic seclusion, and wander out into the streets. During the next few weeks we shall, no doubt, have the usual dose of accidental shootings. A fool sees a gun in the corner, assumes that it can not possibly be loaded, points it in fun, and kills somebody, his mother or sweetheart perhaps. This is an every-day story of the autumn months. If the tender-hearted persons who are so troubled about dickybirds and acrobats would take up this much more serious question, they might possibly do some good. A sound flogging would be a mild penalty for the abominable folly of pointing a gun at any one "in fun." Disease has its fashions like bonnets and crinoline, and it would appear that the humors of the mind have a similar tendency to become epidemic.

It can not have escaped observation that for some time past the papers have been full of trials for libel and breach of promise of marriage. It might almost be supposed from the reports of the law courts that everybody had been seized with an uncontrollable passion for libeling everybody else, and that all the unmarried male adults in the country had given themselves up madly to flirting and jilting. We have not the slightest intention of discussing any of these cases, or of questioning the justice of the verdict in any particular instance. We refer to them merely as evidence of the curious tendency of such things to come in a rush. It is difficult to say whether it is only an epidemic of violent litigiousnes, or whether libeling and jilting have really become more prevalent in English society; but, on the whole, we can not help thinking that the former surmise is the correct one. It is difficult, in reading the cases which are reported day after day, to resist an impression, that the strain which is now being put on the law of libel and slander, and also on that of breach of promise, is rather more than they can be expected to bear. We have certainly no sympathy with backbiters and slanderers, or with faithless swains. It is quite right that people should be taught to keep a watch upon

their tongues, to eschew idle gossip, and to be very careful how they speak ill of their neighbors, and also, that promises of marriage should not be allowed to be lightly broken.

But it may be doubted whether it is desirable that a civil action should be twisted from its natural and legitimate purpose, and be made the means of inflicting punishment for small and not very easily defined offenses. There is also an obvious danger in encouraging a spirit of excessive litigiousness, and in leading people to imagine that they are either bound or entitled to seek legal redress for everything that can be construed into an injury to their feelings. What is vulgarly called "taking the law" of a man may be a pleasant revenge for those who can afford it, and who, even if they fail to get a verdict, may have the satisfaction of knowing that their adversary had been subjected to much anxiety and expense; but it can hardly be supposed that reckless litigation is calculated to promote social harmony and good feeling.

It was predicted, when plaintiffs in breach of promise cases were allowed to appear in the witness-box, that defendants would certainly have a bad time of it; and the results of trials would seem to show that there were good grounds for this belief. It will be remembered that, in the memorable case of *Bardell* v. *Pickwick*, Mrs. Bardell was borne fainting into the court, with her darling boy kicking and howling in sympathy behind her; and if she had been permitted to go into the box, her counsel's famous speech would probably have been superfluous. It is difficult to imagine the defendant in an action of this kind, who, on the most favorable construction of his conduct, has made a fool of himself and fallen a victim to the designs of an artful woman, presenting an interesting and prepossessing appearance before a jury. If he looks soft and ashamed of himself, the jurymen feel that he is letting down their sex before the world; if he is bold and defiant, it is accounted heartlessness, and is pretty certain to be punished by heavy damages. Every thing is against him. There may be good reasons why he is justified in endeavoring to escape from a marriage with a woman who has perhaps in many ways imposed on him; of whose want of delicacy, sensibility, refinement, or honesty he has become painfully aware; whose parrot talk, sham graces, and false hair he has seen through as soon as the first glamour passed off; but then it is difficult to bring these things seriously and impressively before a jury. They are things hard to prove from the witness-box, although they are probably things which an impartial person of the least discernment could not be five minutes in the plaintiff's company without discovering. The smart, flashy woman, who can droop her eyes and make good play with her handkerchief, and who is just the sort of person to lay a clever trap for a simple fellow, is also admirably adapted to produce an effect when giving her evidence in court. Speculative attorneys, with an eye to a profitable case, may be trusted to take care that their client has sufficient schooling beforehand in the niceties of her part, and in those sensational passages which are supposed to be most telling with juries, and to be not altogether thrown away upon judges. It appears

that a dead set has lately been made on the farmers. In nine out of ten recent breach of promise cases the defendants belonged to this amiable class, and perhaps it is not less significant that the plaintiffs have usually been barmaids, or young persons in a light fancy business. From of old the bucolic heart has been proverbially soft and tender, and the farmers of to-day are no doubt as susceptible as the shepherds of early times. After a brisk forenoon at market, and a comfortable dinner at the "ordinary," Strephon is just in the mood for a chat with Chloe in the bar, or a little philandering with Daphne at her counter, and is probably not too guarded in his simple prattle. The result is that he finds himself one day depicted in thrilling language as a gay and ruthless deceiver, and has to pay over a snug little fortune to the shrinking dove with whose gentle heart he has so cruelly trifled. There are, no doubt cases in which it is possible to form a reasonable estimate of damages for breach of promise, as, for instance, where the plaintiff has given up a situation, or spent money in preparations for the wedding, or where her counsel take their ground solely upon the material advantages she would have enjoyed if the defendant had married her, and ask compensation for so many gowns and dinners of which she had been defrauded. But if lacerated feelings are to be paid for, it would be interesting to see the account made out in detail. It is tolerably obvious that the sort of women who do not shrink from the exposure of their love affairs in a public court, and the publication of the more ridiculous passages of their correspondence in every newspaper in the country are not, as a rule, the most sensitive of their sex.

It is usual for judges in cases of this kind to warn the jury against giving what are called vindictive damages; but it would seem that they are not always indisposed to connive at verdicts which are intended to punish the defendant, although at the same time it is admitted that the plaintiff is not entitled to compensation. In a recent breach of promise at Chester, the jury said they desired to give just enough damages to carry costs. The only meaning which can be attached to a verdict of this kind is, of course, that the jury do not see that the plaintiff has suffered any real injury, but they think the defendant acted imprudently, and should be made to smart for it a little. The same fundamental misconception of the meaning of a civil suit underlies most of the verdicts which are delivered in actions for libel. The person libeled rarely obtains more than a few shillings or a few pounds, which is as much as to say that he is none the worse for the hard things which have been said of him; but still, as a matter of social discipline, the defendant must pay a fine. The practice of allowing costs to suitors who have practically failed to make out their case is a dangerous encouragement to speculative actions. It may sometimes be necessary for a man to vindicate his character by an action for libel; but as a rule, suits of this class only give a wide currency to observations which would otherwise have been quickly forgotten, and which in all probability never did the person to whom they were applied any substantial injury. It is seldom that any one resorts to this kind of protection

who does not feel that his character is already in a questionable condition. It would appear that in the case of libels a reaction has set in against the over-straining of the law to which some of the judges have been in the habit of lending themselves, and it is not improbable that something of the same kind may happen before long in regard to actions for breach of promise. The only legitimate ground for a civil action is that an injury has been done for which compensation can be assessed in money, and, if it can not be fairly assessed in this way, the jury have no right to look beyond the claims of the plaintiff, and to consider whether the general interests of society require that the defendant should be punished. It is not desirable that the law should be administered in such a manner as to encourage frivolous or speculative suits. Some of the judges require to be reminded, as Dr. Carpenter reminded the philosophers at Brighton, that common sense is, after all, the basis of their science. They are too apt to forget that the object of the law is rather to make peace than to foster litigation and provide incomes for sharp attorneys. A strong judge who had the courage to take in hand tricky or trivial cases, and to laugh them out of court, as the late Mr. Justice Maule used to do, would render eminent service at the present time.—*Saturday Review.*

THE LEGAL PROFESSION AND GENERAL CULTURE.

THE intimate relation of law to all science and all culture is readily perceived and generally conceded. The utility of philosophy, science, art, poetry, and history to the legal profession, not only in the development of individual character, but in the practice of the profession, is also admitted. But in an age when all the forms of literature and science have become intricate and immense, and when the law has become proportionately complex and vast, it is not without anxiety that the lawyer with liberal tastes and a desire for broad culture, contemplates, the possibility that the demands of his profession may exclude the gratification of those tastes and desires. While it is desirable that every department of knowledge and every profession should advance in completeness, complexity, and scope, requiring a corresponding increase of mental effort on the part of the individual in his calling, it is equally desirable that the members of each department and profession should understand enough of the others to appreciate and aid them. Every true lover, however, of his profession will make that his prime and uniform object of attention; his chief endeavor will be to become proficient, and, if possible, foremost in it. Such a character will never be subjected to the charge of *dilettantism*. A recent writer in one of our quarterly reviews has made the following pertinent and thoughtful observation: "If the gravest complaint against American civilization as it stands typified to-day were to find utterance, it might be resolved into words like these: it tends to one-sideness in the State—materialism;

to many-sideness in the individuals who compose the State, a condition of things to be so strongly deprecated in both particulars that it is difficult to say which involves the greater injury; a condition of things too, which, could it only be reversed, making the state many-sided, and the citizen one-sided, the happiest results might be looked for." But this criticism which is very true and just, considered in its application to society, at large, has less of pertinency when applied to the legal profession. For lawyers are apt to be devoted exclusively to their profession; and to look with indifference upon all knowledge, not legal knowledge, or, as Dr. Wallis expressed it in his very admirable address before the law department of the University of Maryland, last June, "there are many able and successful lawyers who devoutly believe, of the law, as certain Mohammedan sectaries of the Koran, that there is nothing written outside of it which is good, and it is therefore sinful to read any thing which is not in it." The *tendency*, unquestionably, of a large portion of the profession is toward "one-sidedness," and such a "one-sidedness" as is rather undesirable than otherwise, in view of the liberal character of the legal profession, and the broad and universal relations which it sustains to society and to the State.

That an enlarged acquaintance with literature, philosophy, and science is not inconsistent with an intimate knowledge of the law, great success at the bar, and dignity and distinction on the bench, is demonstrated by numerous historic examples. Many of the greatest jurists and advocates of English jurisprudence have been distinguished for their attainments outside of the law; while on the continent it has never been considered that an eminent and able lawyer should be any the less a scientist, a philosopher, a poet, or a novelist; and in ancient Rome, the mother of jurisprudence, the most celebrated lawyers were men of broad learning and liberal tastes. It has been the culture and universality of the most distinguished of the legal profession which has given it the appellative of *liberal* profession, quite as much as any intrinsic quality of the law itself. And the curious but instructive spectacle presents itself of a profession, many of those members by great attainments within and without it, rise to glorious and enviable heights, and many other members of which, with close and exclusive attention to its principles and details, and with very little knowledge of other departments, remain in obscurity all their lives. Somewhat is due, unquestionably, to difference in natural intellectual capacity and material advantages. But the record of the lives of the greatest lawyers shows conclusively, that only when to a deep and intimate acquaintance with the law there is superadded a high and noble aspiration and culture derived from extensive reading and philosophic thought, are achieved the highest triumphs in a science, "in the ashes of which are taken up the sparks of all the sciences in the world."

In addition to the personal accomplishments and attainments beyond the prescribed limits of the profession which have adorned the characters and lives of men who are familiar to every member of the bar, and even to every student of the law, there is presented the fact that many of the ablest and most distin-

guished lawyers were also men of letters—were writers of great merit, whose works were as highly valued by the *literateurs* as by the lawyers of their own and subsequent periods. And when it is remembered that, at the various inns of court in London, there was for a long time a strong prejudice against the members of the profession taking the pen, it is all the more extraordinary that so much and so valuable literature should have been furnished to the world by men who were thoroughly conversant with the law, and attained the highest rank as advocates and judges. We need scarcely mention the names of Bacon, Burke, DeBury, Fortescue, More, Hatton, Clarendon, Hale, North, Somers, Harcourt, Campbell, King, Brougham, and Romilly, whose literary labors either in the form of philosophy, of criticism, of history, or of poetry, have rendered them famous in the world of letters. It is said by an English writer that "Jeffreys and Macclesfield *represent* the unlettered chancellors; More and Bacon the lettered." "Even more than for the wisdom of his judgments, Mansfield is remembered for his intimacy with 'the wits,' and his close friendship with that chief of them all, who exclaimed, 'How sweet an Ovid, Murray, was our boast,' and in honor of that 'sweet Ovid,' penned the lines:

> Graced, as thou art, with all the power of words—
> So known, so honored in the house of lords."'

Lord Eldon was an Oxford essayist in his young days, and in his old days he compiled "The Anecdote Book." He was one of the many great lawyers who associated with Samuel Johnson and found pleasure in his conversation. The most eminent lawyers of American history, men like Story, Kent, Choate, Webster, and Pinckney, maintained an intimate acquaintance with the learning of their time, and scarcely allowed a day to pass without catching some fleeting moment in which to devote themselves to the classics, to philosophy, to science or to poetry, and thus preserve the beautiful harmony of their souls. Even art has not escaped the devotion of the greatest lawyers, although music has received the largest share of attention. A reliable historian tells us that "Sir Thomas More and Lord Bacon, the two most illustrious laymen who have held the great seal of England, were notable musicians, and many subsequent keepers and chancellors are scarcely less famous for love of harmonious sounds than for judicial efficiency. Lord Jeffreys was a good after-dinner vocalist and was esteemed a high authority on questions concerning instrumental performances. Lord Camden was an operatic composer, and Lord Thurlow studied thorough bass, in order that he might direct the musical exercises of his children." But it is unnecessary to bring forward further evidence that the most successful and able jurists and advocates of the past have not found it impractible to keep up extensive reading, considerable literary labor, and much artistic taste in connection with the duties of their profession. The question now arises, has the law so increased in magnitude and complexity of late as to preclude the maintenance of the same liberal and broad culture? We are not prepared to accept an affirmative answer to this question. The capacity of the human mind advances with its institutions and professions;

and relatively speaking, the profession of the law to-day requires no larger place in the intellect of its members than it did in the days of Bacon and More. The facilities for the acquirement of the fundamental principles, and the results of all advanced science and of all philosophy, are tenfold augmented; the power of generalization in humanity, and in the legal mind especially, is constantly strengthening; and there is no adequate reason, save prejudice and indolence, why the legal profession should not be full of that learning, culture, and taste, which extensive research in fields outside as well as inside of the profession alone can give. And we cordially assent to the admirable and timely remarks of Dr. Wallis, who, in the address to which we have alluded, uses the following language: "Gentlemen, your profesion calls upon you for no sacrifice of your best gifts and powers. There is room for all of them within it, unless pedantry has the making of the pale. There is scope in it for Fancy and her nobler sister, Imagination. There is room for all literature, all science, and every liberal art. There is field for wit and for humor, for taste and grace, for all that is splendid in the mastery of eloquence, all that can influence the human mind and penetrate and control the human heart. History has no record of an advocate whose genius and culture were above his office, and it is in part the fault of just such prejudice as I am combating that we have so few in the country, to-day, who approach the level of its real greatness."—*Albany Law Journal.*

HON. WILLIAM H. SEWARD.

THE Hon. William Henry Seward died at his residence, in Auburn, on the 10th inst.

Mr. Seward was born in Florida, Orange County, New York, on the 16th of May, 1801. After a preparatory course at the Farmer's Hall Academy, in Goshen, he entered the sophomore class of Union college at the age of fifteen. After graduating, he became a student in the law-office of John Anthon, of New York, where he remained for some years, and afterward continued his studies in the office of John Duer and Ogden Hoffman, in Goshen. As a student of the law Mr. Seward displayed those qualities of industry, application, and quick conception which characterized his later life. It was his practice to rise at four, and, after a day's application to the law, to devote his evenings to general literature and composition. He was admitted to the bar, at Utica, in 1822, and, in the January following, took up his residence in Auburn, where he formed a partnership with Elijah Miller, then first judge of Cayuga County. In 1824, Mr. Seward married Francis Adeline, youngest daughter of his partner. His success at the bar was rapid and brilliant, and soon gave him a reputation beyond the limits of his little city. He was, from the first, accustomed to argue his own cases, and not, like too many young men of his day and ours, to employ counsel in all matters before the courts. He was wont to meet in the contests of the forum such lawyers as Elisha Wil-

liams, John C. Spencer, and Albert H. Tracy, and it is a sufficient evidence of the young advocate's ability that he was regarded as their peer.

In 1830, Mr. Seward was elected a State senator, as the candidate of the anti-masonic party, and, at the end of his term, was re-elected. Of his career as a politician we do not purpose, nor is it necessary, to speak; we only intend to notice briefly the salient points of his career as a lawyer. But the senate of his day was not only a political organization, but the court of last resort as well, and the estimation in which the young senator was held, as a lawyer, by his colleagues, is fairly illustrated by the case of *Parks* v. *Jackson*, 11 Wend. 442. In that case the chancellor, the head of the court, wrote and delivered an elaborate opinion on one side, and Mr. Seward delivered an opinion, equally elaborate, on the other side. When the vote of the court was taken, Mr. Seward's opinion had the concurrence of the entire body save one, that one being the chancellor.

In 1845, Mr. Seward was the counsel for the defense in the then celebrated libel suit of *J. Fenimore Cooper* v. *Greeley & McElrath*, publishers of the *Tribune*, and his argument on the trial was a most masterly defense of the liberty —not the license—of the press.

But Mr. Seward's reputation at the bar was mainly in his earlier years—that of a criminal lawyer—and was founded on his defense of the negro, Freeman, whose trial was one of the *causes celebres* of the times. The history of that case is briefly this: Wyatt, a convict in Auburn State Prison, was indicted for the murder of a fellow-convict. Without friends or money, he was unable to secure counsel for his defense, until the day but one before his trial, when Mr. Seward responded to his appeal and undertook his cause. Wyatt's previous history and strange conduct induced his counsel to interpose the defense of moral insanity, and so ably did he present the defense that the jury were unable to agree. The defense of moral insanity was then novel, and the people regarded it as but a trick to defeat justice, and were virtuously indignant. Before the second trial of Wyatt, Mr. Seward was called to Washington and Charleston on professional business. During his absence, Freeman, a negro twenty-three years old, massacred the whole family of one Van Ness, a gentleman of wealth and social position, and a friend and client of Mr. Seward. The murderer endeavored to escape but was quickly caught and brought back, and, when taken into the presence of his victims, confessed the crime amid fits of violent laughter. The whole neighborhood was wild with excitement, and it was only by the most vigilant exertions of the authorities that Freeman escaped lynching. And not only was the neighborhood shocked and excited, but the whole State as well, for crimes of such magnitude were not so common in those days as they have since grown. The memory of Seward's defense of Wyatt was yet rankling in the breasts of the people, and many were so fatuous as to believe that Freeman would not have done the horrid deed had he not believed, from hearing Mr. Seward's speech in that case, that punishment might be escaped on the grounds of insanity. Curses, both loud

and deep, were hurled against Seward, and threats were boldly made of what would befall him should he undertake Freeman's defense. So bitter, indeed, was the feeling, that Mr. Seward's law partner publicly declared that Mr. Seward would not undertake the defense.

A special term of the court was ordered by the Governor, Silas Wright, for the re-trial of Wyatt and the trial of Freeman. Mr. Seward returned from the South, shortly before the setting of the court, but gave no expression as to his intentions regarding Freeman's trial. Wyatt was first tried, and was again defended by Mr. Steward, but to no purpose. The current of popular feeling all set one way, and Wyatt was convicted. Freeman's case came on directly after; an immense concourse of people was present, and threats of vengeance were freely uttered against any lawyer who should defend him. Mr. Seward had privately made himself familiar with the character of the prisoner, and had satisfied himself that Freeman was an irresponsible idiot. Freeman was arraigned, and when asked if "guilty or not guilty," he answered "I don't know." The same answer was returned to the judge's questions if he was ready for trial or had any counsel. The court then turned to the bar and said, "Will any one defend this man?" Deathlike stillness reigned in the court-room. Pale with emotion, yet firm and unflinching, Mr. Seward arose and said: "May it please the court, I appear as counsel for the prisoner." The silence continued for a moment, and then the excitement became intense, and many threatening demonstrations were made. But the moral courage of the man cowed the ignoble herd, and the trial proceeded without molestation to the counsel. Insanity was, of course, the defense, but so strong was the prejudice that even the rulings of the court were stretched to the uttermost against the prisoner. The closing argument of Mr. Seward was one of the most powerful ever delivered to a jury in this country, but it was without avail, and a verdict of guilty was returned. Mr. Seward obtained a stay of proceedings, and, on review, a new trial was ordered. When the case came on again, so far demented was Freeman that the court refused to try him, and he died shortly after, a conceded lunatic. So wide a reputation did Mr. Seward obtain from his brilliant defense in this case that, not long after, he was called to Detroit, Michigan, to defend a number of men indicted, for conspiracy, but our limits will not permit us, at present, to follow him further.

After the expiration of his term as governor, Mr. Seward devoted himself principally to practice in the United States courts, particularly in patent cases, until he was made a United States senator, since which time his life was devoted to affairs of State.—*Albany Law Journal.*

HAMILTON COUNTY DISTRICT COURT.

STATE OF OHIO.

NOTICE TO INDORSERS THROUGH THE POST-OFFICE.

Thos. J. Cottle and R. H. Cottle vs. Joseph C. Thomas. Thomas Cottle and Richard Cottle were sued in the Common Pleas Court as indorsers upon a note. They defended on the ground of want of due notice. Judgment was rendered against them, and the case comes before this Court on a petition in error.

Judge Force announced the opinion. As to Thomas Cottle, we find he was not strictly an indorser, but was a guarantor, and liable as such. Richard Cottle was an indorser, residing in Cincinnati. The holder of the note also lived in Cincinnati, and attempted to notify Richard Cottle by addressing a notice of protest to him at Cincinnati without any other address, and dropping that note in the Cincinnati Post-office. Was that notice sufficient to charge him? Parsons, in his work on Bills and Notes, says: "The true test would then seem to be only the fact, whether the holder, and the party to whom notice is to be sent, reside in the same town or not." We think this statement of the law was not precise when it was written, and is not accurate now.

Originally, of course, it was necessary, in order to charge an indorser, to serve the notice actually upon him. When the post-office was established, to transmit letters from one city to another, transmission by this public means was held to be sufficient; but when there was no delivery within the city, a letter put into the Post-office by a resident of the city, addressed to another resident, was not transmitted by the mail, but was only received, and held on deposit until it should be called for. Such a deposit of a notice in the city Post-office was not, therefore, sufficient to charge an indorser living in the same city. Some years ago we had, in the United States, a partial city delivery of letters. The post-office did not undertake to deliver letters to the public generally at their homes, but letter-carriers were employed by the Postmaster to carry letters to the residences of such persons as requested such delivery as a matter of convenience. Where other practices obtained, the letter carrier was substantially the agent of the person who received the letter from him; and there a notice dropped in the city post-office, addressed to a person who was in the habit of receiving letters by such carrier, was held to be delivered to him and held to be sufficient notice. The case of Walters vs. Brown, 15 Md. 285, is a well considered case of that period. In London, however, the post-office undertakes, as a part of its regular business, to deliver letters to the public generally within the limits of the city, and there it has been held that a notice of protest dropped into the City Post-office for a person living in London is a sufficient notice. This rule under the law of the London Post-office as stated in the English books, is copied without qualification by Kent and Story; and in some American cases we find the statement that a notice dropped into the city mail, addressed to a person who lives within the limits of a letter-carrier's

delivery, is sufficient notice. For example: Remington vs. Harrington, 8 O., 507; Bank of Columbia vs. Lawrence, 1 Peters, 582. But these statements were mere general talk by the Judges, not having relation to the case in hand, nor applicable to the post-office system which then obtained.

Now, however, in the United States, the post-office undertakes as a part of its regular business to deliver letters to the public generally in the large cities. We have found no decisions as to the effect of this change upon the rule of diligence to charge indorsers. But the courts have taken occasion to qualify the old statement of the rule, and to intimate that when a case shall arise they will be ready to change the rule as to the effect of mailing notices of protes to an indorser living in the same city. The Supreme Courts of Massachusetts and Pennsylvania have always held strictly to the rule that the mailing of a notice to an indorser living in the same city was insufficient; but in Shelbourne Bank vs. Townie, 102 Massachusetts, 177, the Court now qualify the statement by saying, "in a city where there is not a general delivery at residence by the post-office;" and in Shoemaker vs. Mechanics' Bank, 58, p. 79, the Court says: "It seems that since the Government has undertaken to deliver letters generally at residences in cities, that a mailing of a protest would be sufficient between two parties living in the same city." But we find no decision giving us a rule, and we must deduce the rule from principle.

In London, where there is a city delivery by mail, letters are never dropped into the post-office addressed simply "London." Some more definite address is always added; and in Cincinnati, now that sundry neighboring villages and thinly inhabited districts have been annexed to the city, the mere address of "Cincinnati" on a letter might, in many cases, be insufficient to secure a prompt delivery.

We hold, therefore, that a notary in Cincinnati, to charge an Indorser living in the city by dropping his notice into the post-office, should give the letter some address sufficiently definite to secure a prompt delivery, whether by giving street and number, or a designation of the out-lying district wherein the indorser may live. If that is not done, it should be shown, in order to charge the indorser, that he is in the habit of receiving letters by the letter-carrier, and so that his residence or place of business is known to the carrier. If neither of these is done, it should be shown that the notary or holder could not, by the use of reasonable diligence, ascertain the residence or place of business of the indorser.

In the present case the notice was dropped into the City Post-office, addressed "Cincinnati," without any more definite address. There was no proof that the indorser was in the habit of receiving by the carrier letters so addressed, nor was there any proof that his residence, or place of business in the city, could not have been ascertained by reasonable diligence. Hence, the record does not show that due diligence was used to charge the indorser, Richard Cottle, with notice, and the judgment as to him must be reversed.

William Disney for plaintiff in error; Archer and McNeale, *contra*.

Hamilton County District Court.

AGREEMENT TO SELL PROPERTY ON WEEKLY PAYMENTS

Keber & Miller vs. W. I. Sanders. Judge Burnet delivered the opinion of the Court in this case, a proceeding in error to reverse a judgment of the Common Pleas, in an action of trover to recover the value of a mirror and pictures which the plaintiffs allege the defendant had converted to his own use, they being the owners of the property. The petition set out an agreement between Keber & Miller and one John Pierce, by which the latter was to hold for them, as their exclusive property, the articles in question, until he should have paid to them $135, which was to be paid in weekly installments, and that upon failure to perform the conditions for two weeks the property was to be delivered to Keber & Miller, and all money paid thereon was to be forfeited.

There were separate findings of fact and law by the Court below, in which it is charged there was error.

The findings were that Pierce took the mirror to his home at an agreed price, that he subsequently abandoned his family and left the State, and that his wife, to obtain sustenance for her family, sold the mirror to the defendant; that the agreement between Pierce and the plaintiffs was never filed as a chattel mortgage; that their interest was that of a mortgagee.

The agreement purports to be a bailment, an agreement for a future sale, with a delivery of possession merely to the proposed purchaser, and until he should have complied with the conditions there was to be no vesting of title in him. The express language of the agreement can not be misunderstood, and if construed strictly according to its terms, there can be no doubt the title remained in Keber and Miller. It was claimed, however, that the Court was not bound to the letter of the agreement, that they must look to the entire transaction to ascertain its true nature, and that in that view this instrument was in the nature of a mortgage. The Court could not regard it in that light. In ordinary language it would be termed a conditional sale, and strictly it was not to be considered even that; but it is a bailment of the property, and upon the performance of certain acts there was to be a sale.

The Court would hold, therefore, that this was a bailment, with a stipulation that the bailee may become the purchaser on performing certain conditions; that it is not a chattel mortgage reserving a lien; that the bailee acquired no title, and that the defendant although purchasing from him without knowledge of the rights of the plaintiffs, takes no title as against them.

Judgment of the Court below reversed.

H. M. Moos, for plaintiffs; C. H. Blackburn, *contra*.

SUPREME COURT OF OHIO.

TO APPEAR IN 22 VOL. O. S. REPORTS.

ATTACHMENT.

Bula Sturdevant vs. Harmon P. Tuttle. Error to the Common Pleas of Ashtabula County, reserved in the District Court.

WEST, J.—*Held:*

An attachment will lie in a civil action to recover unliquidated damages for assault and battery, under Section 191, of the code of civil procedure, as amended February 16, 1865, which provides, among other grounds, that such process may issue when the defendant has "fraudulently or criminally contracted the debt, or incurred the obligation on which suit is about to be or has been brought."

Judgment reversed and cause remanded.

TRUST—WITNESSES.

Wm. M. Hubbell *et al.* vs. Eliza Hubell *et al.* Error to the Superior Court of Cincinnati.

MCILVAINE, J.—*Held:*

1. A being seized of certain real estate, conveyed the same to B., his son by deed absolute on its face; B. afterward, by like deed, conveyed the same estate to C., who at the same time conveyed it to D., the wife of B. After the death of A., his widow and certain of his heirs brought an action against B. and his wife, D., and certain other of the heirs of A., the latter of whom, though identical in interest with the plaintiffs, declined to be joined with them as such. The object and prayer of the petition was to raise a trust on the deed from A. to B. in favor of the widow of A. for life, and the remainder to the heirs of A., and to compel a conveyance from D. in execution of the trust, and also to compel B. to account to the widow of A. for rents and profits. Pending the action, and after separate answers by B. and D. denying the trust and setting up the statute of frauds, D. died, and the action was revived against her heirs, who answered, claiming an absolute estate in the premises by inheritance from their mother. B. also filed a supplemental answer claiming an estate for life by the courtesy.

Held: That under the 313th section of the code as amended April 5, 1867, [S. and S. 556,] the plaintiffs (and the defendant, who was in interest with them) were incompetent as witnesses to testify against the heirs of D. to facts which occurred before the death of D.

2. When there are two parties, plaintiffs, or defendants, claiming several interests under the same title or alleged state of facts, and the adverse party

is a competent witness as against one of them, and incompetent, under the 313th section of the code, as against the other, and the case is one in which separate judgments may be rendered, the testimony of such party may be received in evidence, but can be used and considered only as against the party as to whom the witness was competent; and the Court should render such judgment or judgments in the case as would have been warranted by the evidence, in case there had been several actions—the evidence being considered in one action and not in the other.

3. A tenant by the courtesy is not such a representative of the tenant in fee or in such privity of estate with him, that a judgment or decree affecting the title of the former will conclusively bind the estate of the latter.

4. In an action to declare a trust and charge it upon the trust estate, the holders of the legal title and persons claiming an interest in the property are necessary parties; but a former trustee who has been divested of all title and interest therein is not a necessary party.

Judgments at General and Special Terms reversed, and cause remanded.

WORK—PRICE.

George Allison vs. Anton Horning. Reserved in the District Court of Summit County.

DAY, J.—*Held:*

In an action to recover the amount due on a contract for work, when the testimony is conflicting as to the price agreed upon for the work, it is competent to show the value of such work at the time the contract was made, as tending to shw what the agreed price was.

Judgment of the Common Pleas affirmed.

RAILROAD ACCIDENTS—EXPERTS.

The Cincinnati and Zanesville Railroad Company vs. Richard Smith. Error to the Court of Common Pleas of Fayette County. Reserved in the District Court.

WHITE, J.—*Held:*

1. The servants of a railroad company, in operating its trains, are bound to use ordinary care to avoid injury to domestic animals trespassing on the railroad.

2. Where such trespassing animals were killed by a train, if the servants of the company having the train in charge, by the exercise of ordinary care, and with due regard to their duties for the safety of the persons and property in their charge, could have seen such animals on the track in time to have saved them, it was their duty to have done so, and for their negligence in this respect, where the owner is not guilty of contributory negligence, the company will be liable.

3. A person skilled in the running of railroad trains may be asked, as an expert, upon an assumed state of fact which the evidence tended to prove, whether or not, in the case assumed, the brakemen were in their proper places.

Judgment affirmed.

Supreme Court of Ohio.

NUISANCE—SURFACE WATER.

John Tootle vs. Daniel Clifton. Error to the District Court of Ross County. WELCH, C. J.

1. The erection of an embankment upon one's own land, whereby the surface water on the adjoining land of another is prevented from flowing in its natural course, and caused to flow off in a different direction over the land of the latter, is a nuisance for which an action may be maintained without showing any actual damage, and for which nominal damages, at least, may be recovered.

2. Title by prescription may be acquired by twenty-one years' adverse enjoyment of an easement, and the period begins to run from the time the right of action accrues.

3. When the only issue in a cause is upon the truth of immaterial matter, it is not error in the Court to render judgment upon the pleadings, irrespective of the verdict of the jury.

Judgment affirmed.

PROMISSORY NOTE.

William P. Smith and others vs. Emeline McKinney, executrix, &c.

BY THE COURT.—*Held:*

1. A promissory note made on the 18th day of March, 1862, payable one year after date, "to be paid in gold or silver coin, if required," could not, after maturing, payment in coin being required, be discharged by the payment of its face in legal tender notes, under the act of Congress of February 25, 1862, making United States Treasury notes legal tender for the payment of debts. Phillips vs. Dugan, 21 O. St. R. Approved and followed.

2. The release of the maker by the payee, after maturity, from his obligation to pay such note in coin, is a sufficient consideration to support a new promise to pay the face of the note and fifty per cent. in addition, in legal tender notes, it appearing that the premium on gold at the time of making the new promise was more than fifty per cent. on legal tender notes.

Judgment affirmed.

CONSTRUCTION—SCHOOL LAW.

School District No. 2, Oxford Township, Butler County, vs. Lewis M. Dilmore. Motion for leave to file a petition in error.

PER CURIAM—

The provision in Section 7 of the School Law, passed March 14, 1864, (S. & S., 707,) that no person shall be "employed" as a teacher unless he has first obtained the certificate required by law, does not render invalid a contract for employment made with the teacher before he obtains the requisite certificate, provided he obtains it before entering upon the duties of his employment.

Section 7 of the act of March 14, 1853, (S. & C., 1,348,) forbidding the making of certain contracts by school directors, does not embrace or affect contracts

for the employment of teachers, and the latter description of contracts can not be avoided by the district on the ground of want or insufficiency of funds to pay the teacher.

INDICTMENT.

John Goodall vs. The State of Ohio. Motion for the allowance of a writ of error.

BY THE COURT:

Where an indictment charged the defendant with stealing a *silver* teapot and other named articles of *silver* ware, and the evidence on the trial showed that the articles stolen were *plated* ware, consisting of only one twenty-fifth part silver, and there was no finding of the Court, or evidence showing that the variance was material to the merits of the case, or prejudicial to the defendant, Held—That the variance was not fatal, and the defendant was properly convicted, there being a good legal description of the articles stolen after the false word "silver" is rejected.

Motion overruled.

WRITS OF ERROR.

James Bartlett and others vs. the State of Ohio. Motion for the allowance of a writ of error.

BY THE COURT:

This Court will not consider or grant applications for the allowance of writs of error in cases where the application can as well be made to the Common Pleas, unless in exceptional cases, where the special circumstances render the application here necessary.

Motion refused, on the ground that application can be made to the Common Pleas.

PETITION IN ERROR.

David Burke, jr., vs. Barnabas Jackson and others. Motion for leave to file petition in error.

BY THE COURT:

1. The 7th section of the act of March 24, 1864, (S. & S., 324) which gives to parties interested the right of appeal from the decision of the Township Trustees in locating drains, ditches, &c., by "the applicants giving written notice thereof to the clerk of such township, within five days after decision of said Trustees, and by filing with said clerk a bond," &c., is to be construed as requiring the bond to be filed within said period of five days, and unless it be so filed the appellate Court has no jurisdiction of the appeal.

2. Where the Court has no jurisdiction of a cause, it can render no judgment therein for costs, but costs of proceedings in error, to reverse a judgment rendered without jurisdiction, must be adjudged to the plaintiff in error.

Motion overruled.

SEAMAN'S WAGES—AVERAGE.

Jonathan H. Barker *et al.* vs. The Baltimore and Ohio Railroad Company. Error to the Superior Court of Cincinnati.

WEST, J.—*Held:* Expenses incurred for seaman's wages and subsistence are items of charges proper to be included in the adjustment of general average.

The cases of Perry vs. Ohio Ins. Co., 5 O. R., 305; Gazzam vs. The Cincinnatia Ins. Co., 6 O. R., 71; and Webb vs. The Protection Ins. Co., 6 O. R., 456, are overruled so far as they are in conflict with this decision. Judgments of the Superior Court reversed and causes remanded.

DEACONS—PLEADING.

John Devoes *et al.* Deacons and Trustees, &c., vs. William H. Gray *et al.* Error to the District Court of Highland County.

MCILVAINE, J.—*Held:*

1. The deacons of an unincorporated religious society, who are *ex-officio* agents for the management and control of its property and effects, can not be held personally liable on a contract made by other agents of the society, unless it be shown that the former participated in the appointment of the latter, or in some way ratified such contract.

2. In order to hold a member of such society responsible for its debts, it must be shown that such member in some way sanctioned or acquiesced in their creation.

3. Such society can not by its polity, or its rules and regulations, invest or transfer the title to property or impose personal obligations upon its members or officers, in a mode unauthorized by the general laws of the State.

4. If the charter or the powers and franchises granted by a foreign state to a corporation, whether located in this State, or elsewhere, become the foundation of an action in this State, they must be specially pleaded; and a pleading for that purpose which does not disclose the State by which, nor the terms in which, they were granted, is bad on demurrer.

5. The statute of January 3, 1872, S. and C. 305, entitled "An act securing to religious societies a perpetuity of title to lands," &c., is applicable only to cases where lands and tenements are conveyed to some person or persons, as trustee or trustees, for the use, &c.

6. If the plaintiff's petition be adjudged insufficient upon demurrer, and no leave to amend be asked for, it is not error to proceed to final judgment against the plaintiff, without granting leave to amend. Judgment of the District Court reversed and the judgment of the Common Pleas affirmed.

MANDAMUS.

Ohio *ex rel.* Charles Steinbeck *et al.* vs. The Treasurer of Liberty Township Delaware County. *Mandamus*, reserved in the District Court of Delaware County.

WHITE, J.—*Held:*

1. An order drawn by the Clerk of the Board of Education, under the statute, in favor of a third person or bearer, on the Township Treasurer, is not negotiable, and a purchaser takes such order subject to the same defenses that could be made against it in the hands of the payee.

2. The written acceptance of such order by the predecessor of the Township Treasurer, to whom it is presented for payment, imposes no greater obligation on the latter to pay the same than he would have been under had it been presented without such previous acceptance.

3. The Board of Education is made, by the statute, a body corporate, and the contracting of a debt by the Board, and the directing the issuing of an order to pay it, are corporate acts which can not be performed by the individual members of the Board acting separately.

Peremptory writ refused.

COMMON CARRIER—PRACTICE.

H. W. Brown & Co. vs. D. W. Mott & Brothers. Error to the Superior Court of Cincinnati.

WELCH, C J.

1. Where goods are described in the bill of lading as destined for a place beyond that to which the carrier undertakes to transport them, it is his duty, in the absence of contrary instruction or usage, to forward them by the usual conveyance toward their place of ultimate destination.

2. Where goods are marked with the name and place of residence of the owner, and are described in the bill of lading as so marked, and nothing further appears to indicate their destination, the residence of the owner will be held to be their ultimate place of destination.

3. A bill of lading for the transportation of goods from New York to Philadelphia, was executed in the following form: "Received of Davis, Rhodes & Co. (1) one case mdse. marked D. W. Mott & Bros., Memphis, Tenn., to be transported to Philadelphia, and there delivered to the Penn. R. R., all rail to Cincinnati, Ohio." Nothing further appeared in the bill, or upon the package, to indicate its destination. The goods were duly received at Cincinnati by the agents of the Pennsylvania Railroad Company, and by them forwarded in the usual course of conveyance to Memphis, but were lost on the voyage thither. In an action by the owner of the goods against the forwarding agents—Held: That *prima facie*, the ultimate destination of the goods was Memphis, and not Cincinnati, and that in the absence of evidence to the contrary, the agents were justified in forwarding them to Memphis, and were not liable to their owners for their loss.

4. In a proceeding without action under the 495th section of the Code, the submission, the agreed case, and the judgment of the Court thereupon, constitute the complete record, and it is not necessary, in order to a review and reversal of such judgment by proceeding in error, that there should be a motion for a new trial, or a bill of exceptions.

Judgment reversed.

KENTUCKY COURT OF APPEALS.

CRIMINAL LAW—EXTRA-JUDICIAL CONFESSIONS.

Cunningham vs. Commonwealth. From Hickman. Hardin, Chief Justice.

Pendergrass suddenly and mysteriously disappeared from his home in Hickman County, and Cunningham, in various conversations, made statements conducive to the belief that he had killed and robbed him and concealed certain articles of clothing and property taken from him, which, or some similar, were afterward found, as well as the dead body of a man shot through the head, but too much decayed for identification. Cunningham was indicted for the murder, and tried and convicted. On trial the jury were instructed "to take into consideration the confessions proved to have been made by the accused, together with all the other testimony given before them, and determine from all the evidence in the case as to the guilt or innocence of the accused," &c.

Held—This instruction is objectionable in assuming that confessions had been proved to have been made by the accused. Sec. 238, Crim. Code, provides that: "A confession of a defendant unless made in open Court will not warrant a conviction, unless accompanied with other proof that such an offense was commited."

This means that besides the proof of any confession a defendant may have made of his guilt, unless made in open Court, there must, to warrant a conviction, be other evidence conducing to prove him guilty of the offense alleged to have been committed by him, or in other words, to show that such an offense had been committed and not inconsistent with his guilt; and not merely some "other testimony" than that adduced to prove the confession, which might have no tendency whatever to establish the charge.

Generally the practice of attempting to remedy the error in a misleading instruction by giving another free of that objection is entitled to no favor. The second instruction did not cure the defect. It said that the jury could not find the accused guilty on the evidence of the confessions, unless "accompanied with other evidence in the case that Pendergrass *was in fact killed and murdered*;" thus virtually making the proof of confessions sufficient to warrant a conviction if aided by the bare act that Pendergrass was murdered, although independent of the proof of confessions, the evidence may have had no tendency to establish the guilt of the accused, but, on the contrary, may have operated to rebut the evidence of his confessions, and point to another as the perpetrator of the murder.

Judgment reversed.

TRADE MARKS.

Laird vs. J. B. Wilder & Co. From Louisville Chancery. Hardin, Chief Justice.

Laird, of New York, prepared and sold a cosmetic in small bottles, the

printed label having on it the bust of a female, and the words: "Laird's Bloom of Youth, or Liquid Pearl, for beautifying and preserving the complexion and skin, prepared by George W. Laird, No. 74 Fulton street, New York."

J. B. Wilder & Co. sold a cosmetic in similar bottles, with similar labels, except the words "Jos. Laird, No. 384 Broadway, New York," were substituted for "George W. Laird, No. 74 Fulton street, New York."

This was a suit brought by Laird to enjoin J. B. Wilder & Co. from using or imitating his trade-mark, to which they pleaded that he was himself deceiving the public and unworthy of the protection of a Court of Equity.

Held—The imitation of Laird's bottle and label was such that a Court of Equity would interpose for his protection, were his case otherwise meritorious. Relief is not withheld from him because of the apparent worthlessness of the article, or the misrepresentation accompanying it; but because it contains properties rendering its use injurious. His own witnesses admitted that all manufactured prior to and during 1867, contained carbonate of lead which is shown to be posionous, and a recent analysis of some sold in bottles with his label was found to contain the same. This suit was brought in June, 1868, and the presumption is that much of his stock of 1867 was still on the market. In putting his drug on the market he has deliberately perpetrated a fraud, which a Court of Equity should rebuke rather than uphold. He who asks equity must come with pure hands. (13 Howard's Pr. Rep., 385; 19 ib, 567; 8 Simon's Rep., 532.)

DIGEST OF RECENT DECISIONS.

STATE OF CALIFORNIA.

Action for medical services.—A physician employed to attend a patient is the best and the proper judge of the necessity of frequent visits, and in the absence of proof to the contrary, the court will presume that all the professional visits were deemed necessary and were properly made.—*Todd v. Meyers*, 358.

1. Measurement of distance on a navigable stream.—Where a certain distance is called for from a given point on a navigable stream to another point on the stream, the measurement must be made by its meanders, and not in a straight line.—*People v. Henderson*, 29.

2. Idem—On a public highway.—The same rule prevails when the distance is called for upon a traveled highway.—*Id.*

3. Boundary on a navigable stream.—When a tract of land is bounded upon a navigable stream, the distance upon the stream will be ascertained—in the absence of other controlling facts—by measuring in a straight line from the opposite boundaries.—*Id.*

1. **Corporation—Title no property.**—The legal title to the property of a mining corporation is vested in the corporation, and not in the stockholders as such.—*Wright v. Oroville, M. C.*, 20.

2. **Idem.—Powers of Trustees.**—The board of trustees of a corporation may control the corporate property within the limit which the law has assigned to the exercise of corporate authority.—*Id.*

3. **Idem.—Alienation of property.**—Corporate acts, by which corporate property is alienated, if done pursuant to the prescribed mode, and not being in themselves *ultra vires*, are, in point of mere law, binding upon the corporate title; and through that title equally binding upon the interest of the stockholders.—*Id.*

4 **Idem.—Equitable Jurisdiction.**—In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interest of the stockholders.—*Id.*

5. **Idem.—Corporate authority a trust.**—The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted with the view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest.—*Id.*

6. **Idem.**—A court of equity will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred.

7. **Idem.**—The court will interfere to relieve an injured stockholder from loss after such an act has been done, provided no superior equity has intervened, nor the rights of innocent third parties attached.—*Id.*

Book Notices.

THE HORACE HAWES WILL CASE. A report of the proceedings and arguments in the Probate Court of the City and County of San Francisco, California, on the trial to admit to probate the last will and testament of Horace Hawes, deceased. By J. C. BATES, one of the Counsel for contestant. Law Binding, octavo, 600 pages. A. L. Bancroft & Co., Publishers, San Francisco, California.

We find a statement in the preface to the effect that, "In preparing this "work for publication, care has been taken to let those who are anxious enough "to read or refer to the same, have just what it purports to be—the proceedings "as they actually took place at the trial."

On an examination of the book we find it consists principally of a report of

the testimony presented in contesting the will of Horace Hawes, together with copies of the contested will, the deeds of foundation of the Mont Eigle University, and Chamber of Industry of San Francisco, Cal., the charge given by the Court to the Jury, and a brief sketch of the life of the decendent.

Horace Hawes was a millionare lawyer of San Francisco, a man of considerable ability, who was at one time a member of the California Senate. Having risen from a very humble position in life by his indomitable energy, and remembering his early struggles, as a poor boy, for an education, he conceived the idea of founding an institution of learning in the neighborhood of San Francisco, alike accessible to poor and rich, and which should be of so high a character as to draw to it students from all countries, and make the name of its founder imperishable.

It appears from the testimony in the case, that his death was caused by consumption, under which disease, for a number of years previous to his decease, he had been suffering, and which, as claimed by the contestant, shattered his mind to such a degree as to render his will void, on the ground of insanity.

The report of the testimony comprises about five hundred pages, the principal portion being introduced by the contestant, to prove the insanity of the testator. Those portions of the work more particularly interesting to the legal profession, are: Firstly, the report of the testimony of the eight experts who were called to give their opinions in regard to the mental condition of the deceased in answer to a hypothetical question containing the important points of the case; secondly, the points and authorities as to the burden of proof in probate cases, where the insanity of the testator is questioned; and thirdly, the opinion of the Court (the Hon. Selden S. Wright) on that point. The arguments of Counsel, and the testimony of some of the witnesses, are worthy of notice, as containing passages only equaled by some to be found in the works of John Phœnix, and Mark Twain. For an illustration of this peculiarity, we find that one witness said "the opinion Mr. Hawes entertained of his own abilities were very extravagant," and that he (the witness) had seen a common grocery-store politician, who could fire tobacco juice fifteen feet without scattering, who felt that there was a singular unity between his mind and Edmund Burke's," and that Mr. Hawes' conceit of his own intellectual greatness was perhaps equal to that." Counsel in commenting on this testimony, broadened the simile by saying that "the witness illustrated it (the opinion held by the testator regarding his own greatness) by telling you that he had seen a pot-house politician who could spit seventeen feet and hit a cat in the eye, or words to that effect."

The book will prove of interest to those who desire to read a history of the latter portion of the life of Horace Hawes, written in the clear, strong language of witnesses under oath, in a Court of Justice, whose testimony was subjected to the close scrutiny of skillful and watchful attorneys. The work will receive a hearty welcome from members of the legal and medical profession, who are interested in the important subject of insanity.

THE

AMERICAN LAW RECORD.

VOL. 1. JANUARY, 1873. NO. 7.

SUPERIOR COURT OF CINCINNATI.

General Term, (October, 1872.)

R. W. LEE, PLAINTIFF,

vs.

THE CITIZENS' NATIONAL BANK OF PIQUA AND G. VOLNEY DORSEY, DEFENDANTS.

SYLLABUS.

A National Banking Association was organized under the Act of Congress of 1864. In its *articles of association*, it provided that the bank might make by-laws "to prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to it, either as principal debtor or otherwise, without the consent of the board." It subsequently adopted a by-law providing that "certificates of stock shall contain upon them *notice* of the provision that no transfer of stock shall be made without the consent of the board of directors, by any stockholder indebted to it." It then adopted another by-law providing that "certificates of stock signed by the president and cashier, may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only on the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank and cancelled, and new certificates issued."

It then issued certificates of stock, which did not state that they were not transferable by the holder while liable to the bank; but which stated that they were "transferable only on the books of the bank, in person or by attorney, on the surrender of such certificates," and, upon the backs thereof were printed blank forms of assignment and power of attorney, *under seal*, for the holders to assign their stock.

The cashier of such bank, who was also a director, became the owner of fifty shares of its stock, each share being for $100. He signed his name to the

blank form of assignment and power of attorney, and delivered the same to a business firm, of which he was a member, to raise money upon for the use of such firm. The firm hypothecated it and delivered it to bankers, who loaned money upon the faith of it, they having no knowledge of the owner's liability to the bank, and no notice of the requirements of its articles of association or by-laws. At the time of such pledging, the party to whom the certificate of stock was issued, was liable to his bank for a large sum of money. He *afterward*, being cashier and custodian of the bank's transfer books, transferred such stock on the books to the president of the bank, individually, but really in trust to secure the ban for his liabilities to it. The certificate was not returned, it being in the hands of his pledgees, and the transfer was made on the books without the knowledge of any one except such cashier; and the bank thereupon transferred this stock to him upon its books, and has since paid him the dividends upon the same.

The bankers to whom the stock had been pledged, not being repaid their loan in full, sued the pledger, said cashier, and recovered a judgment against him for between $1,500 and $1,600, upon which they caused execution to issue, and, to make their money, let the sheriff levy on the stock in their hands; they delivered it to him for the purpose, when it was further levied upon on two other executions, in favor of the debtor's other general creditors. It was sold, like personal property, at sheriff's sale, without the pledger's consent to either levy or sale, and another firm, knowing the terms upon which the pledgees held it, purchased it for $1,600, it being worth about par, which money they paid to the sheriff, who paid it over to the original pledgees, who retained it in satisfaction of their debt, and, with their consent, the sheriff delivered the stock certificate, accompanied by a bill of sale, to the purchasers. They sold and delivered it to the plaintiff, who was one of their firm at the time of their purchase.

The certificate of stock was duly presented by the purchasers, to the bank, and a transfer to the books duly demanded and refused, on the grounds aforesaid, and because the same stood transferred to the president of the bank as the owner, in person, thereof. The bank, being located in another county than that in which the suit was brought, voluntarily entered its appearance to the action in the county where suit was brought.

1. *Held:* That the Act of Congress authorizing the organization of the bank and providing for its government, the articles of association, the rules and by-laws of the bank, and the act of issuing and *form* of the stock certificate must all be construed together; and while, in such cases, the bank's equity and rights are superior to those of the mere general creditors of the stockholder, a person who receives such certificate from the holder, so indorsed in blank, in the usual course of business, for value, and without actual notice of the owner's liability to his bank, or of its rules and by-laws, acquires a right and property in such stock, paramount to the equities of the bank, and, upon return of the certificate, may compel such bank to transfer such stock to him. Such stock is not negotiable paper, in the legal sense of the term, but the assignee's right is derived from the fact that the bank itself has put it in the power of its stock-holder to raise money upon it, and must bear the loss as between it and an innocent purchaser or pledgee.

2. In this case, this stock has never been transferred, the acts of the cashier and bank attempting to do so, are void, the certificate of stock not having been returned as required by the rules of the bank, and that was notice to the bank of others' rights in the stock.

3. The owner of a certificate of stock, in the form of that in this case, may assign it and appoint an attorney, *in blank*, though it be an instrument under seal.

4. Such stock can not be levied upon and sold on execution, and such attempted levy and sale are void, without the levy and sale were assented to by the owner of the certificate.

5. The holder of such stock in pledge, as collateral security for its owner's debts, is an agent for the latter, which agency is coupled with an interest in the pledge, and, like a trustee, he must account to his *cestui que trust* for the surplus remaining after the satisfaction of his interest, which imposes on him the duty of guarding the interests of all parties as far as possible. He can only sell with the consent of the pledger, or after due notice to him, and if he do so, he will be liable for the sacrifice of others' interests.

6. Upon the facts of this case, the bankers holding the pledge, have, in equity, *assigned* their debt and pledge to the plaintiff, who stands in their stead.

7. He can, therefore, not claim title to the entire stock, but only *a lien* upon it for $1,600, and interest upon that sum from the date of paying the money to the sheriff therefor. He can not thus sacrifice $5,000 worth of stock for $1 600.

8. The 57th section of the National Banking Act, authorizing suits to be brought against such banks, in State Courts, only in the counties of their location, is a mere personal privilege, which they may waive; and if they enter their appearance to suits brought in other counties, they give to the State Courts full jurisdiction over them.

9. These legal questions arising, depend wholly upon the Constitution of the United States or Acts of Congress, and in no way involve any State Constitution or legislation; the decisions of the Supreme Court of the United States, settling the construction of the same, will be followed by State Courts, though they may have construed similar provisions in the constitution and statutes of their own States differently.

OPINION BY YAPLE J.

This case comes before us for decision upon the law and facts, by reservation from Special Term.

The plaintiff, in his petition, alleges that the Piqua Bank is organized under what is known as the National Banking Act, passed June 3, 1864, and located at Piqua, Miami County, Ohio; that on May 2, 1867, one Robert B. Moores, then a director and the cashier of the bank, became the owner and holder of fifty shares of its capital stock of one hundred dollars each, authenticated by the signature of the defendant, G. Volney Dorsey, as president, and Moores as cashier, with a blank form of indorsement and power of attorney, under seal, printed on the back thereof; that Robert B. Moores, the owner and holder of each certificate, afterwards signed his name to such blank forms of indorsement and power of attorney, and before the 4th day of November, 1867, delivered the same to a trading firm, of which he was a member, composed of himself and one Henry A. Perkins, for hypothecation for the benefit of such firm; that on the 4th day of November, the firm hypothecated the certificate by delivering it, so indorsed, as collateral security, to A. G. Burt & Co., bankers in the city of Cincinnati, in the usual course of business, for a loan of $3,000 to the firm, such stock having been, before that time, fully paid for to the bank by Moores; that part of such loan was repaid, and the

balance being due, Burt & Co., on the 27th day of November, 1869, brought suit in this court against such firm on its note given for such loan, and, at the February term, 1870, recovered a judgment against Robert B. Moores (Perkins having been discharged in bankruptcy) for $1,556.30, with interest from January 3, 1870, and $11.10 costs; that on April 21, 1870, Burt & Co. caused an execution to be issued on the judgment, which was levied upon such stock, together with two other executions in favor of general creditors of Moores, in their hands, by the sheriff, and which stock was, by that officer, sold at sheriff's sale, on May 5, 1870, to Adolph Wood & Co., for the sum of $1,600 (Moores not assenting to such levy and sale), and the certificate, with a bill of sale, delivered to them, and the money, after deducting costs, handed over to Burt & Co., who received the same; that on May 24, 1870, Adolph Wood & Co., such owners and holders, presented the certificate of stock and bill of sale to the bank, and demanded a transfer of the stock to them on the books of the bank, which demand the cashier refused to comply with, by order of the board of directors of the bank; that Wood & Co. then sold and transferred the certificate to the plaintiff, who is the holder and owner thereof, but that the bank refuses to recognize him as such, or to transfer the stock to him on its books, and that the defendant, G. Volney Dorsey, the president of the bank, claims to have some right or interest in the subject of the litigation.

The plaintiff then prays the court to establish, by judgment, his ownership of the stock, free from all claims or alleged liens upon the same by the defendants; that the bank be required to transfer the stock to him on its books, and to account to him for all dividends since May 5, 1870, and for alternative and general relief.

Upon the summons issued in the case, there is this indorsement:

"By virtue of express authority, we hereby enter the appear-
"ance of the defendants.

"MATTHEWS & RAMSEY."

The bank has not answered, but is represented in court by its attorneys.

Dorsey filed an answer and cross-petition alleging that he is the sole owner of the stock; that on the 16th day of January, 1868, he being the president of the bank, received from Robert B. Moores, then a director and the cashier of the bank, and to whom such certificate of stock had been issued, and in whose name it then stood upon the transfer books of the bank, a complete transfer of such stock, with certain other stock of Moores, to secure to the bank an indebtedness of said Moores

to it, amounting to $23,500; that he, Dorsey, continued to hold said stock, subject to a lien thereon of the bank for all Moores' indebtedness to it, until the 26th day of July, 1869, when he, Dorsey, gave his individual obligation to the bank for the then amount of Moores' indebtedness to it, amounting to $37,247.29, a large part of which he has since paid, and for the balance of which he is still bound to the bank; that on August 9, 1869, the bank consented to and did transfer to him all its rights in all such stock; that, by the rules and by-laws of the bank, such certificates of stock are transferable only on the books of the bank by the stockholder in person or by attorney, each certificate containing a printed notice to that effect, that it was provided by the 15th section of the by-laws of the bank, before, on, and ever since Nov. 4, 1867, among other things that the stock of the bank should be transferred only on the books of the company, and that no transfer should be made without the consent of the board of directors, by any stockholder who should be liable to the bank, either as principal, debtor, or otherwise, and that from May 9, 1867, until after November 4, 1867, when Moores' stock was pledged to Burt & Co., Moores was liable to the bank in the sum of $8,500, which remained unpaid and was part of the liability assumed by him, Dorsey. He then prays that the plaintiff may be compelled to deliver up the certificate of stock to him and that the same may be cancelled.

The following is a copy of the certificate of stock and the indorsement in blank by Moores.

"THE CITIZENS' NATIONAL BANK OF PIQUA, }
STATE OF OHIO. }

"No. 47.....50 Shares.

"This is to certify that Robert B. Moores is entitled to fifty "shares, of one hundred dollars each, of the capital stock of the "Citizens' National Bank of Piqua, transferable only on the "books of the bank, in person or by attorney, on the surrender "of this certificate, May 2, 1867. Piqua, O.

R. B. MOORES, Cashier. { STAMP. } G. VOLNEY DORSEY, Pres't."

ON THE BACK.

"For value received.....hereby sell, transfer, and assign to "..... .....the shares of stock within "mentioned, and authorize..... "to make the necessary transfer on the books of the bank.

"Witness my hand and seal this.....day of..... "186... "ROBERT B. MOORES."

"Witnessed by..... { SEAL. }

The by-law, fifteen, referred to in the defendants' answer, provided *that certificates of stock shall contain upon them notice* of the provision that no transfer of the stock shall be made without the consent of the board of directors by any indebted stockholders. *This*, this certificate does not contain. It was issued under another by-law, sixteen, which provided that "certificates of stock, signed by the President and Cashier, may "be issued to stockholders, and the certificate shall state upon "the face thereof, that the stock is transferable only upon the "books of the bank; and when stock is transferred, *the certifi-* "*cates thereof shall be returned to the bank* and cancelled, and "new certificates issued."

Article 6, of *the Articles of Association* of this bank, also provided, that it might make by-laws to *prohibit, if the Directors* "*shall so determine, the transfer of stock owned by any stockholder* "*who may be liable to it, either as principal debtor or otherwise,* "*without the consent of the Board.*"

From May till after November 4, 1867, Robert B. Moores was only liable to the bank in the sum of $6,500, with Dorsey, who is his father-in-law, as indorser, and in $2,000, for which he was indorser for a Mr. Moores, but during all that time he usually had a balance in his favor upon the books of between $6,000, and $7,000. He continued to be a director in and cashier of the bank for some time after January 16, 1868, when the transfer of this stock was made to Dorsey on the books of the bank. Moores being cashier, on January 16, 1868, without Dorsey's knowledge, transferred on the bank's books, "*all his right, title, and interest* to G. Volney Dorsey," to this and other shares of stock. The word 'trustee," after "Dorsey," was subsequently inserted on the advice of counsel, but whether in Moores' presence or with his consent does not expressly appear, though it is presumed it was. Of course, the certificate of stock was not present or returned; and it was, at the time, without the assent of the board of directors. Since August 9, 1870, when the bank transferred all its rights in the stock to him, Dorsey has received the dividends upon it, viz., 2½ per cent. semi-annually.

The evidence shows that, when this stock was sold by the sheriff to Wood & Co., May 5, 1870, such stock was worth par, or seventy-five per cent. of its face at forced sale. The bank having given up the stock and accepted Dorsey as its debtor, the question of right to be determined is between the plaintiff and Dorsey.

The 5th section of the act of 1864, providing for the organization of National Banks, requires articles of association, which "shall specify in general terms the object for which the associa- "tion is formed, and may contain *any other* provisions, not in- "consistent with the provisions of *this* act, which the association

"may see fit to adopt for the regulation of its business and the "conduct of its affairs." And section 8 provides that the "board "of directors shall also have power to define and regulate by by-"laws, not inconsistent with the provisions of *this* act, the man-"ner in which its stock shall be transferred," &c.

Section 12 enacts that the capital stock of such banks shall be divided into shares of one hundred dollars each, be deemed personal property, and transferable on the books of the association "*in such manner as may be prescribed in the by-laws or articles of association.*" But the 35th section forbids such bank from making "*any loan or discount on the security of the shares of its "own capital stock,*" and from becoming the purchaser or holder thereof, unless to prevent loss on a debt previously contracted in good faith, and then it must dispose of the same within six months.

The thirty-seventh section of the act of 1863 (12 *stat. at L.* 676) contained substantially the same provision as the present 35th section, 13 *stat. at L.* 110, but the 36th section of the act of 1863, repealed and supplied by the 12th section of the act of 1864, above mentioned, expressly provided that "no shareholder, "&c., shall have *power* to sell or transfer any share held in "his own right so long as he shall be liable, either as principal, "debtor, surety, or otherwise, to the association for any debt," &c. This restriction is repealed by the act of June 3, 1864, and entirely omitted from its provisions.

It will thus be observed, that under the act of 1863, such associations could not so draw their certificates of stock, or frame their articles of association or by-laws, as to permit a stockholder to vest a paramount equitable right of property in them, in innocent purchasers for value, while such stockholder should be indebted to the bank; but under the act of 1864 this may be done; so upon principle, the question in every case would be, whether the bank, in view of its articles of association, by-laws, and authorized form of certificates of stock, construed together, has or has not done so.

There have been adjudications upon these points under these acts. In the case of the *Bank* v. *Lanier*, 11 *Wal.* 369, the Supreme Court of the United States have held, that where a stockholder in such a bank agrees with it that if it will, *in future*, deposit with him its funds at a bank of his in another city, it shall have a lien on his stock to secure such deposits, so *thereafter* to be made, and he does not deposit such stock with the bank, but keeps it and assigns it for value, to an innocent purchaser, such purchaser can hold it as against such bank. This decision is clearly correct under the act of 1864, for a deposit is a loan, and the statute, section 35, forbids any loan upon the faith of, or pledge, or deposit of the stocks, by, or with such bank; and if

the bank can not receive, or hold its stock in pledge for future loans, it can acquire no lien therefor by mere agreement, not accompanied by delivery. This case carefully distinguishes between such cases and those in which such banks endeavor to secure themselves for the *previous* indebtedness of stockholders, incurred independently of the credit of their stock.

In *Knight* v. *Old National Bank*, &c., 4 *Law Times Rep.*, a stockholder, *previously* indebted to the bank, made an assignment of his stock, for the benefit of his creditors, and his assignee claimed it for creditors generally, against the bank, which, in its *articles of association*, forbid the valid transfer of such stock, while the stockholder should be indebted to the bank, and the Circuit Court of the United States, *Clifford, Justice*, held that such assignee could not recover against the bank. The vital facts of this case were wholly different from those in the *Bank* v. *Lanier*. The debt was one contracted in the past, and the plaintiff was the mere assignee for the benefit of creditors. No third person's rights intervened. An assignee in bankruptcy, or under insolvent laws, acquires only the rights of his assignor; any claim in his hands is subject to all the equities of every body, that it would have been in the hands of the debtor; hence, it was as if the debtor, himself, had insisted that the bank should transfer his stock to his creditors, generally. This rule of law is settled by the uniform and unbroken course of decisions both in England and in the United States.

Scott v. *Surman, Willes' Rep.* 400.
Exparte Newhall. 2 *Story's Rep.* 360.
Mitchell v. *Winslow, id.* 630.
Ontario Bank, v. *Mumford* 2 *Barb. Chy.* 596.
Strong v. *Clawson*, 5 *Gill (Ill. R.)* 346.
Warden, &c., v. *Guylord & Son* 14 *Wal.*

The confusion produced by this decision, and its apparent conflict with the *Bank* v. *Lanier*, simply arises from the fact that a wrong reason was given for the decision. for it is not at all in conflict with that case. In the *Bank of Utica* v. *Manufacturing Bank*, 20 N. Y. 501, the court held, that a bank could not pass such by-laws, because the act of its incorporation provided that it might do so in its *articles of association*, from which *Justice Clifford* inferred that a national bank may make such provision in its articles of association, but not by a mere independent by-law, though in the *Lanier* case, it was the illegality of the matter, covered by the by-law, that the court based the decision upon. In *Conklin* v. *Second National Bank of Oswego*, 45 N. Y. 655, which was a case of the assignment by a stockholder of his stock, for the benefit of creditors, though previously indebted to his bank, his stock certificate stating on its face that the stock "is not transferable until all liabilities of the stockholder to this bank are paid," the court held the transfer good, as

against the bank, on the assumed authority of the *Lanier* case, decided by the Supreme Court of the United States. With all due respect, we hold that the question in the *Lanier* case was a wholly different one, and that this New York case was wrongly decided.

The next inquiry is, what is the law where such a banking corporation has provided in its articles of association and by-laws, that no stockholder shall assign or transfer his stock while indebted to the bank, such liability having been created previously and not in any way upon the security of the stock itself, when the bank has adopted and issued to such stockholder a *form* of certificate entirely omitting reference to such restriction, and stating that no transfer is to be made on its books, except on *return of the certificate* in person or by attorney, with a blank form of assignment and power of attorney printed on the back of such certificate; and such stockholder shall have signed his name to the blank assignment and power of attorney, and delivered the certificate upon sale or pledge to a third party, for value, which party has no other knowledge than what the certificate contains? Does such stockholder acquire an equity paramount to that of the bank, created and reserved by its articles of association or by-laws? If so, it will add great value to such stock by enabling its original takers to avail themselves of it as a basis of credit in the business world, and prevent them from virtually sinking so much of their means in the bank, and will greatly add to the kinds and amount of property the commercial world may base business transactions upon. It would obviously facilitate the organization of such banks, for men would then take stock knowing that they did not withdraw so much of their property from furnishing them a basis of credit with the world. If this can not be done all moneys invested in National bank stock is rendered useless to the owners as a basis of credit, whether they are indebted to their banks or not. For this the world can not know. The case of the *Bank vs. Lanier* does decide that such a purchaser or pledgee from such stockholder of such certificate as was issued in this case, does acquire a paramount equity in the stock over the bank and as against its articles of association or by-laws. See 11 Wal. pp. 376, 377, 378.

But it is here contended that this case is not correctly decided, and we are asked to hold the law to be different. The National Banking Act has nothing to do with state constitutions or laws. It depends entirely upon an act of Congress, and we feel it our duty to follow the construction given to that act by the Supreme Court of the United States, as that and all Federal Courts do to the decisions of the highest state courts upon questions depending wholly upon state constitutions and laws.

Were our State Courts to hold this question differently, the Supreme Court of the United States would review and annul such decisions. This is not a case where states have construed their reserved powers one way and the United States another, and the question is presented which is the ultimate judge of such reserved powers. The argument of counsel for the defendant, Dorsey, could only be properly urged for consideration in that class of cases.

The symmetry of the law under so complex a system of government as we have, requires us to hold as we do in this class of cases.

But the decision of the Supreme Court of the United States but followed well-considered decisions of State Courts made upon the very point, and the correctness of which it expressly affirmed. We allude to cases growing out of the celebrated Schuyler frauds. See *N. Y. & N. H.R. Co.* v. *Shuyler*, 34 N. Y. R. p p. 83-4-5; *Bridgeport Bank* v *same*, 30 *Conn. R.* 231. These cases decide that such a certificate can only be transferred on the books of the corporation by a return of the same, and if not so returned by the stockholders, that is *notice* to the company that he has parted with it to somebody of the nature of whose rights it is bound to inquire before taking any action in the premises, and they clearly establish that, by such valid transfer, by the stockholder, without notice of his indebtedness to the bank, the stockholder's assignee acquires an equity paramount to the bank, also, that the stockholder's signature to the blank assignment and power of attorney, though under seal, is valid; and that such a certificate makes the stockholder *the agent* of the bank, and all whom it represents to sell or pledge and pass title to such stock certificates. *N. Y. & N. H R. Co.* 30 *Conn. R.* These two cases gave the Supreme Court of the United States abundant authority for the decision in the Lanier case.

It is said that *Conant* v. *Seneca County Bank*, 1 O. S. R. 298, decides the very reverse. Not at all. The 46th section of the Ohio Banking Law, 43 O. L. 43, is almost word for word the provision contained in section 36, of the act of Congress of 1863, restricting the stockholder's *power* of transfer, which is not in the act of 1864, under which these transactions arose. See 1 O. S. R. p. 303. *Pendergast* v *Bank of Stockton*.4 *Law T. Rep.* 247, decided by the Circuit Court of the United States for California, is not in point. In that case the person taking the stock from the stock-holder *had full knowledge of the rule adopted by the bank, and of the stockholder's indebtedness to it.* See p 252.

So we are clearly of the opinion that Burt & Co. acquired a lien paramount to the rights of this bank, by the transfer of this stock to them by Moores, to secure the money loaned to his

firm. One of two innocent parties must suffer, and the bank, by drawing the certificate in the form it did, put it in Moores' power to injure the public, and must bear the loss. The facts satisfy us that Moores intrusted it to his firm for that purpose, and took the benefit of the money raised upon its credit, and the New York and Connecticut cases above cited, as well as the case in 11 *Wallace's Rep.*, establish that the bank could not transfer this stock on its books, to any body, without its return, and that its non-production was notice to it of Burt & Co.'s rights. In fact, Moores himself, the bank's cashier, and the man who had pledged it, undertook to transfer it without the consent of the board of directors of the bank. For these reasons, the stock has never been validly transferred to Dorsey. The attempts to do so are void. When transferred, new certificates must issue, and if that could be done without the surrender of the old, double issue of stock would be the result.

It is next contended that the plaintiff has no title to this stock, because Burt & Co. surrendered it to the sheriff, who levied their execution upon it, under which it was sold, and that this relinquished their lien arising from the pledge to them, and plaintiff through the sheriff's sale acquired no other right to the stock than that of Robert B. Moores', to which the bank's rights were paramount. We admit that such right of the bank, under its articles of association and its by-laws, was paramount to the rights of the general creditors of Moores. *Whitaker & Sumner*, 20 Pick, 399, decided by C. J. Shaw, is a leading case relied upon. But, before it can be considered as in point, we must determine whether the sheriff's levy and sale upon this execution were of any validity—whether they were not absolutely void, and the stock, therefore, never in the hands of the law at all.

The stock could not be levied upon and sold upon execution.

Oystead v. *Shed*, 12 *Mass.* 510.
Denton v. *Livingston*, 9 *Johns*, 96.
Goodnow v. *Duffield*, *Wright's O. R.* 456,
Haven v. *Wentworth*, 2 *N. H. R.* 93.
Mc Clelland v. *Hubbard*, 2 *Blackford*, 361.
Johnson v. *Crawford*, 6 *id* 377.
Buford v. *Buford*, 1 *Bibb.* 306.
Thomas v. *Thomas*, 2 *A. R. Marsh*, 291.
Cosby v. *Ross*, 3 *J. J. Marsh*, 291.

So the levy and sale upon execution are void, it not appearing that Robert B. Moores assented thereto. Burt & Co. could only have sold it through the law by proceedings on creditor's bill; or by proceedings in aid of execution, if no third party's rights intervened, or upon attachment, under our statute, against Moores. Now, upon the evidence, we are satisfied that

Burt & Co. gave the certificate to the sheriff to make their money out of it by a sale; that when he had done so, they took the money from Wood & Co., who well knew the terms on which they held the stock, and assented to the transfer of the certificate to them, the sheriff being the agent of both parties, and this worked *an equitable assignment*—a thing well known to the law, and differing from subrogation, in the fact that the latter applies more properly to principal and surety—of all their interest in the stock, to wit, the amount of their judgment and costs, less the costs subsequent to the issuing of the execution to Wood & Co., who have transferred their right to plaintiff, a member of the firm of Wood & Co. The amount due Burt & Co. on the judgment, on May 5, 1870, when Wood & Co. paid the money, was $1,599 38, or, we may say, $1,600, the amount paid for the stock.

Burt & Co.'s possession of the stock was, and the plaintiff's is, the possession of an agent coupled with an interest. The stock could not be sacrificed by them while in their hands. In a proper way they could have realized their money from it; for the balance they would have stood as trustees for other interested parties. They could not sacrifice the stock without rendering themselves liable for a breach of their trust. They did not sell it as the law requires in the case of a pledge or collateral security.

See *Story on Agency*, sections 313, 489, 488, 496, and cases there cited. The plaintiff can only claim $1,600, with interest from May 5, 1870.

We shall, therefore, adjudge and decree that the defendant, Dorsey, pay to the plaintiff the sum of $1,600, with interest from May 5, 1870, upon the payment of which the plaintiff shall surrender to him this certificate of stock; and that the bank shall issue no certificate of stock to Dorsey or his assigns, in lieu of this certificate, for the amount included in this judgment, before Dorsey shall pay the same to the plaintiff, or allow dividends to him or them upon such amount. It seems that the 57th section of the Banking Act of 1864, only authorizes National banks to be sued in the State Courts in the counties or cities where located; but this, we hold, is a mere personal privilege which may be waived, as this bank has expressly done in this case.

Judgment will be entered accordingly, each party to pay his own costs.

Attorneys for the plaintiff, *Huston & Shunk.*

Attorneys for the defendants, *Matthews, Ramsey & Matthews.*

SUPREME COURT OF NEW HAMPSHIRE.

TO BE PUBLISHED IN VOL. 51. N. H. R.

GRAY V. JACKSON.

The defendants who were common carriers between P. and B., carried from P. to B. a parcel directed to R., a place beyond their route, and delivered it to the next carrier according to the usage of the business, and the parcel was lost beyond B. The Judge who tried the facts did not find an undertaking of the defendants for carriage beyond B., and thereupon gave a general verdic the defendants. *Held*, that there was no ground for setting aside the verddict.
When a contract is made by a common carrier in one state to transport g from that state into another, and the goods are lost, the rights of the pa are governed by the law of the state in which the loss happens.

Assumpsit, by Calvin Gray against the defendants as common carriers. It was alleged in the declaration that the defendants received of the plaintiff, at Portsmouth, N H., the sum of $41, to be carried from Portsmouth to Reading, Mass., and, there delivered to Nancy Thrasher. By agreement of parties the case was tried by the court, who found the following facts.

The defendants are expressmen running from Portsmouth to Boston. They receive, at Portsmouth, besides packages for Boston, packages for all parts of the country, and at the end of their route deliver them to other expressemen to be forwarded. There is no evidence that the defendants have any business connection or arrangement with other expressmen. July 11, 1865, the plaintiff delivered to the defendants, at Portsmouth, a package containing $41, directed to "Miss Nancy Thrasher, Reading, Mass.," a place not upon the defendants' route; and the plaintiff paid fifty cents as the entire expressage from Portsmouth to Reading. The defendants gave the plaintiff the following writing:

"Jackson & Co., Portsmouth and Boston Express. Portsmouth, July 11, 1865. $41.00. Received of Calvin Gray, package said to contain forty-one dollars, directed to Miss Nancy Thrasher, Reading, Mass., per Jackson & Co., Marden." The plaintiff knew that the defendants carried packages from Portsmouth to Boston, but did not know whether their line extended elsewhere or not. No notice was given him on this point by the defendants, except so far as such notice may have been given by the above writing and the other facts herein mentioned. When the package was delivered by the plaintiff to the defendants, the plaintiff understood that the defendants undertook to carry it to Reading, and there deliver it to Miss Thrasher. The defendants understood that they undertook to do nothing more than they afterwards did. There was no conversation on this matter at the time, but the court finds the understanding of each party to have been as above stated.

The defendants carried the package to Boston, gave it to the agent of the expressman whose rout was from Boston to Reading, paid him twenty-five cents, and took his receipt. The Reading expressman appropriated the money to his own use, and has since left this part of the country.

The defendants had no business connection with the express from Boston to Reading.

About four weeks after July 11th, an agent of Miss Thrasher, to whom the Reading expressman had admitted the receipt of the money, but refused to pay it over (virtually acknowledging that he had spent it), went with Miss Thrasher to the Boston office of the defendants, notified the defendants of the nonrece pt, and demanded the money. About two weeks later, the plaintiff notified the defendants, at their Portsmouth office, that the money had not been received.

The court found a verdict for the defendants, and the plaintiff moved for a new trial.

Minol, Tappan & Mugridge, for the plaintiff.

C. P. Sanborn, for the defendants.

DOE, J. "Whenever any subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him," says Holt, C. J., in Lane v. Cotton, 12 Mod. 472, 484, where he names inn-keepers and common carriers as engaged in public official duties. One who, in the language of Lord Holt, "has made profession of a public employment," or "exercises a public employment" (Coggs v. Bernard, 2 Ld. Raym. 917), is bound to serve the public while he remains, or professes to remain, in that employment. The obligation of a common carrier of goods is "to receive and carry goods according to his public profession." Johnson v. M. R. Co., 4 Exch. 367, 373.

The defendants have taken upon themselves the public office, trust, and duty of common carriers between Portsmouth and Boston, but not between Boston and Reading. They were under an obligation as common carriers to receive the plaintiff's parcel and carry it to Boston. That was their official duty. Assuming the office, they promise to perform its duties. This is common law. But it was no part of their official duty to carry the parcel to Reading, or to receive it coupled with a contract to carry it to Reading. And when the plaintiff accuses them of violating a contract to carry it to Reading, the plaintiff must prove the contract on which he relies. It is not proved by the official duty of their public employment, because that does not extend beyond Boston. A contract to carry the parcel

to Reading, must be a mutual understanding of the parties. It may be proved expressly, or by implication, by direct or circumstantial evidence, by writing or parol, by words or conduct, or usage. The understanding may be mutual, in contemplation of law, if the defendants are estopped to deny that, it is mutual.

In Hyde & A. v. T. N. Co., 5 T. R. 389 (decided in 1793), the defendants, a navigation company, carried cotton to Manchester, where it was put in a warehouse and burned the same night. In the bill, made out by the defendants and paid by the plaintiffs when the cotton was received by the defendants, was a charge for cartage, which was intended for the cartage to the defendants' warehouse in Manchester. Formerly the defendants employed their own carts, but had latterly given up this business, together with the profits derived from it, to their book-keeper; and the plaintiffs knew that the cartage was received for him. A verdict was found for the plaintiffs, and the defendants moved to set it aside. The only ground upon which the motion could be granted was, that there was no evidence to sustain the verdict. The only question for the court was, whether there was any evidence from which the jury could have found the fact that the defendants undertook as common carriers to cart the cotton to the plaintiffs' warehouse; and the decision was in favor of the plaintiffs. Mr. Justice Buller said: "It is like the case of an inn-keeper, who agrees with his head ostler that the latter shall supply the customers with post horses; in which case, if goods be lost, the inn-keeper is liable, because he holds himself out to the public as the responsible person." All the judges held that the charge for cartage showed that the defendants undertook to deliver the cotton at the plaintiffs' warehouse. Whether such an undertaking was shown by such a charge under the circumstances, was a question of fact which the jury had decided; and the court could decide nothing more than this—that the charge was evidence from which the jury might properly have found the undertaking. But the court, in accordance with the English custom of the judge giving his opinion on the weight of the evidence, spoke of the evidence, not as tending to prove, or competent to prove the fact, but as proving it.

Judge Redfield says, that in England, until a late period, the usage of inland common carriers was to employ their own porters to deliver parcels; that those who dealt with them acted upon the faith of their making a personal delivery; and that "Hyde v. Tr. and M. Nav. Co., 5 T. R. 387, is decided upon this ground, and upon the additional fact that the carriers charged for cartage to the house of the consignee, thus showing that they so understood the contract." F. & M. Bank v. C. T. Co., 23 Vt. 208, 209. In that view of the subject there are no legal

elements except the common doctrine of estoppel, and the general principle that a mutual understanding may be a contract. If the carrier and the consignor understand that the carrier undertakes to deliver a parcel at the town to which it is directed, or to the person to whom it is directed, or at his house or shop, the mutual understanding is the contract. The usage of making such delivery may be evidence tending to show the fact of an understanding that a particular parcel is to be delivered according to the usage. If the consignor had, and the carrier had not, such an understanding, the carrier's usage may be evidence tending to show the fact that he held himself out and practically represented himself as undertaking to do what he usually did; and if the consignor acted on the faith of such holding out and practical representation, the doctrine of estoppel may be applied. The carrier may be estopped to deny that he understood the contract to be what his conduct induced the consignor to understand it to be. And the usage of other carriers may tend to show the fact that the defendant, by carrying on their kind of business, held himself out as undertaking to carry goods according to the usage of his neighborhood; and an estoppel may be raised in that way.

In this view there is no law peculiar to this branch of the contract of a common carrier. There is no law in it, except the elementary and general principles applicable to all contracts, that a contract is a mutual understanding, and that a party may be estopped to deny that his understanding was such as he induced the other party to believe it to be. All the rest of the question whether by an implied contract a carrier undertook to carry goods beyond his route, is a question of fact to be determined upon the evidence by the tribunal authorized to try the questions of fact involved in the issue.

How can so plain a question of fact be changed into a question of law? In Muschamp v. L. & P. J. R. Co., 8 M. & W. 421 (decided in 1841, and everywhere accepted as the leading case on this subject), it was held to be a question of fact. A parcel directed to a place beyond the defendants' route, and carried by them through their route and forwarded, was afterward lost. Baron Rolfe "stated to the jury, in summing up, that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier." The jury found a verdict for the plaintiff, and the defendants moved "for a new trial, on the ground of misdirection."

"Lord Abinger, C. B.—The simple question in this case is, whether the learned judge misdirected the jury in telling them that if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they were liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. It is admitted by the defendants' counsel, that the defendants' contract to do something more with the parcel than merely to carry it to Preston: they say the engagement is to carry to Preston, and there to deliver it to an agent (of the plaintiff) who is to carry it further, who is afterward to be replaced by another, and so on until the end of the journey. * * * But if, as it is admitted on both sides, it is clear that something more was meant to be done by the defendants than carrying as far as Preston, is it not for the jury to say what is the contract, and *how much* more was undertaken to be done by them? Now, it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants; but other views of the case may be suggested quite as probable. * * * Is it not, then, a question for the jury to say what the nature of this contract was; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary? * * * Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, if the railway company refuse to supply him with the name of the new agent, they break their contract. It is true, that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with the name would entitle him to bring an action against *them*. But the question is, Why should the jury infer one of these contracts rather than the other? Which of the two is the most natural, the most usual, the most probable? * * The whole matter is, therefore, a question for the jury, to determine what the contract was on the evidence before them.

Gurney, B.—"I think there was no misdirection in this case, and that the jury might fairly infer the contract was such as was stated by the learned judge."

In this explicit manner the undertaking of the carrier to be responsible for the delivery of the parcel beyond his own route was held to be a pure question of fact, to be determined by the jury on the evidence. There was such an undertaking, if both

parties so understood it. Whether there was such an understanding, was plainly a question of fact, and no attempt was made to change it into a question of law. It was submitted to the jury by Baron Rolfe, and the only point decided by the court was, that it was a question of fact which must be submitted to the jury.

When Baron Rolfe told the jury that the evidence in the case was *prima facie* evidence of such an undertaking, by these words he held the undertaking to be a matter of fact to be proved by evidence. In saying that the evidence was *prima facie* evidence of the fact, he merely expressed his opinion of the weight of the evidence, in accordance with the general custom of English judges. State v. Hodge, 50 N. H. 519, 522, 525. In their practice, such opinions are given in various forms. Where we should say, "There is some evidence to be submitted to the jury," English judges often say, "The evidence proves," or "The weight of the evidence is," or "From the evidence the inference is," or "The presumption is," or "This is *prima facie* evidence," or "This evidence shifts the burden of proof," or "This evidence is sufficient to prove the fact unless it is rebutted by the other party." And when exception is taken to such statements, the point intended to be raised by and decided by the court is, not whether the judge may rightfully give the jury his opinion of the evidence in such forms (that is taken for granted), but whether there is any evidence for him to give his opinion of, and for the jury to give their verdict upon. Muscamp v. L. & P. J. R. Co. is an instance of this practice. The defendants contended that the evidence did not tend to prove an undertaking of the defendants to carry the parcel beyond their own route, but that it tended to prove a different undertaking, and that there was misdirection in submitting the question to the jury instead of directing a verdict for the defendants, or ordering a nonsuit. If the defendants had admitted that there was evidence from which the jury might find an undertaking of the defendants to carry the parcel beyond their own route, and had contended that there was misdirection in the judge giving the jury his own opinion of the *prima facie* weight of the evidence, their first difficulty would have been to convince the court that they were serious in raising an objection so apparently preposterous in Westminster Hall.

The opinions of English judges on the weight of the evidence being constantly given in such expressions as "From this evidence the inference [or presumption] is," or "This is *prima facie* evidence," or other equivalent phrases, these expressions, having been used for ages in the trial of cases by jury, became the

common judicial language used in delivering judgment on motions for new trials, as well as summing up to the jury. On the motion for a new trial, in Muschamp v. L. & P. J. R. Co., Lord Abinger, delivering judgment, said the undertaking alleged by the plaintiff "is the most likely contract under the circumstances." In saying this he no more undertook to state a rule of law than Mr. Justice Bailey did when he told the jury, in King v. Diggles (50 N. H. 520), that "it was not very likely that an old man would sell his spectacles." Lord Abinger also incidentally remarked: "In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which, *prima facie*, must be made, of the defendants having undertaken to carry the goods the whole way." Giving his opinion of the weight of the evidence, he declared the undertaking alleged by the plaintiff to be "the most likely contract under the circumstances;" and he drew the inference of fact that "the most likely contract" was, *prima facie*, the contract which the parties intended to make, and by a mutual understanding did make. All this he expressly held to be matter of fact, and not matter of law. "The whole matter," says he, "is therefore a question for the jury, to determine what the contract was on the evidence before them."

But the decision in that case has often been misunderstood. It has been erroneously supposed that the opinions of Rolfe and Abinger, on the *prima facie* weight of the evidence, were laid down as law. Through that error, the decision has been taken as the establishment of a peculiar legal principle fixing the liability of common carriers beyond their own routes, although it was held, with remarkable clearness and emphasis, that the whole matter was a question of fact for the jury. By such a mistake, and others of a similar kind, a plain question of fact may inadvertently be changed into a question of law.

The mistake in regard to the doctrine of Muschamp's Case, on the point of *prima facie* evidence, was promoted, and another mistake was disseminated, by the reporters who made the head note of the case, by adding to a summary of the evidence this unfortunate statement: "*Held*, that the Lancaster and Preston Railway Company were liable for the loss." If they had said, "*Held*, by the jury, that the company were liable; *Held*, by the court, that there was evidence competent to be submitted to the jury," they would have made a correct and useful statement of the case. In Angell on Carriers, sec. 95, it is said that in Muschamp's Case "it was held that the company were liable for the loss," from which the reader would understand that it was so held by the court.

It has been by no means an unusual thing for fact to be turned into law by the English practice of the judge giving the

jury his opinion of the evidence. State v. Pike, 49 N. H. 438; Lisbon v. Lyman, 49 N. H. 572; State v. Hodge, 50 N. H. 521. If the decision in Muschamp's Case had always been carefully read with a full comprehension of that practice, and a clear perception of the distinction between law and fact which that practice tends to confound, the liability of carriers beyond their own routes would have avoided all the darkness, confusion, and conflict in which it has been involved. The simple solution of all the difficulties that have arisen on this subject is, not to hold fact to be law, and not to mistake the opinions of judges on the weight of evidence for opinions on principles of law.

The perplexity of some American authorities, growing out of a misapprehension of Muschamp's Case, makes it necessary, in examining all the authorities, English and American, to observe critically how the question arose in each particular case, whether it was submitted to the jury or any other tribunal as a question of fact, whether the real doctrine of Muschamp's Case was understood, whether the attention of the court was called to the distinction between law and fact, and whether a single case can be found in which the court, having their attention expressly and directly called to the distinction, or having the distinction clearly in mind, have held so plain a question of fact to be a question of law.

In Watson v. A. N. & B. R. Co., 15 Jur. 448, S. C. 3 Eng. L. & Eq. 497 (decided in 1851), the defendants, by their station master Chevins, received goods directed to Cardiff, a place beyond their line, which extended only as far as Nottingham. The plaintiff claimed damages for detention of the goods at Bristol, a place beyond the defendants' line, and delay in their arrival at Cardiff. The case was tried by the judge of the county court (without a jury), who awarded damages to the plaintiff. "The company now appealed against the decision, on two grounds: first, that they were not liable for the carriage beyond Nottingham." Opinions were delivered by Justices Patteson and Erle. The judge of the county court had found upon the evidence an undertaking of the defendants to carry the goods beyond their line; and there is nothing to show that he did not find the undertaking as a fact. Patterson, J., commenced his opinion by saying: "We must take this case as it is stated, although we do not quite see what question is submitted to us." The question of the defendants' undertaking for carriage beyond their line being a question of fact, as held in Muschamp's case, and the judge of the county court having decided that question as he had authority to do, and incompetency of evidence not being stated as a ground of appeal, it is not singular that the court were not quite able to see what question of law was submitted

to them. Mr Justice Patteson further said: "If carriers receive a package to carry to a particular place, whether they themselves carry it all the way or not, they must be said to have the conveying of it to the end of the journey." That is a proposition about which there never was any doubt. Receiving "a package to carry to a particular place," means receiving it with an undertaking to carry it to that place; and a carrier, like other contractors, is bound to perform his undertaking. On which question Mr. Justice Patteson said;" Chevins appears to have been the agent of the defendants; he receives the parcel to carry it to Cardiff, and makes out an invoice which the defendants have refused to produce. Now putting these circumstances together, there is abundant evidence that they contracted to carry the package to Cardiff." Mr. Justice Erle said: "The first question is whether there is any evidence of the defendants having contracted;" and he expressed his opinion of the weight of the evidence in the usual English manner. This case is a mere confirmation of the doctrine of Muschamp's case, that the question of a carrier's undertaking to carry beyond his route is a question of fact, and the question whether there is any evidence tending to show such an undertaking is a question of law

In consequence of carriers being liable to be held by juries on circumstantial evidence to have undertaken to carry beyond their routes, as in Muschamp's case, and apparently in consequence of the inattention of carriers being called by that case to this liability, some of them took the precaution to insert in their waybills, bills of lading, or receipt-notes, notices, conditions, or stipulations, intended to protect them against such liability. And in Fowles v. G. W. R. Co., 7 Exch. 699 (decided in 1872), it was held, upon a receipt-note signed by the plaintiff's agent and construed by the court as a written contract, that the defendants had not undertaken to carry beyond their route.

In Scothorn v. S. S. R. Co. 8 Exch. 341 (decided in 1853), the defendants received, at the G. B. Station, packages directed to E. I. Docks, London, and received the freight for the entire distance. By their practice, all goods received by them at the G. B. Station, and directed to London, were carried on their own line as far as Birmingham, and from thence forward to London by the L & N. W R. Co. The jury found that a clerk of the latter company had authority from the defendants to receive a countermand, which the plaintiff gave him, changing the direction of the packages to another point in London. The defendants' counsel seem to have been so well assured that the jury would find an undertaking to carry beyond their route, as the jury found in Muschamp's case, that they did not make any question on that point, but merely claimed that the clerk was not the defendants' agent to receive the countermand. Alder-

son, B., said "There can be no doubt that the defendants made a contract to carry the plaintiff's goods the whole distance to London for certain reward for the entire journey; and there is also no doubt that they would have been liable for the loss through their negligence in carrying during any part of that journey. Then the question arises, what was the contract between the parties. It really amounts to no more than a question of fact, and there is abundant evidence of a contract to delivered in the declaration, according to the plaintiff's directions, in London. In saying "There can be no doubt that the defendants made a contract to carry the plaintiff's goods the whole distance to London," he expressed a very strong opinion on the weight of the circumstantial evidence on a question which the defendants did not raise. They did not raise it, probably because they knew what the verdict would be upon it, even if the jury were not aided by the opinion of the court on the weight of the evidence, and because they knew what the opinion of the court was on the weight of the evidence in such cases, and because they knew that that opinion would be given to the jury if they raised the question. It was manifestly useless for the defendants to raise the question when the inclination of the jury against them would be so strongly reinforced by the opinion of the court on the weight of the evidence.

There is certainly nothing in this case in conflict with Muschamp's case; but the latter is confirmed by the question and answer of Baron Alderson, "What was the contract between the parties? It really amounts to no more than a question of fact."

In Collins v. Bristol and Exeter Railway Co., 11 Exch. 790 (decided in February, 1856), the Great Western Railway Co., who were carriers from Bath to Bristol, received from the plaintiff a van-load of furniture to be conveyed to Torquay, a place beyond their line; and the plaintiff signed a receipt-note which contained a stipulation that the Great Western Railway Co. were not to be responsible for loss or damage arising from fire, and a stipulation that they were not to be responsible for any loss, damage, or detention that might happen beyond the limits of their railway. The furniture was burned in the possession of the defendants, who were the next carriers beyond the Great Western Co., on the line toward Torquay. It was agreed at the trial that no advantage should be taken as to the action not having been brought against the proper carrier. The question was, whether any of the carriers on the entire line were responsible for the loss. The jury found there was no negligence on the part of the defendants, and the judge directed a verdict for the

plaintiff. It was held by the Court of Exchequer (Alderson, B., delivering the opinion), that the contract for transportation from Bath to Torquay, was one contract made by the plaintiff with the Great Western Co. alone; that the company contracted in express terms upon the face of the receipt-note to carry the goods from Bath to Torquay; that the stipulation as to fire protected them against loss from fire during the entire journey; that no action was maintainable against any of the companies; and that there should be a nonsuit. All this was a mere construction of the receipt-note held to be a written contract, and the decision is not authority on the question whether the finding, by inference and implication from circumstantial evidence, of an undertaking of a carrier to carry beyond his own route, is a matter of law or a matter of fact.

In November, 1856, Collin's case was again decided on appeal in the Exchequer Chamber. 1 H. & N. 517. It was there held that the true construction of the writing signed by the plaintiff was, that the Great Western Co. did not undertake to carry the goods to Torquay; that they were not to be responsible beyond their own railway; and that the stipulation as to loss by fire protected them alone—and the judgment of the Court of Exchequer was reversed. This decision, like the one reversed by it, being a mere construction given by the court to a paper held to be an express written contract, is not authority on the question whether the finding an undertaking by inference and implication from circumstantial evidence is a matter of law or a matter of fact.

In 1859, Collin's case went to the House of Lords on appeal The judges were summoned, and asked whether the defendant were liable. Byles, Crompton, and Wightman answered in the affirmative, Watson and Martin in the negative, and Williams replied that there was evidence to go to the jury on the question. Byles, J., said: "There was but one signed document between the plaintiff below, the consignor, and the Great Western Railway Company, but that comprehends two contracts" Watson B., said: "I think there never was any contract with the defendants, but only one with the Great Western Railway Company." All this turns on the receipt-note, and the 10th condition indorsed thereon. * * In the first case on this subject, Muschamp v. The Lancaster Railway Company, Rolfe, B., left it to the jury, as a matter of fact, whether, where goods were carried over continuous lines of railway belonging to several companies, there was a separate contract with each company, or one contract with the company of the first railway who received the goods; and it was found by the jury, and upheld by the court, to be one contract with the company who received the goods." Crompton, J., said: "This case appears to me to de-

pend on the construction which is to be put upon the contract of carriage signed by the plaintiff below when he delivered the goods in question to the Great Western Railway Company. * * * The carrier in these cases is not bound to undertake to carry goods beyond his own line of railway; it must depend entirely on the contract whether he undertakes any duty after the goods have arrived at the place beyond which he does not carry. The contract in this case appears to me to be of this kind: the Great Western Railway Company being under no obligation in point of law to receive goods to be carried beyond their own line, say to the plaintiff,—we will carry on the terms set forth in receipt-note; and to these the plaintiff agrees." Martin, B., said; "The question mainly, although not entirely, depends upon the receipt-note; and in my opinion that note, with the facts, proves, not the contract which the plaintiff is bound to establish, but a very different one, viz., a contract by the Great Western Railway Company to carry the goods from Bath to Torquay. * * * I give my opinion on the question proposed by your Lordships—not on the question whether, on the evidence at the trial, there was a case to go to the jury." Williams, J., said: "I understand the question proposed by your Lordships to be, in effect, whether there was any evidence to go to the jury that the defendants were liable. * * * To the question so understood, I reply in the affirmative."

The case was decided by Lords Chelmsford, Cranworth, Wensleydale, and Kingsdown. Chelmsford, Lord Chancellor, said: "If the true meaning of the 10th condition be what I have stated, then there is an express contract with the Great Western Railway Company for the conveyance of the goods from Bath to Torquay. * * * I think, therefore, that the contract was entire, was for the whole journey from Bath to Torquay, and was made with the Great Western Railway Company alone. * * * I may add, that my Lord Brougham, who heard the whole argument, entirely agrees in this opinion." Lord Cranworth said: "The clear import of the receipt-note, taken by itself, is, that the company received the goods of Collins under an engagement to convey them to Torquay." Lord Wensleydale said: "The contract on which this case depends is so ill-penned that it is not surprising those who have to construe it should form different opinions upon its meaning. * * * On the whole, although I have felt considerable doubt in the course of the proceedings, I think the minority of the judges, who have given their opinions to your Lordships, are right." Lord Kingsdown said: "If the question was, as one or two of the judges in their opinions seem to consider, whether the case having been properly left to the jury, there was evidence on which the jurors might find the verdict complained of, I should

have had great difficulty in saying there was not. But the case depends on the construction to be put on a written contract; and as to that, although not without some hesitation, I acquiesce in the view taken of it by my noble and learned friends." And the judgment of the Court of Exchequer Chamber was reversed. This decision, like the former ones in the same case, is a mere construction of a paper held to be an express contract in writing; but there is much in the opinions of the judges and lords to know that the question whether the finding an undertaking by inference and implication from circumstantial evidence was regarded as a question of fact to be decided by the jury.

In Wilby v. W. C. R. Co., 2 H. & N. 703 (decided in 1858), the defendants, whose railway extended from Panzance to the Truro, received at Panzance goods addressed to a person at Wolverhampton, "per first steamer for Hayle." The defendants safely carried the goods to Hayle, and delivered them to a steamer. The goods were damaged while in the possession of some carriers beyond the defendants' route. The case was submitted to the court upon an agreed statement of facts, the "court being at liberty to draw any inference of fact which a jury might properly draw."

Pollock, C. B. The "court to be at liberty to draw the same inference as a jury, we entertain no doubt as to what conclusion we ought to draw; though I should have been better satisfied if it had fallen to the province of a jury. However, we must decide a question of fact, viz., whether there was evidence for a jury that the defendants undertook to carry the parcel the whole distance from Panzance to Wolverhampton, or whether they only undertook to carry it from Panzance to Hayle, and there place it on board of a steam-packet, when their responsibility would end. * * * In this case, if I had been on the jury, I should have had no hesitation in finding that the defendants undertook to carry the parcel from Penzance to Wolverhampton." Watson, B.—I am of the same opinion. This is rather a question of fact than of law, and as to the fact I entertain no doubt. * * In Muschamp v. The Lancaster and Preston Railway Company, 8 M. & W. 421, the question was properly left to the jury. * * It is conceded that Muschamp v. The Lancaster and Preston Railway Company was well decided; but it is said that this case is distinguishable, because for a certain distance the sea intervenes * * There is nothing unreasonable, so as to lead to the conclusion that the company did not contract to carry by sea." Channell, B., said, "I should have been more satisfied if the question had been submitted to a jury; but since we have to decide, I think that the defendants undertook to carry the whole distance. With respect to the argument that there was a special direction

that the parcel should be sent by steamer from Hayle, that circumstance does not, in my opinion, alter the case. The question still is, whether the defendants' liability was that of common carriers. If they did not like to carry by steamer, as directed, they were at liberty to reject the parcel; but they did not do so. As to the old objection that the carriage by sea was *ultra vires*, I do not at present see any distinction between carrying by sea and carrying on the line of another person." And judgment was given for the plaintiff.

In Mytton v. Midland Railway Company, 4 H. & N. 615 (decided in 1859), the South Wales Railway Co. were carriers from Newport to a point from which the Great Western Railway Co. were carriers from Gloucester to Birmingham. The plaintiff bought of the South Wales Co. at Newport a through ticket from Birmingham, and was carried over the three lines, but his baggage was lost by the defendants. By agreement of parties a verdict was entered for the plaintiff for £56, subject to a case in which the evidence was stated. Martin, B., delivering the evidence of the court, said, "Upon these facts the only question is whether there was any contract between the plaintiff and the Midland Railway Company, or whether the contract was not an entire contract with the South Wales Railway Company to convey the plaintiff the whole distance from Newport to Birmingham. We are of opinion that there was but one contract, and that that contract was with the South Wales Railway Company, and not with the Midland Railway Company. There was one sum paid and one ticket given for the entire journey, and there was no evidence whatever of any privity of the Midland Railway Company to that contract, except that, by arrangement with the South Wales Railway Company, they conveyed on their line passengers booked from Newport to Birmingham. We think that the principle of the Muschamp v. the Preston and Lancaster Railway Company applies to this case; and, as there was no contract with the Midland Railway Company, the plaintiff fails in this action, and the defendants are entitled to our judgment." And judgment was rendered for the defendants. The parties having referred the evidence to the court, the court found, upon the evidence, that the first carrier undertook to carry the plaintiff to Birmingham. The court declared that they followed Muschamp's case, in which the question was held to be and decided as a question of fact. About the same time, Watson, B., one of the judges who decided this case, giving his opinion in Collin's case to the House of Lords, particularly referred to Muschamp's case, and to the question being there left "to the jury as a matter of fact." And the year before the decision of Mytton's case, three of the judges who de-

cided it—Pollock, Watson, and Channel—delivering their opinions in Wilby's case, had asserted the question to be one of fact, and had decided it as such, no member of the court expressing any dissent or doubt. If the court had intended in Mytton's case to overturn their own decision made the year before in Wilby's case—if they had intended to hold that to be law in 1859, which they had unanimously and explicitly held to be fact in 1858,—they would have avowed such a design, or have manifested it in an unmistakable manner. Mytton's case, therefore, must be classed with the cases in which the question of a carrier's undertaking to carry beyond his own route has been decided as a question of fact.

In Coxon v. Great Western Railway Co., 5 H. & N. 274 (decided in 1860), the court held that, by a document construed by the court as a written contract, the first carrier undertook to carry beyond his own route.

Great Western Railway Co. v. Blake, 7 H. & N. 987 (1862), was tried before Martin, B., in 1860, when the following facts appeared. The defendants (the Great Western Railway Co.) contracted with passengers to carry them from Paddington to Milford, over their own railway from Paddington to Grange Court, and thence over the railway of S. Wales R. Co. to Milford. There was an arrangement between the two companies under which the two lines were worked. and the fares paid by passengers apportioned between them. The plaintiff (Blake) purchased the usual ticket from the defendants, and paid his fare, and became a passenger to be conveyed by the defendants from Paddington to Milford, without any change of cars. He was injured on the South Wales line by a collision with an engine left on that line by the servants of the South Wales Railway Company. There was no negligence on the part of the driver of the train in which the plaintiff was carried. "The learned judge told the jury that the circumstance that the engine was left upon the line by the servants of the South Wales Railway Company, and not by the servants of the defendants, did not relieve the defendants from their legal liability, but that they were by law responsible for such negligent and improper act; whereupon the jury found a verdict for the plaintiff." The defendants, in pleading, denied that the plaintiff was "a passenger to be by the defendants safely or securely carried or conveyed on the said journey in the declaration mentioned." But they did not deny that they contracted to carry the plaintiff over the South Wales line to Milford. They probably knew that the jury, aided by the opinion of the court on the weight of the evidence, would find they did so contract. But they claimed that they were not responsible for the acts of the servants of the South Wales Railway Co., over whom they had no control. The Court

of Exchequer Chamber held that, having contracted to carry plaintiff to Milford over the line of another company, their responsibility was the same as if they had contracted to carry him all the way on a line of their own.

In Weber v. Great Western Railway Co, 3 H. & Co. *771 (1865), Blackburn, J., left to the jury the question whether the defendants contracted with the plaintiff to convey his goods beyond their line, and the jury found for the plaintiff. During the argument of the defendants' motion for a new trial in the Court of Exchequer, Bramwell, B., said: "The question is, whether there was evidence for the jury of a contract with the Great Western Railway Company to carry the whole distance from Worcester to Chester." Pollock, C. B., delivering the opinion of the court, said: "I am of opinion with the rest of the court, that there was evidence for the jury of one contract only, and not two contracts. The jury have so found, and we think there was evidence to warrant their finding."

These are the principal English cases usually cited on the question of a carrier's liability beyond his own route. They show that, in England, when there is no paper to be construed by the court as a contract in writing—when the undertaking of the carrier to carry beyond his own route is to be inferred or implied from circumstantial evidence—the question is one of fact. They also show that, upon the evidence usually introduced on that question of fact, the jury and the court habitually arrive at the same conclusion. When a carrier has made no stipulation and given no notice that he would not carry or be responsible beyond his own route, he is found, as a matter of fact, to have undertaken to carry to their destination, goods directed to a place beyond his own route. Under peculiar circumstances, or in cases of remote, unfrequented, unexplored, or inaccessible regions, a different undertaking would probably be found, and additional precedents made, demonstrating still more clearly the nature of the question as one of fact. But, in ordinary cases, the first carrier's undertaking being uniformly found to extend to the point of destination on any continuous line of transportation, his liability is practically the same as if it were fixed by a rule of law. And with a tendency to allow settled fact to grow into law, and in the absence of a universal habit of critically and inflexibly preserving the distinction between law and fact, it is not unlikely that the finding of the jury, recorded as the head note in Muschamp's case, will eventually be regarded as the statement of a principle of English law.

In Keys v. Railways & a., 8 Irish Com. L. 167 (1858), it was held that there was evidence competent to be submitted to the jury on the question whether carriers, severally owning distinct parts of a line, contracted jointly to carry the plaintiff and his

luggage over the entire line. Monahan, C. J., delivering the opinion, said that Muschamp's case "decided the proposition, that where one railway company sells a through ticket, and takes a parcel directed to a person far beyond the limits of its own line, the jury *may* find the existence of a contract by them to carry beyond their own line." After commenting on Scothorn's case, the same judge says of Wilby's case and other cases: "It is to be observed that, in this and other cases, no judge has decided the question of liability at all. They only decided that in each of those cases there was evidence to go to the jury of a contract for the entire journey by the company who sold the ticket; and that the jury and not the court were to say whether such contract was in fact entered into."

The case was confirmed in Hays v. S. W. R. Co., 9 Irish Com. L 474 (1859), where it was also held that by the true construction of a certain written contract between two carriers, one of them was the agent of the other.

These authorities show that the English cases are rightly understood in Ireland.

In Perkins v. P. S. & P. R. Co., 47 Me. 573 (decided in 1859), the defendants admitted themselves to be carriers from Portland to Boston. Their station agent at Biddeford signed a written contract purporting to bind them by an express promise to deliver the plaintiff's goods in Bloomington, Ill. The only question was the question of fact, whether the agent had authority to make such a contract. By agreement of parties, that question was submitted to the court upon evidence; and upon the evidence the court found that, as a matter of fact, the defendants were estopped to deny that the agent had such authority. In Knight v. P. S. & P. R. Co., 56 Me. 234 (1868), the plaintiff purchased "a through ticket over three distinct lines of passenger transportation." The court said, "railroads may so issue their tickets and so conduct as to have the purchasers understand that they undertake for the whole route, in which case they will be held responsible to that extent." There is nothing in these cases having any tendency to show that, in the absence of an express written contract, a carrier's undertaking beyond his route is not a question of fact.

In Crafts & Wife v. British & American Express Co. (tried by jury in Coos, November term, 1868), the defendants were carriers on the Grand Trunk Railway from West Milan to Northumberland. At West Milan they received goods directed to Mrs. Crafts, at Newbury, Vt., a place not on their route, but to which goods might be sent by other carriers from Northumberland. A part of the goods arrived at Newbury, and a part were lost. The court (Bellows, J.) left the question of the de-

fendants' undertaking to carry the goods beyond their route to the jury as a question of fact. "The court instructed the jury that if the defendants, through their agents, received the goods at West Milan, directed to Mrs. Crafts, at Newbury, Vt., and undertook to carry them there and deliver them to her, and they were lost, the defendants were liable, unless the loss was by the act of God or the public enemies; and they would be liable, even though they were lost on some stage route after they left Northumberland, and while in the hands of another express company. That if the undertaking was made to deliver them to a stage line and another express company on the route to Newbury, and they did so, they would not be liable for a subsequent loss. But if they undertook to carry and deliver them at Newbury, they might employ such intermediate agents as carriers, as they pleased, but their responsibility as carriers would continue the same after leaving the Grand Trunk Railway as while on that road; and that it was immaterial whether they had a general business connection with such intermediate agents or carriers or not, provided the undertaking to carry the goods to Newbury was shown." The only difference between this case and Muschamp's case is, that Baron Rolfe gave the jury his opinion of the weight of the evidence, and Judge Bellows did not. The jury in this case, without the aid of the judge's estimate of the evidence, concurred with the jury who tried Muschamp's case in finding a verdict for the plaintiffs; and at the adjourned law term at Manchester, Aug., 1869, judgment was ordered on the verdict by the whole court, Perley, C. J., delivering the opinion. The case was not reported because it was not regarded as establishing any new or settling any doubtful point, or as otherwise important to be published. Gen. Stats., ch. 200, sec. 3.

At the same adjourned law term, Aug., 1860, at Manchester, was decided Nashua Lock Co. v. W. & N. R. Co., 48 N. H. 339. That cause was submitted to the court on an agreed state of facts, and the court were unanimously of opinion that the plaintiffs were entitled to recover. Perley, C. J., said: "The contract between the plaintiffs and the defendants must be implied from the facts stated in the agreed case. * * The general question is, whether the defendants undertook for the transportation of the goods through to New York, or only agreed to carry and deliver, or tender, them to the Norwich & Worcester Railroad. * * * The nature of the undertaking must be inferred from the facts stated in the agreed case." It is not expressly declared in the opinion that the defendants' undertaking was inferred as a matter of fact as distinguished from a matter of law, but this point is made certain by Bellows, C. J., in Barter & Co. v. Wheeler &

a., 49 N. H. 9, 27, 28 (decided in Dec., 1869), where, in commenting upon Nashua Lock Co. v. W. & N. R. Co., he says, "in the case of continuous line formed by several distinct companies, each operating a distinct part of the entire line, but each empowered to contract for freight over the whole route, and to receive pay for the whole distance, the receipts to be divided among the several companies in prescribed proportions, it would be competent for a jury to infer a joint contract by the several carriers to transport the goods over the entire route. It is quite well settled now that they have the capacity to make such joint contract, and we think that from the facts stated a jury might infer it." When a case is submitted to the court upon an agreed statement of facts, as Nashua Lock Company v. Worcester and Nashua R. Company was, the parties are supposed to intend that such facts may be found by implication from the facts agreed, as a jury would be warranted in finding. That is the natural construction of an agreed case, in the absence of any express stipulation on the subject, and such is the construction given to agreed cases in this as well as in other jurisdictions. Underhill v. Manchester, 45 N. H. 214, 221.

In Farmers' and Mechanics' Bank v. Champlain Trans. Co., 23 Vt. 186, 208, 210, 212, 213 (1851), Judge Redfield says: "If the law fixes the extent of the contract, in every instance, in the manner assumed, then most undoubtedly are the defendants liable in this case, unless they can show in the manner required some controlling usage. But if upon examination it shall appear that there is no rule of law applicable to the subject, and the extent of the transit is matter resting altogether in proof, then the course of business at the place of destination, the usage or practice of the defendants and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself." Judge Redfield did not fail to see that Muschamp's case "considers it chiefly a matter of fact, to be determined by the jury as to the extent of the undertaking," by the expression "chiefly a matter of fact," taking into account the idea that the question was, of course, subject to the general and elementary rules of law upon which all contracts rest. Upon a thorough consideration of the subject, the learned judge sums up his own views and delivers the decision of the court thus: "All the cases, almost without exception, regard the question of the time and place when the duty of the carrier ends as one of contract, to be determined by the jury from a consideration of all that was said by either party at the time of the delivery and acceptance of the parcels by the carriers, the course of the business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the

intention of the parties. The inquiry, then, in the present case, must come to this before the jury, whether it was reasonable for the plaintiffs, under the circumstances, to expect the defendants to do more than to deliver the parcel to the wharfinger. If not, then that was the contract, and that ended their responsibility, and the plaintiffs can not complain of the defendants because the wharfinger was unfaithful. The defendants, unless they have, either expressly or by fair implication, undertaken on their part to do something more than deliver the parcel to the wharfinger, are no more liable for its loss than they would have been had it been lost upon ever so extensive a route of successive carriers, had it been intended to reach some remote destination in that mode. But if the plaintiffs can satisfy the jury that, from the circumstances attending the delivery or the course of the business, they were fairly justified in expecting the defendants to make a personal delivery at the bank, they must recover; otherwise, it seems to us, the case is with the defendants."

The same judge, in his work on the Law of Railways, vol. 2, sec. 180-3, says: "There are many cases where the American courts have held the carrier liable beyond the limits of his own route, upon the ground of a special undertaking, either express or implied; but whether any such contract exists is regarded as a matter to be determined from all the facts and attending circumstances of the case, and will more generally be an inference for the jury than the court, unless it depends upon the effect of written stipulations."

Morse v. Brainerd & a., 41 Vt. 550 (1869), was a proceeding in chancery, tried by the court upon facts and testimony reported by a master. The defendants, as receivers operating the Vermont Central and Vermont & Canada Railroads, received of the plaintiff, at Swanton, Vt., certain cattle directed to Medford, Mass. The cattle were transported safely over the Vermont railroads, but were injured on the lower and connecting roads. The court say: "The company is liable for injuries that occur beyond the termination of their own road only when they stipulate to deliver the property at a point beyond. * * * If, then, the defendants are to be made liable in this case, it must be upon the ground that they received the property in question under a contract, express or implied, to deliver it at Medford, its place of destination. Whether there was such a contract or not is mainly a question of fact, to be determined upon the master's report and the evidence referred to. That there was no express contract for the delivery of this property at Medford is conceded. Was there an implied contract to that effect?" After stating the facts showing a joint transportation line (such as the

one in Barter & Co. v. Wheeler & a., 49 N. H. 9, 11, 12, 26, referred to in Nashua Lock Co. v. W. & N. R Co.,48 N. H. 361,) the court proceeds thus : "These facts, and, in short, without stopping to enumerate further, the great mass of facts and testimony reported by the master, are consistent, and many of them only consistent with the idea of an assumed liability to transport the property, in this case, from Swanton to Medford. Such, we think, must have been the understanding and expectation of Morse and the station agent at Swanton, at the time the property was put on the defendants' road at that place." Sitting as a Court of Chancery, and inferring the fact from facts and evidence reported by the master, the court found the mutual understanding of the parties that the defendants were to be responsible beyond their own route.

Nutting v. C. K. R. Co., 1 Gray 502 (1854,) was submitted to the court upon an agreed statement of facts, from which the court did not infer the additional fact that the defendants undertook to carry beyond their own route. The defendants' liability, therefore, resting on the official duty of their public employment, did not extend beyond their own route, and the plaintiff did not recover. The opinions of the English judges in Muschamp's case, on the *prima facie* weight of the evidence, were mistaken for opinions of law, and the court said, "we can not concur in that view of the law." The real difference was a non-concurrence in the English estimate of the weight of evidence. In this and some other cases, judges, speaking of "a special contract," or a "positive contract," of a carrier to carry beyond his own route, must be supposed to mean a contract proved by other than the general duty of the carrier's public employment, and not an express contract as distinguished from an implied one. Moses v. B. & M. R., 24 N. H. 84, 88.

"In Fitchburg and Worcester Railroad v. Hanna & a., 6 Gray 539 (1856,) the arrangement of the plaintiffs was with another railroad and a steamboat company to and from New York. It appeared that, in receiving goods at New York to be carried over the plaintiffs' line, the steamboat company acted as the plaintiffs' agent. It followed, of course, that the plaintiffs could collect the whole freight, but were liable for damage done to the goods by the negligence of the steamboat company; and it was so held. But without such agency it would have been otherwise." Darling v. B. & W. R. Co., 11 Allen 297. Such agency, of course, may be found by a jury from slight circumstantial evidence.

In Najac v. B. & L. R. Co., 7 Allen 329 (1863,) from an agreed state of facts the court found the fact that the defendants undertook to carry the plaintiff's baggage beyond their own route.

In Lowell Wire Fence Co. v. Sargent & a., 8 Allen 189 (1864,) the plaintiffs sent by the defendants, who were expressmen between Lowell and Boston, a coil of wire fence, directed to Annapolis, in Maryland, and gave them a bill for the price of the fence to collect from the person to whom the package was addressed. The defendants carried the package and bill to Boston, and, according to the usual course of business, delivered them to Adams & Co 's Express, by whom they were carried to Annapolis, where Adams & Co. collected the bill and the charges for freight, but the money received on the bill was never paid over to Adams & Co. The case was tried by a jury, who found a verdict for the defendants; and the plaintiffs alleged exceptions, which were overruled. Hoar, J., delivering the opinion of the court, said: "The court instructed the jury, 'that they were to determine what the contract between the plaintiffs was; that if the contract was to carry the fence to Boston and there deliver it to Adams & Co., then the defendants, upon safely carrying and delivering the fence to Adams & Co. at Boston, would thereby be discharged from all liability to the plaintiffs on account of said fence and the bill therefor from that time, and would not be liable for any loss or neglect on the part of Adams & Co., or for the amount of the bill, even if Adams & Co. had collected and held the money.' The correctness of this instruction is the question presented by the bill of exceptions. There was no express contract in relation to the transportation of the fence; and whether the implied contract was to carry it to Annapolis, or merely to carry it to Boston and forward it thence by the ordinary lines of transportation, was certainly a question for the jury upon the whole evidence in the case; in determining which, they would consider the nature of the business, the advertisements or notices given by the defendants, and all the circumstances tending to show the understanding of the parties. It was therefore properly left to the jury."

In Darling v. Boston & Worcester Railroad Co., 11 Allen 295 (1865,) the defendants were "the carriers on the last line of transportation," and the injury done to the goods was done when in the possession of some other carrier, before they reached the defendants' line. The Michigan Central Railroad, the first carrier who received the goods, gave a receipt for them, which the court (constructing it as an express written contract) declared was "so framed as to exclude the idea of joint responsibility with other carriers." And the court held there was no evidence tending to show any contract between the plaintiff and all the carriers jointly, and no evidence tending to show that the defendants were liable for damage done to the goods in the pos

session of some other carrier, before they came to the defendants' line.

In Gass & a. v. N. Y. P. & B. R. Co., 99 Mass. 220 (1868,) the plaintiffs claimed, as matter of law, that the defendants were liable for goods which were burned on a steamboat, and which never were in the defendants' possession, on the ground that the steamboat company were agents of the defendants or in partnership with them. The court held there was no evidence of such agency or partnership.

Burroughs & a. v. N. & W. R. Co., 100 Mass. 26 (1868,) seems to have been submitted to the court upon an agreed statement of facts. The plaintiffs' goods were destroyed on a steamboat in Long Island Sound by collision and fire, after they had been carried by the defendants to the end of the route. The plaintiff sought to charge the defendants as common carriers beyond the line of their railway, on three grounds. One was that a station agent of the defendants had, by a written contract, expressly promised to deliver the goods in New York. But the court held that the facts were "clearly insufficient to warrant a court or jury in inferring that he had authority to bind the defendants as common carriers beyond the line of their own railroad." The plaintiffs also relied upon a written contract between the defendants and the steamboat company. But that contract expressly provided that each company shall bear the losses happening on its own line. The plaintiffs also relied upon a "freight tariff" posted in the defendants' stations. But that expressly exempted the carriers from loss by collision or fire. And the court, apparently trying the case as a jury would try it, upon the evidence, gave judgment for the defendants.

In Pendergast v. Adams Express Company, 101 Mass. 120 (1869,) there was a written contract which, as the court held, expressly limited the undertaking of the defendants to forward the parcel "to their agent nearest or most convenient to the destination, and then delivering it to other parties to complete the transportation." Gray, J., delivering the opinion of the court, said: "When a common carrier is a corporation established for the purpose of transporting goods over a certain route, goods delivered to such corporation, directed to a more distant place, are presumed by our law to be received for the purpose of being carried by it over its own route only, and then forwarded by another carrier to their destination. Burroughs v. Norwich & Worcester Railroad Co., 100 Mass. 26. When there is no charter to indicate the limits of the carrier's business, and no written agreement between him and the other party, the question what was in fact the extent of his undertaking, is a

question for the jury. Lowell Wire Fence Co., v. Sargent, 8 Allen 189."

Hill Ming. Co. v. B. & L. R. Corporation, 104 Mass. 122 (1870,) was submitted to the court upon an agreed statement of facts, with an agreement that the court might draw any inferences from the competent facts stated that a jury would be justified in drawing. And from the facts agreed, the court drew the inference of fact that the defendants (a corporation) undertook for the carriage of the plaintiffs' goods beyond their own line.

The Supreme Court of Connecticut put a low estimate upon the weight of the evidence usually introduced by the plaintiff in this class of cases; and peculiar views prevail in that State concerning the power of a corporation to bind itself by a contract carriage beyond the line on which it is specifically authorized by its charter to assume the public office, and perform the duties of a carrier. And the court of that State, acting upon their opinion of the weight of the evidence and their views of corporate power, set aside verdict as against the evidence, and other nonsuits in cases in which courts, entertaining a different opinion of the weight of the evidence, and different views of corporate power as affected by estopped in contracts, would not adopt such a practice. Hood v. N. Y. & N. H. R. Co., 22 Conn. 1; Elmore v. N. R. Co., 23 Conn. 457; Naugatuck R. Co. v. W. B. Co., 24 Conn. 468; Converse & a. v. N. & N. Y. T. Co., 33 Conn. 166.

In Bostwick v. Champion & a., 11 Wend 571, S. C. 18 Wend. 175, the question was of the liability of the defendants as partners, not as common carriers. The action was not brought upon any duty, obligation, or contract of a common carrier. The defendants were carriers on separate sections of a continuous line; with a community of interest in the profits of the entire line; and they were held to be partners. It has never been supposed that individuals engaged in the business of carriers were specially incapacitated to exercise the right of forming a partnership enjoyed by people in other kinds of business.

At the trial of Weed v. S. & S. R. Co., 19 Wend. 534 (decided in 1838,) the defendants moved for a nonsuit, on the ground that they "had not the power to contract, and did not contract, to carry" the plaintiff's trunk beyond their own road. It does not appear that they had any desire to go to the jury on the question whether there was in fact a contract extending beyond their road, and it is not probable that they had any such desire, under the circumstances of that case. Their claim that they made no such contract was apparently placed upon the sole ground that, as a matter of law, they had no corporate power to make it. Cowen, J., delivering the opinion of the court, be-

gan by saying, "The defendants, having undertaken to carry from the Springs to Albany, can not now be received to say that they were in truth carriers no farther than Schenectady, the termination of their own road."

At the trial of St. John & a. v. Van Santvoord & a., 25 Wend. 660, it appeared that the defendants, owners of a line of tow-boats on the Hudson River, between New York and Albany, received a box of goods marked for Little Falls, a place on a canal beyond Albany. The defendants carried the box to Albany and delivered it, according to the usage of business, to a canal-boat plying between Albany and Little Falls. On the arrival of the canal-boat at Little Falls, some of the goods were missing, and the box appeared to have been broken open. The plaintiffs objected to the evidence of usage, but it was received. The judge charged the jury that there was no evidence of any contract on the part of the defendants to carry the goods to Little Falls; that the known usage of the trade (not brought home to the plaintiffs) formed part of the contract between the parties; and that if the defendants delivered the goods at Albany according to usage, and used ordinary diligence in procuring a safe conveyance and in forwarding the goods, they were entitled to a verdict. The jury found for the defendants, and judgment was rendered on the verdict. This judgment was reversed by the Supreme Court (in 1841,) on the ground that the judge erred in holding that, as matter of law, there was no evidence from which a contract could be implied to carry the goods beyond Albany. Nelson, C. J., giving his own opinion of the weight of the evidence, said it appeared to him that such a contract was fairly to be inferred from the evidence. The decision amounts to this: the contract was what the parties understood it to be, and there was evidence from which an understanding that the defendants were to carry the goods beyond their line might be inferred. In 1843, the judgment of the Supreme Court was reversed, and the judgment of the Court of Common Pleas affirmed by the Court of Errors, by a vote of eighteen to five. Chancellor Walworth said the only question was, whether the judge of the Court of Common Pleas was right in receiving evidence of the usage, and in telling the jury that the defendants had discharged their duty if they had carried the goods safely to Albany and had forwarded them by a safe canal line from there, and declared he had no doubt the judge was right in both particulars. The chancellor put his opinion on the ground that the only material evidence was the mark on the box and the usage, and that both parties must have understood that the defendants would transport the box to the place where their business as common carriers terminated, and send it on in the

usual way as forwarders, from that place. Putnam, senator, who concurred with the chancellor, said that from the evidence given at the trial, the jury had a right to assume that the box in question was delivered to the defendants to be transported according to the business of their line, and that it was the province of the jury to determine the effect and extent of the implied contract between the parties. Porter, senator, dissented, on the ground that the question of an implied contract of the defendants to carry the goods beyond their line should have been left to the jury. In the decision of this case, Muschamp's case (decided in 1841,) was not referred to. 6 Hill, 157.

In Wilcox v. Parmelee, St. 3 and 610 (1850,) the court said that, in Muschamp's case, "the defendants were held liable," and erroneously supposing that the defendants were held liable by the court, they seem to have adopted the verdict of an English jury as a rule of American law.

In Hart v. R. & S. R. Co., 4 Seld. 37 (1853,) the defendants owned the last of several roads forming a line from Whitehall to Troy. The plaintiff purchased a through ticket at Whitehall, and passed over the entire line as a passenger, without change of car, and some of her luggage was lost. The court in their opinion, use this language: "The court charged the jury that it was for th m to say whether it was proved that the defendant, by its agents, received the baggage and agreed to carry it to Troy; and on the decision of the motion for a nonsuit, after all the evidence was given, the court stated it was a matter to be left to the jury. The court was right both in the charge and in the refusal to nonsuit. There were facts which it was proper to submit to the jury, who were the proper judges of the weight of evidence, and it would have been error to have refused so to submit them."

In Wilbert v. N. Y. & E. R. Co., 12 N. Y. 245 (1855,) the question was of the defendants' liability for the detention of goods on their own road. Hand, J., in the course of a dissenting opinion, said that in some of the cases the corporation to whom property was first delivered was held liable for the default of other corporations, and that where a carrier was in the habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them there had been presumed.

In Schroeder v. H. R. R. Co., 5 Duer 55 (1855,) it was found, by a judge deciding the facts as well as the law, that the defendants undertook to carry goods beyond their own line, and the question then was whether there was any evidence.

In Hunt v. N. Y. & E. R. Co., 1 Hilton, 228 (1856,) it was

held that there was no evidence of the defendants' liability for damage done to goods before they received them.

In Dillon v. N. Y. & E. R. Co., 1 Hilton, 231, it was held that there was no evidence of an undertaking of the defendants to carry beyond their own line.

In Foy v. T. & B. R. Co., 24 Barb. 382 (1856,) it was alleged in the plaintiff's complaint that the defendants contracted to carry a wagon from Troy to Burlington. "On the trial, the plaintiff proved the allegations in the complaint." No question was raised at the trial as to the defendants' liability beyond their own line. The only objections made to the plaintiff's right of recovery were, that there was no sale of the property, that the property never was demanded, and that there was no proof of negligence. In a *dictum*, Harris, J., expressed his opinion of the weight of the evidence tending to show a contract to deliver the wagon to Burlington, a place beyond the defendants' line.

In Russell & a. v. Livingston & a., 16 N. Y. 515 (1858,) the defendants carried from Amsterdam to Vienna, a package directed to a person at Port Gibson (a place beyond their line,) "Care of Dawley, Express Agent, Vienna." Dawley, the defendants' agent at Vienna, delivered the package to a stage running to Port Gibson, and it was lost. It was decided to be erroneous to rule, as matter of law, that Dawley received the package as the plaintiffs' agent.

In Quimby v. Vanderbilt, 17 N. Y. 306 (1858,) the question whether the defendant, a carrier from New York to Nicaragua, undertook to carry the plaintiff from New York by way of Nicaragua to San Francisco, was left to the jury, and it was held that there was evidence proper to be submitted to them.

Hempstead v. N. Y. C. R. Co., 28 Barb. 485 (1858,) was tried by a judge without a jury, and the judge found that the defendants did not contract to carry beyond their own line, and this finding was not set aside.

In Cary v. C. & T. R. Co., 29 Barb. 35 (1859,) the defendants' line was from Toledo to Cleveland. The defendants, at Toledo, sold to Miss Bedel (the plaintiff's assignor) tickets for Buffalo. The defendants moved for a nonsuit on the ground that no contract was proved to carry beyond Cleveland. The motion was denied and there was a verdict for the plaintiff. Allen, J., delivering the opinion of the court, said, "that there was no proof of a contract on the part of the defendant to carry the lady and her luggage beyond the termination of its road can not be alleged. The proof was, that she applied to the defendant's clerk and servant for a passage ticket from Toledo to Buffalo, and was furnished with tickets which carried her to Buffalo, over the

defendant's road and the other intermediate roads; and the defendant's clerk received the fare for the whole distance. Some contract was made by the defendant at that time, and if, upon the evidence, the defendant desired to make a question whether it was a contract for carriage by the defendant for the whole distance, or whether, in entering into the contract, the defendant represented and contracted for or in behalf of other corporations or individuals, as to a part of the distance, he was entitled to have such question passed upon by the jury; that is, if there was a doubt as to what the contract was, it was a proper question for the jury. But there was certainly evidence to carry the cause to the jury upon the question whether or not the defendant had contracted as alleged. * * * The court charged the jury * * * that the contract of the defendant was to deliver the trunk at Buffalo. * * * As the question relating to the discharge of the defendant from liability by the delivery of the trunk to the Painesville road depends entirely upon the terms of the contract and its validity, if for carriage of the passenger and her baggage east of Cleveland, the exceptions need not be further considered in this connection, except to repeat the remark before made that the defendant did not ask to have the jury decide what the contract was. Had it done so, and the court had decided it as matter of law, it might perhaps have been error. The counsel did not object that the court, by passing upon the question, invaded the province of the jury, but the exception was based rather upon the ground that the defendant had not contracted because it could not lawfully contract for service beyond Cleveland. In Muschamp v. The Lancaster and Preston Junction Railway Co. (8 M. & W. 421,) in a case somewhat similar, it was treated by the court as a proper case for the jury to determine what the contract was—whether the railway company had undertaken to carry a parcel beyond the terminus of its road, or had agreed to carry it to its terminus and there deliver it to another carrier for transportation. The court held that they could not say that the latter was the import of the contract, as was asked by the defendant to be decided in this case. It was assumed by the defendant's counsel to a proper question for the court, as there was no dispute about the evidence; and when a question is so treated, the party can not, upon appeal, insist that it should have been submitted to the jury. (Barnes v. Perine, 2 Kernan 18.) If there was evidence upon which the jury might have found the contract, as alleged by the plaintiff, rather than as claimed by the defendant, as a question of fact, the ruling and decision of the court will be sustained; in other words, there is no error for which the judgment will be reversed."

In Chouteaux v. Leech, 18 Pa. St. 224 (1852,) the defendants

were bound by a written contract. In P. C. R. Co. v. Schwarzenberger, 45 Pa. St. (9 Wright,) 208, the carrier gave notice that it was not liable beyond its own route, and therefore the plaintiff failed to prove a mutual understanding that the carrier would carry the plaintiff and his baggage beyond the carrier's own route. In B. & P. S. Co. v. Brown, 54 Pa. St. 77 (1867,) the question was left to the jury. Jennison v. C. & A. R. & T. Co. (District Court Phil.), 4 am. L. Register 234, was governed by an express written contract. Stroud, J., upon an examination of the authorities, expressed his opinion that when the only evidence is the direction of goods by marks beyond the carrier's route, the carrier is only bound to transport and deliver them according to the usages of the business. In a note to this case, the editors of the Register say (p. 239) that the contract for carriage beyond the carrier's route "is in general a question of fact, and is to be determined by the finding of a jury."

In Bradford v. S. C. R. Co., 7 Rich. 201 S. C. (1854,) it was held to have been properly left to the jury to find the defendant liable as a joint carrier. In Bradford & a. v. S. C. R. Co., 10 Rich. 221 (1857,) it was held that there was no evidence that the defendant was liable as a joint carrier. In Kyle v. L. R. Co., 10 Rich. 382, the defendants were bound by a written contract to deliver goods beyond their own line. Bennett v. Filgaw, 1 Flor. 403, does not relate to the responsibility of a carrier beyond his route.

In R. R. Co. v. Sullivan & a., 25 Ga. 228 (1858,) there was a written contract to deliver goods at Augusta, Ga., and it was held that the direction on them, "Cha st. So. Ca.," could not control the express undertaking.

In Railroads, apts., v. Sprats, 2 Duval 4 (1865,) the appellants being joint carriers with others, gave a through bill of lading for the transportation of goods from Louisville to New York, on which the jury found a verdict against them, and the verdict was not set aside.

In Carter & a. v. Peck, 4 Sneed, 203 Tenn. (1856,) it was held (apparently as matter of law) that a carrier receiving in advance, payment for transportation to a point beyond his route, thereby contracts to carry to that point.

In U. S. Express Co. v. Rush & a., 24 Ind. 403, it was held to be the duty of a carrier to deliver goods, directed beyond his own route, to the next carrier, according to the usual custom of business, and that in the written contract in that case there was no stipulation changing that duty.

In Ill. C. R. Co. v. Copeland, 24 Ill. 332, 337, 338 (1860,) the court fell into the mistake of supposing that in Muschamp's case the defendants were held liable by the court as a matter of

law; and upon that mistake the law of Illinois seems to be settled. Ill. C. R. Co. v. Johnson, 34 Ill. 389.

In Candee v. P. R. Co., 21 Wis. 582, the Supreme Court of Wisconsin were disposed to follow Ill. C. R. Co. v. Copeland, 24 Ill. 332. In Peet v. C. & N. W. R. Co., 19 Wis. 118, it was held that the defendants were bound by a written contract to carry goods beyond their own line. In D. & M. R. Co. v. F. & M. Bank, 20 Wis. 122, it was held that by the true construction of a written contract the defendants were not responsible beyond their own line.

In Angle & Co. v. M. & M. R. Co., 9 Iowa, 487, the opinions of English judges on the weight of the evidence were mistaken for opinions of law, and adopted as such.

These are some of the principal American cases, usually cited on the question of the liability of a carrier beyond his own route, in the absence of an express written contract. Some of them are not in point. Many contain nothing but *dicta* on the subject. Some turn on writings held to be, or treated as, express contracts, the construction of which by the court shows the understanding of the parties, without the finding of a jury on parol or circumstantial evidence. Some are based on the mistake of supposing that in Muschamp's case the defendants were held liable by the court as a matter of law. Some are controlled or influenced by the mistake of supposing that in Muschamp's case the opinions of the judges on the *prima facie* weight of the evidence were opinions on the law. It would seem that in no one of them has the question been held to be, or been treated as, a question of law, where it was claimed to be a question of fact, or where attention of the court was called to the distinction between law and fact,—a distinction which has been clouded by misapprehensions of Muschamp's case. In nearly all of them, when there is no decisive contract in writing, it is held to be, or practically treated as, a question of fact. There is much in the American authorities going strongly to show that Lord Abinger was right, and there is nothing in them having any considerable tendency to show that he was wrong, when he said, in Muschamp's case, "The whole matter is therefore a question for the jury to determine what the contract was, on the evidence before them."

There are cases in which a carrier's liability depends upon the terminus of his route, the geographical extent of his public employment; where the question is, to what point he has assumed the public duties of a common carrier, and how far he is required by his general public duty to carry goods, under pain of an action against him. This is a question of fact. Walker & a. v. Jackson & a., 10 M. & W. 161; Johnson v. M. R. Co., 4 Exch. 367; Richards v. L. B. & S. C. R., 7 Com. B. 839; Crouch v.

L. & N. W. R. Co., 14 Com. B. 255; Williams v. Vanderbilt, 29 Barb. 491. In some cases the carrier's liability is considered in a manner tending to show that the question of his undertaking to carry beyond his route was not distinguished from the question of the extent of his route. The question whether the place to which the goods are directed is beyond the carrier's route, and the question whether, if it is beyond his route, he undertook to carry the goods to it, may be contested in the same case; sometimes a single piece of evidence has a bearing on both of those questions; and there would often be an inconsistency in holding one of them to be a question of fact and the other a question of law.

In Nashua Lock Co. v. W. & N. R. Co., 48 N. H. 339, 362, there is a statement of some of the consequences of holding, as matter of law, that when goods are lost on some part of a continuous line of several associated carriers, the carrier on whose section of the line they were lost is alone liable. It is there said that it would often be difficult and sometimes impossible for the owner of the goods to learn where his loss happened; that he would have no means of learning himself, and would not, unless of a very confiding disposition, rely on any very zealous aid, in his search, from the carriers; that, if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distinct party, among strangers, in circumstances such as would discourage a prudent man, and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy. The forlorn condition of the owner in such a case is put as an argument against holding, as matter of law, that the first carrier is not responsible beyond his own route.

On the other hand, in Van Santvoord & a., v. St. John & a., 6 Hill, 157, 163, 170, there are statements of the consequences of holding, as a matter of law, that a carrier is liable beyond his route. Rhoades, senator, says: "There are many men in this State, who are engaged as common carriers in the transportation of the produce of the country by land. One of these men receives a load of flour on board his wagon for the purpose of delivering it at some point on the Erie Canal, the barrels being marked and directed to a town in the interior of the State of Maine. The carrier neglects to make a special contract that his liability is to cease at the point of delivery on the canal, but he delivers the flour in good order on the canal, and the property is forwarded from one line of transportation to another, until it passes into the hands of the last carrier on the route, by whose want of care it is lost. It would, under such circumstances, be a most severe and harsh rule of

law which should make the person who first undertook the transportation of the article liable for its loss. Bockee, senator, depicts the consequences of such a rule as "most alarming to all who are engaged in freighting and transportation." "Suppose," says he, "the box had been marked 'Brown's Hole, Rocky Mountains.'" If the law implies a contract to deliver the box at that place, he observes, as it is the duty of every man faithfully to fulfill his contracts, the carrier "must abandon his ordinary avocations and business, leave the delights of domestic association, embark with his dear-bought freight, and follow the long lines of internal navigation till he reaches the head waters of the Yellow Stone. Then he must traverse a vast desert, with Indian horses and pack-saddles, exposed to famine, to the wintery storms, to wild beasts and savages; and, if Providence should protect him through every danger, he returns, after years of suffering, a worn-out beggar to a ruined home."

All the weight of these arguments from consequences is against holding the question to be one of law. And they may be arguments proper to be addressed to a jury or other tribunal trying the facts of a case upon the question what the understanding of the parties was.

If the question in this case is of the mutual understanding of the parties, and if that question is one of fact, we are restrained by the constitution from holding it to be a question of law. State v. Hodge, 50 N. H. 522–525. The modern practice of trying common law cases by a judge, without a jury, and the habit of inferring facts from an agreed statement of facts submitted to the court, and other influences besides those named in State v. Hodge (519–521, 525,) may contribute to obscure the distinction between law and fact. But when the obscurity is penetrated, and a question is discerned to be a question of fact, no influence can induce the court to decide it as a question of law.

The principal argument for deciding the question in this case as one of law, is drawn from the convenience of a uniform and certain rule. No lack of such a rule has resulted in England from holding it to be a question of fact. The verdicts of English juries seem to be sufficiently settled and invariable to answer any reasonable demand on that score. And there would seem to be no cause to apprehend that any serious inconvenience will be experienced in this State from a want of uniformity and certainty in verdicts on questions of this kind. The subject can not be justly subjected to an absolutely inflexible rule. "It might be consoling to the carriers and others if we could lay down a rule of law somewhat more definite in this case. But from the almost infinite diversity of circumstances

as to steamboat carriage, that is impossible. There will usually be, at every place, some fixed course of doing the business, which will be reasonable, or if it would not be submitted to, and which will be easily ascertained on inquiry, and with reference to which contracts will be made, and which it is equally the interest and the duty of both parties to ascertain before they make contracts, and which it would be esteemed culpable negligence in any one not to ascertain, so far as was important to the correct understanding of contracts which he was making. F. & M. Bank v. Champlain Trans. Co., 23 Vt. 213, 214.

And if, in ordinary classes of cases in which a fixed and uniform rule would be of great utility, there were danger that verdicts would be variable and uncertain, the danger might not be wholly obviated by holding the question to be one of law. It is said, Nashua Lock Co. v. W. & N. R. Co., 48 N. H. 346, 357, 363, that there is no little confusion and contradiction of authority respecting the liability of a carrier beyond his own route; that a review of the American cases shows but too plainly that if our courts have differed from the English, they are far from agreeing among themselves in any principle or doctrine that can be called the American rule; that there is not only much confusion, but no little conflict in the American authorities; and that the perplexing diversity of decision on this subject is such that there would seem to be no remedy unless the national Legislature can provide one under the power given by the constitution to regulate commerce. If such is the condition of the authorities, it is proper to be considered in the choice of the tribunal by which the subject is to be settled and put at rest. If courts are now obliged to confess that their inability to establish a uniform rule by their own decisions, has thrown the country into such confusion that the interposition of Congress is necessary, this is not a favorable occasion for insisting that the need of uniformity requires the matter to be adjudicated by the court instead of the jury. And if the confusion of the authorities is much less than has been supposed, still an examination of them shows that juries have been more successful than courts in establishing a uniform system of rules on this subject.

One serious objection against the practice of turning fact into law is, that it introduces arbitrary rules and disorganizing exceptions into the scientific system of the law, overwhelms that reason which is the life of it (Co. Lit. 394 b.,) and changes the law into a chaotic collection of fragmentary and incoherent regulations, to be mastered only by sheer force of a rare and marvelous memory.

But the constitutional view is the only one necessary to be considered, because it is conclusive. If trial by jury is as val-

uable as it seemed to the founders of our institutions, the danger of holding a matter of fact to be a matter of law outweighs the inconvenience of any uncertainty likely to be produced by verdicts of juries on the liability of carriers beyond their own routes. A single precedent of a matter of fact turned into law is a dangerous thing where precedent is authority. "One precedent creates another. They soon accumulate, and constitute law. What yesterday was fact, to-day is doctrine. Examples are supposed to justify the most dangerous measures, and where they do not suit exactly, the defect is supplied by analogy." If the court may invade the province of the jury at one point, they may invade it at all points. If they can appropriate a part of it, they can appropriate the whole, and, uniting the offices of judge and jury, which the constitution has divided, destroy the check and balance which have been deemed essential to the judicial branch of a free government. And, were it conceded that we are not now menaced by those governmental invasions of popular rights which our constitutional trial by jury was chiefly intended to defeat, we do not know to what danger future generations may be exposed, nor to what use a precedent, apparently harmless in itself, may hereafter be applied. Whether trial by jury is as valuable as it seemed to the founders of our institutions, is a question not to be debated before a tribunal sworn officially to support that trial as an institution established by the fundamental law.*

Upon the question of the understanding of the parties in this case, it may be doubtful whether the mere reception by the defendants of the parcel, directed to a place beyond their route, is evidence of an undertaking to carry the parcel to that place, or to be responsible for its carriage beyond Boston. It may be that they were bound to receive it, and to carry it to the end of their route, and to deliver it there to the next express, according to the usage of the business. If they were bound by the official duty of their public employment to receive it, how could their reception of it be evidence of a contract outside of and beyond their official duty? If their reception of it was within the reach and comprehension of their office, if they could not refuse to receive it and carry it to the next express at the end of their route, under pain of an action against them, how could the performance of such a duty be evidence of a contract to perform more than that duty and to serve the plaintiff beyond their route? If the defendants had attempted to throw off a part of the official

*For cases drawing the distinction between law and fact, see State v. Bartlett, 43 N. H. 230, 231; Pitkin v. Noyes, 48 N. H. 303, 304; Lisbon v. Lyman, 49 N. H. 563, 564, 568; State v. Jones, 50 N. H. 369; State v. Hodge, 50 N. H. 510. REPORTER.

duty of their public employment between Portsmouth and Boston by a notice given to the plaintiff, there would be no presumption that the plaintiff had waived his legal right and made a contract to release them from a duty which he could require them to perform, or from a responsibility which he could require them to bear. F. & M. Bank v. Champlain Trans. Co., 23 Vt. 205; Moses v. B. & M. R. R., 24 N. H. 88, 89. There would be no presumption that he made a contract to relieve them from their obligation to serve him in any thing within the reach and comprehension of their office, which extends from Portsmouth to Boston. And how could a presumption be raised, from their rendering him service between Portsmouth and Boston, which they were bound to render, that they contracted to render him service beyond Boston, which they were not bound to render.

But the plaintiff did not know that the defendants were carriers only as far as Boston, if he believed they were carriers to Reading, if he would not have delivered the package to them had he known they would deliver it to another carrier, and if there was any thing in their words or conduct intended to mislead the plaintiff, or which would have induced a man of ordinary care and prudence to entertain the plaintiff's belief and act upon it, a case of estoppel might be made out. There might be a case in which a carrier's silence and omission to give notice of the extent of his route, would be evidence tending to show, by way of estoppel, a mutual understanding, that the carrier undertook to carry beyond his route.

Upon the question of a mutual understanding in the absence of conclusive proof in writing, there could ordinarily be the direct testimony of the parties themselves. Norris v. Morrill, 40 N. H. 395; Severance v. Carr, 43 N. H. 65; Graves v. Graves, 45 N. H. 323; Hale v. Taylor, 45 N. H. 405; Delano v. Goodwin, 48 N. H. 203. The omission of either party to testify on that point might be evidence against him. Lisbon v. Lyman, 49 N. H. 568, 575, 580. What was said and done at the time the plaintiff delivered the package to the defendant might give some light on the question. The non-payment of freight in advance, or the prepayment of the whole as one charge, or as several charges, might be competent. The usage of the defendant and other carriers might be important. If these defendants and the carrier beyond their route were partners in the through business between Portsmouth and Reading, or had an association or agreement among themselves in relation to it, their partnership or mutual agency might be material; and the absence of such partnership or agency might be material. Burroughs & a. v. N. & W. R. Co., 100 Mass. 29, 30; Hill Mng. Co. v. B. & L. R. Co., 104 Mass. 134. There might be a great

variety, both of direct and circumstantial evidence, tending to show a mutual understanding, actual or constructive, affected in the mind of the parties by a real concurrence, or in contemplation of law by estoppel. No such mutual understanding, binding the defendants to carry the plaintiff's parcel beyond Boston, was found by the judge who tried the facts in this case.

The authorities on the carrier's liability beyond his own route, seem not generally to put it upon the law of the State in which his contract is to be performed Neither do they expressly make an exception to take this class of cases out of the general rule that the construction and force of a contract are governed by the law of the State in which it is to be executed. Barter & Co. v. Wheeler & a., 49 N. H. 29; Thayer v. Elliott & a., 16 N. H. 102; Whitney v. Whiting, 35 N. H. 462; 2 Kent Com. 459. If the part of the defendants' contract, which was to be performed in Massachusetts, is governed by the law of Massachusetts, the decisions of that State furnish no ground for granting a new trial in this case. If the defendants should tomorrow obtain one or more charters incorporating them as common carriers between Portsmouth and Boston, and they should, as a corporation, receive another parcel under the circumstances of this case, we can not suppose that their responsibility would be held, as a matter of law, in Massachusetts, to be different from what it now is. The fact that by the terms of their charter they were carriers only between Portsmouth and Boston, might be evidence on the question whether they intended to undertake for carriage beyond Boston. It would seem that any presumption drawn from their charter, as to their intention on that point, would be an inference of fact and not of law. But the defendants not being a corporation, it seems to be expressly settled that, by the law of Massachusetts, the question whether they undertook to carry the plaintiff's parcel beyond Boston is a question of fact. The judge who tried the case found a general verdict for the defendants, and there must be judgment on the verdict.

LIABILITY OF TELEGRAPH COMPANIES—NIGHT MESSAGES.

A suit was tried and decided in the Circuit Court of Milwaukee County, last week, involving principles of interest to all business men who have occasion to use the telegraph. The plaintiff, William S. Candee, a leading banker and broker of this city, on the evening of December 25th, 1871, wrote and left at the office of the Western Union Telegraph Company, a dispatch, in cipher,

addressed to his correspondents in New York, directing the purchase of two hundred and fifty shares of the North-western Common stock. The message was written upon one of the "night message blanks" of the company, and was left at the office of the company at half-past eight o'clock in the evening of December 25th, 1871. Through some oversight or negligence of the operator the dispatch was not sent that night, but remained in the office until one o'clock the next afternoon, when it was forwarded to New York, and the stock purchased by the plaintiff's agents in that city. Between the opening of business on the New York Stock Exchange, December 26, and the time when the message was received and the stock purchased, the price of the stock had advanced about two per cent., and the stock therefore cost the plaintiff about $500 more than it would have cost if the dispatch had reached his agents on the morning of December 26th. The plaintiff brought a suit against the Western Union Telegraph Company, claiming this sum as damages. The defendant answered, substantially admitting the facts as above stated, and pleaded in bar of the plaintiff's right to recover, the printed conditions on the night-message blanks, of which the following is a copy:

HALF-RATE MESSAGES.

The Western Union Telegraph Company will receive messages for all stations in the United States east of the Mississippi River, to be sent during the night, at ONE-HALF THE USUAL RATES, on condition that the Company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender.

No claim for refunding will be allowed, unless presented in writing within twenty days.

Send the following message subject to the above terms, which are agreed to.

On the trial, it appeared from the testimony, that the plaintiff sent his book-keeper to the defendant's office at about half-past eleven o'clock of December 26th, the price of the stock having then advanced about one per cent. from the opening quotations, to inquire about the dispatch, and the book-keeper was informed by an employe of the defendant, that the dispatch had gone. It also appeared that the plaintiff had employed the same cipher, in his telegraphic correspondence, with his agents constant about four years, and was known to the defendant's agents to be engaged in the business of buying and selling stocks by telegraph. The case was tried by Judge Small without a jury, and resulted in a decision for the plaintiff for the full amount claimed. The plaintiff's attorneys were Davis & Flanders, and the attorneys for the defendants, Finches, Lynde & Miller.

In deciding the case, Judge Small made the following remarks:

REMARKS OF JUDGE SMALL.

The difference in the authorities upon certain points in this case perhaps arises from the fact that telegraphy is a comparatively recent invention; and

it is only within a very few years that it has been developed into its present vast proportions. While authorities are to be revered as far as they refer to general principles of law, yet in this day and generation, when human skill and ingenuity are developing such constant inventions and improvements, rules must be laid down that vary somewhat in their nature from old rules and regulations. The questions that have been advanced here are very important, and I think American Courts will settle them precisely as the law is in relation to other corporations that act in a quasi-public capacity for the purpose of making money. I think the same rules will be eventually applied to them.

In this case the damages, which the plaintiff seeks to recover, are not because they did not send the message, but because they did send it. If they had not sent it there would be no damages so far as the evidence shows. It is an entirely different case from any cited in the authorities.

It is admitted that on Christmas evening, 1871, at 8:40, the plaintiff delivered a dispatch at the office of the Western Union Telegraph Co., in this city, with an operator left in charge of the office to attend to the night business of the company. The plaintiff was a banker and stock-broker, and for years the company had transmitted messages for the plaintiff relating to his business in New York, and the company must have known the general nature of his dispatches. They must, should have known that bankers' and brokers' telegrams required immediate attention because the fluctuations in stock markets are often so great that a few hours' delay might work serious pecuniary injury to a party. It is further proven and not denied, that this dispatch lay in the telegraph office from 8:40 p. m., on the 25th of Dec., 1871, until 1:05 p. m. of the day following. It is further proven that when the plaintiff, at 11 a. m., on the 26, sent his book-keeper to the telegraph office to ascertain what had been the fate of the dispatch, he was informed by the operator in charge that the dispatch had been duly forwarded.

This fact is not contradicted. After that, the general agent of the defendant, Mr. Weller, informed the plaintiff that at the time his book-keeper called there the dispatch had not been sent; and it shows upon its face that it was not sent until 1:05 p. m., that day. The agents to whom it was sent, pursuing the instructions it contained, bought the 250 shares of North-western stock at a larger price than it could have been bought for in the morning. What was the duty of the Telegraph Company in this case? It was a "night message," but was not sent in the night. The counsel for the defendant urged that because it was a night message it was a mere matter of accommodation on the part of the Company, and that, therefore, the Company had a lawful right to contract against any liability in case of any failure in the sending or delivery of the message.

There is no legal obligation on the part of the Company to send any message until they assume to send it. And when the Company do this for a consideration it is wholly immaterial whether it is a night or day message.

If there was a disorder in the line, or a peculiar condition of the atmosphere, or any other unavoidable cause prevented the prompt sending of the dispatch, it was undoubtedly the duty of the Company to notify the plaintiff that the dispatch had not been sent, and thus leave it optional with him to stop it or send it. It is true the message was in cipher, and the Company did not know what it was; but as the plaintiff had been in the constant habit of sending telegrams in relation to stock in cipher, for years, and the Company was aware of the fact, the presumption is they knew this particular telegram was in relation to stock transactions. The defendant knew, at 1:05 p. m., on the 26th, the time the message was sent, that seventeen hours had elapsed since it was left with them, and they must have known that in those seventeen hours there might be great changes in the New York Stock Market, and I think it was clearly the duty of the Company to inform the plaintiff that the dispatch had not been sent, and to inquire whether at that late hour it should be sent. If the Company did that, the plaintiff would have sustained no injury. But one of the agents of the defendant, at eleven o'clock in the morning of the 26th, falsely informed the book-keeper of the plaintiff that it was sent, leaving him to suppose it was sent in the regular course of business.

This is certainly gross negligence. Then the question arises, is the defendant responsible for this gross negligence? Do the conditions printed at the head of the "night messages" constitute a contract between the plaintiff and defendant whereby the defendant is shielded from the plaintiff's recovering the actual damages which he has sustained by the gross negligence of the defendant? The defendant's counsel claim that the Telegraph Company have the right to make any contract limiting their liability. If that principle is true it must apply to all corporations, and a railroad corporation could make a contract to pay for a service they propose to render, but stipulating that they are not liable for any miscarriage on their part to carry out the contract. That is not law. There should be a consistent rule in this matter. There are certain reservations and limitations which a corporation may make. Atmospherical conditions, which prevent the working of the wires, injury to the wire by designing persons, &c., might be limitations of their liability which are not infringements of any principle of public policy. But there is no defense set up that the wires of the company were not in working condition or that the business of the company was so great they could not send it. I think the construction the plaintiff's counsel gave to those conditions is correct. The language of that contract must be construed strictly against themselves. The judgment of the court is that the plaintiff is entitled to recover the difference between the value of the 250 shares at the opening of the New York Stock Exchange on the morning of the 26th of December, 1871, and the price at which they were purchased at 1.34 p. m., when the dispatch was received by White, Morris & Co., the plaintiff's agents in New York.

It appears from the evidence that at the opening of the stock exchange, Northwestern common stock sold at $64\frac{3}{4}$ per share, and that at the opening of

the afternoon board it was sold at $66\frac{1}{2}$@67, 200 shares being bought at $66\frac{5}{8}$ and 50 at $6 7.

THE CONTRACT OF SURETYSHIP.

One of the most important, but one of the least discussed questions arising out of the contract of suretyship has reference to the release of the surety by condonation of the offenses of the principal in respect of which the person guaranteed might claim to be indemnified by the surety. This branch of the law is not without ancient authority in some shape, but until the recent case of *Phillips* v. *Foxall* (27 L. T. Rep. N. S. 231, Q. B.,) there were no decisions expressly to the point.

When a doubtful principle is settled, and when a point not before arising does arise for decision, it is highly desirable that the Profession should be clearly informed. And in the first place we would observe that the decision come to in *Phillips* v. *Foxall* was very much helped out by the dicta of Vice-Chancellor Malins in the case of *Burgess* v. *Eve* (L. Rep. 13 Eq. 450.) And we may say that it is the operation of the case in equity and the case at common law in agreement upon the question which renders the settlement of the principal entirely satisfactory. At the outset, however, it should be observed that *Burgess* v. *Eve* raised the old question whether a guarantee was continuing or not, but it will be seen that out of a continuing guarantee the point discussed in *Phillips* v. *Foxall* may arise. If, for instance, under a continuing guarantee the dishonesty of the principal may be condoned, the surety might or might not continue to be liable. Therefore, as *Burgess* v. *Eve* is prior to *Phillips* v. *Foxall* in point of time, we will first see what the Vice-Chancellor said upon the general question. The guarantee was given by a father to bankers to secure advances to his son, the latter giving his promissory note, and depositing documents and deeds to remain with the bank as security for the payment of all money due, or to become due, from the son to the bank, on any account whatever. The note which was for £2,000, was discounted by the bank, and further advances were made to the son, for which further advances the father was held liable, his guarantee being continuing. It was upon the attempt to limit the construction to be put upon the guarantee, that the question we wish to consider arose. Being under seal, it was contended that the guarantee was irrevocable, and ought to be construed strictly as applying only to £2,000, and by this means we arrive at the point in *Phillips* v. *Foxall*—when can a guarantee be revoked, and is it revoked by the act of the principal prejudicial to the surety, and known to the person guaranteed? The observations of Vice-Chancellor Malins are perhaps the clearest he ever uttered.

"Certain guarantees," he said, "are undoubtedly irrevocable. When a guarantee is of the fidelity or good conduct of a servant or clerk, or a person in a confidential position, it may be considered as a contract by the employer

and employed, and the surety on his behalf. Therefore, if a father guarantees the fidelity of his son, and upon the faith of that guarantee the son obtains a situation, there being no misconduct on the part of his son, reason requires that the father should not arbitrarily have the power of depriving his son, or any person whose credit he guarantees, of the appointment which he has obtained on the faith of the guarantee. If arbitrarily, and without the fullest justification, he desires to withdraw that which he has deliberately entered into, I am of opinion, under such circumstances as those, that he would have no right to withdraw. But if there is misconduct on the part of the person whose fidelity is guaranteed—for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guarantee because he believed the person to be of good character, when he finds he is not so, and not to be trusted, shall have the power of saying, "I now withdraw the guarantee I gave you ; I give you full notice not to trust him any more." Notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guarantee, and who is therefore responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guarantee when that person has been proved guilty of dishonesty."

The Court of Queen's Bench did not decide *Phillips* v. *Foxall* upon the question of the surety's right to revoke. The guarantee in that case was a guarantee of the honesty of a person employed by a tea merchant to deliver goods and collect money, and the defendant promised to be answerable to the plaintiff for any loss not exceeding £50 in all, which she might from time to time, or at any time thereafter, sustain through any breach of duty by the principal. The facts were that he became a defaulter, and, unknown to the surety, the offense was condoned upon an arrangement that payment of the deficiency should be made by installments. This was done, almost to the full amount, when the servant became a second time a defaulter, and it was in respect of this default that it was endeavored to make the surety liable. The court found in favor of the defendant on this short ground: "We think the surety is discharged, unless he assents or agrees after he has had notice of the dishonesty that the guarantee shall hold good for the subsequent service; but as a revocation of the guarantee as soon as the dishonesty has come to his knowledge, will be the best evidence of dissent, whether his discharge from the contract is founded on express revocation or want of assent after notice of the dishonesty, seems rather a question of words than of substance."

This principle, taken together with the observation of Vice-Chancellor Malins, to our mind make the subject abundantly clear. There is no further question arising out of these cases which ought to be noticed. Parsons, in his work on Contracts, vol. 2, p. 31, lays it down, without, however, citing any authority, that "if the guarantee be to indemnify for misconduct of an officer or servant, the promise is revocable, *provided* the circumstances are such that, when it is revoked, the promisee may dismiss the servant without injury to him-

self on his failure to provide new and adequate sureties." This dictum seems to have been accepted by the Court of Queen's Bench, it being remarked in the judgment delivered by Mr. Justice Quain, that "there can be no doubt that the right of the master at once to discharge the servant on discovering his dishonesty, and so place himself in *statu quo*, is a most material ingredient in the constitution of the question"—or, in other words, if the master can not discharge the servant without injury to his own interests, he is not bound to do so in order to hold the surety.

On the whole, the important principle is established that certain guarantees are revokable, even though under seal, and that they may be revoked either by the surety withdrawing from his guarantee, or by the promisee continuing to employ a dishonest servant, knowingly, without the knowledge of the surety, whereby the surety is discharged.—*The London Law Times.*

SUPREME COURT OF OHIO.

To appear in 22 O. S. Reports.

FOURTEENTH AMENDMENT.

John Foster et al. vs. George Smith. Error to the Common Pleas of Coshocton County. Reserved in the District Court.

WEST, J.—*Held:*

1. The Fourteenth Amendment to the Federal Constitution made "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States," any forfeiture or disability under legislative enactment, or judicial decision to the contrary notwithstanding.

2. Under the Fourteenth Amendment to the Federal Constitution, G. S., a native, and subject to the jurisdiction of the United States, who continuously deserted the military service thereof, for sixty days next after the Presidential proclamation of March 11, 1865, was at the general election of October, 1867, "a citizen of the United States," within the meaning of the Constitution of this State, which makes such citizenship a qualification essential to the elective franchise, notwithstanding anything contained in the act of Congress approved March 3, 1865, declaring that every such deserter "should be deemed and taken to have voluntarily relinquished and forfeited his right of citizenship."

Judgment affirmed.

STATUTE OF FRAUDS.

Lyman T. Thayer vs. Charles L. Luce and John W. Fuller. Error to the District Court of Lucas County.

MCILVAINE, J.—*Held:*

1. Several writings, though made at different times, may be construed to-

gether for the purpose of ascertaining the terms of a contract required, by the statute of frauds, to be in writing and signed by the party to be charged therewith.

2. If some only of such writings be so signed, reference must be specifically made therein to those which are not so signed; but if each of the writings be so signed, such reference to the others need not be made if, by inspection and comparison, it appears that they severally relate to, or form part of, the same transaction.

3. An instrument of writing in the usual form of a deed or conveyance, but not delivered as such, may nevertheless be delivered as an executory contract, or as partial evidence of a contract to sell and convey the lands therein described; and if signed and so delivered by the vendor, and accepted by the vendee, it is sufficient in an action thereon, against the vendor, to take the case out of the operation of the statute of frauds.

4. On the trial of an issue under the statute of frauds, the assent of the plaintiff to the terms of the contract may be shown by parol testimony.

5. If the contract was made by the agent of the plaintiff in such a case, the agency may be established by parol testimony, notwithstanding the agent may have contracted in his own name, without disclosing his agency or the name of his principal in the transaction.

6. If on the trial of a cause incompetent testimony be admitted with the consent of a party, but subject to his objection, and no motion be afterward made to rule out such testimony, its admission will not constitute a ground for the reversal of the judgment.

7. By admission of incompetent testimony for the successful party, though excepted to at the time by the adverse party, does not necessarily entitle the latter to a reversal of the judgment. If the whole testimony in such case be placed on the record, and it appear to the reviewing Court that the rejection of the incompetent testimony could not have changed the result of the trial, the error can not be considered as prejudicial to the party excepting.

Judgment affirmed.

WILL—TENANTS IN COMMON.

Elijah Taylor vs. David C. Simpson, *et al.* Reserved in the District Court of Preble County.

DAY J.:

Where tenants in common held real estate under a will which devised it to them in fee simple, but subject to the contingency that, if either of them died without issue, the survivor should take the whole estate, and one of them, having made permanent improvements on the land, while the other is a minor, and with the knowledge of the character of the title, mortgaged his interest in the real estate to secure a loan of money, and died without issue. *Held*, that the improvements passed with the land under the will to the surviving tenant, and that neither the land nor the improvements could be subjected under the mortgage to the payment of the mortgage debt.

Judgment affirmed.

Supreme Court of Ohio.

AGENT—COMPENSATION.

Samuel Everet and E. E. Wightman vs. Henry N. Bancroft. Error to the Court of Common Pleas of Ashtabula County. Reserved in the District Court.

WHITE, J.:

The plaintiff, a real estate agent, having authority to sell a farm, agreed with his principal, to have for his services, all the farm brought above a specified price per acre, and the balance of the purchase money he was to pay over to the principal. He entered into an agreement in his own name with the defendants for the sale of the farm, whereby they agreed to pay a higher price for it than he was to pay over to his principal. In an action by the plaintiff against the defendants to recover as damages for a breach of the agreement, the amount of compensation he would have received if the agreement had been fullfilled by the defendants.—*Held*:

1. That the liability of the defendants was to be ascertained from their own agreement, irrespective of agreement between the plaintiff and his principal; and that the rule of damages would be the same whether the suit was brought in the name of the principal, or in the name of the plaintiff as one of the contracting parties.

2. When the vendor retains the land, and its value, at the time of performing the agreement, exceeds the agreed price, nominal damages only can be recovered.

Judgment reversed, verdict set aside, and cause remanded.

ROADS—PRIVATE LANDS.

Sidney Beckwith vs. Ezra M. Beckwith and others. Reserved in the District Court of Ashtabula County.

WELCH, C. J.:

Under the statute of January 27, 1853, [2 S. & C., 1,293, Sec. 28,] authorizing a review and survey of roads where the place of beginning or course of the road is uncertain, no power is given so to change the road as to include private lands not before constituting part of the road. As against the owner of such lands, the record of the review and survey of the road is only *prima facie* evidence of the correctness of the survey, and may be rebutted by evidence showing that it exceeds the limits of the old road, and includes his private lands; and evidence of the long continued *user* of the road, within lines which exclude the land in controversy, is competent for that purpose. Where such private lands are included in the road by the review and survey, the Supervisor is liable in trespass to the owner, for entering upon the land and digging up the soil, and he is not protected by the record of the survey, and the declaration of the statute, that "the road, as surveyed, shall be considered a public highway."

Judgment reversed, and cause remanded for further proceeding.

SUPREME COURT OF GEORGIA.

TO APPEAR IN 43 GEORGIA.

ARBITRATION AND AWARD.

1. An award of arbitrators is conclusive as to all matters submitted to them by the parties, but if it is *doubtful*, from the terms of the submission, whether certain matters were submitted to and passed upon by the arbitrators, it is competent for the court to admit evidence as to the truth of the facts of the case, then to charge the jury as to the law applicable thereto.—*Keaton* v. *Mulligan*, 308.

2. It is competent to introduce evidence to show a non-compliance with the terms of an award, inasmuch as that does not impeach the award, but merely goes to show a non-compliance with the terms of it.—*Ib.*

BANKRUPTCY.

Where one filed his petition to be declared a voluntary bankrupt, and ten days thereafter a tract of land belonging to him was sold by the sheriff, under a *fi. fa.* from the court of this State against the petitioner, which had been previously levied, and the petitioner was afterward declared a bankrupt, but died before the proceedings in relation to his bankruptcy were concluded.

Held, that the sale by the sheriff was a good sale, and divested the title of the bankrupt; that no title to the property ever vested in the assignee, and the purchaser at the sheriff's sale got a good title, even as against the wife's right of dower, under the laws of this State.—*Thompson* v. *Moses*, 383.

CONTRACT.

A corporation, though of the same name with a partnership, doing business, by the same agent, before the date of the charter, is not the same person, and to make it liable for a debt due from the partnership, a parol promise by the president, without a new consideration, is not sufficient. There must be a writing, signed by a party to be charged, or by its agent expressly authorized, or must be shown that the incorporation has received the consideration.—*The Georgia Company* v. *Castleberry*, 187.

CORPORATION.

1. It is not *ultra vires* for a railroad company to contract to issue to contractors for the completion of the road, preferred stock in the company, in payment for work to be done, and to agree that a majority of the directors shall be the holders of a certain number of shares agreed to be issued does not make the whole amount of shares greater than the capital stock authorized by the charter. Warner, J., dissenting.—*Hazelhurst et al.* v. *The S. G. & N. A. R. R Co.*, 13.

2. When a municipal corporation is, by its proper officers, acting within the scope of its powers, a court of equity will not, at the instance of the tax-payers of the corporation, interfere to restrain or control its action, on the ground that the same is unwise or extravagant. To sustain such interference, it must appear either that the act is *ultra vires* or fraudulent and corrupt. —*Wells* v. *The Mayor, etc., of Atlanta*, 67.

Supreme Court of Georgia.

CRIMINAL LAW.

When the court admitted in evidence a particular act of insult, a quarrel between the prisoner and deceased, occurring several months before the homicide, and not connected with the cause occasioning it.

Held, that the admission of acts of previous quarrels, of particular acts, to be admissible against the prisoner, must not be a separate, distinct, and independent act, but there must be some link of association, something which draws together the preceding and subsequent acts, something which gives color of cause and effect to the transaction, and sheds light upon the motive of the parties, to render such particular act or acts admissible. The state of feeling generally between them may go in evidence to illustrate their conduct at the time.—*Pound* v. *The State*, 88.

The rule that a conviction can not be had on the uncorroborated testimony of an accomplice alone, only applies to cases of felonies. In misdemeanors, the complicity of the witness goes to his credit, and the jury are to judge of his credibility from all the facts and circumstances, as in the case of other witnesses.—*Parsons* v. *The State*, 197.

INDORSER.

Where a note is indorsed "to be liable only in the second instance," the indorser is not liable until the maker of the note has been sued to insolvency, or some legal excuse alleged for not having done so; but if it be alleged and proved that the maker of the note is notoriously insolvent, and was at the time of the indorsement, that would be a sufficient legal excuse for not suing the maker of the note to ascertain that fact.—*Pittman* v. *Chisolm*, 442.

LANDLORD AND TENANT.

A tenant for a year, under a contract for rent, stands in the shoes of his landlord, and, in general, is not a purchaser, entitled to notice of equities existing against his landlord, in favor of third persons.—*Clark et al.* v. *Herring & Mock*, 226.

MASTER AND SERVANT.

When one man employs a laborer to work on his farm, and another man, *knowing* of such contract of employment, entices, hires, or persuades the laborer to leave the service of his employer during the time for which he was so employed, the law gives to the party injured a right of action to recover damages.—*Jones & Jeter* v. *Blocker*, 331.

PAROL EVIDENCE.

In a suit on a life insurance policy, parol declarations made by the agent of the company prior to the execution, delivery, and acceptance of the policy, can not be received to vary or contradict the terms of the written contract, in the absence of any allegation and evidence as to fraud, accident, or mistake, at the time of its execution, delivery, and acceptance by the contracting parties. —*Sullivan* v. *The Cotton States Life Insurance Company*, 423.

KENTUCKY COURT OF APPEALS.

NO LIEN ON SHERIFF'S ESTATE FOR COUNTY LEVY.

Hall, &c., vs. Vanausdale, &c. Mercer. Lindsay, Judge.

The lien created by the execution by Sheriff of the bond prescribed by section 3, article 9, chapter 83 of the Revised Statutes, applies only to the revenue and public dues, for which the Sheriff is bound directly to the State. The statute does not give to the county or county creditors a lien on the property of the Sheriff.

TIPPLING HOUSES.

Furguson vs. Commonwealth. Cumberland. Hardin, Chief Justice.

A distiller, without State license, sold liquor by the quart, and, on delivering it, was in the habit of treating the purchaser. The statute permitted him to sell by the quart without license, if not drank on the premises or adjacent premises. He was not guilty of keeping a tippling house.

EXECUTION SALES—*Caveat Emptor.*

Lee's Administrator vs. Hood, &c. Butler. Lindsay, Judge.

An execution was levied by the Sheriff on land not in the possession of the debtor, and to which his title was imperfect. At the sale Hood became the purchaser, with notice that the possessor had some claim on it. The execution creditor had in no way controlled the Sheriff in making the levy, or authorized him to do it. The execution of the sale bond satisfied the judgment to the amount of the bid, and the purchaser can not escape paying it, though the title to the land is worthless. A deed for the land to the possessor being of record at the time of the sale, it was gross negligence on the part of the purchaser to fail to investigate the title. (4 Little, 245.)

CREDITORS MAY SUBJECT HUSBAND'S INTEREST IN AN ESTATE BY THE ENTIRETY.

Cochran & Fulton vs. Kenny and wife. Daviess. Lindsay, Judge.

Kenny and wife hold title to eighteen acres of land conveyed to them in 1848 as tenants by the entirety. Their estates is one and indivisible. By the common law the husband would have no power to alienate it so as to defeat or in any way affect the rights of the wife in case she should outlive him [1 Dana 242]; but he could convey the entire estate during the coverture, and if he survived the wife, his conveyance would become as effective to pass the whole estate as if he had been sole seized in fee when he conveyed. [Washburne on Real Property, 425.]

The act of 1846 deprived creditors of the husband of the right to subject to the payment of their debts an estate of this character, in such manner as to deprive him of the possession during the life of his wife, because she as well as he owns and holds a present vested interest in it. This statute expressly pro-

vided that the lands of the wife should not be subject to the debts of the husband, and this Court has held that since its passage the husband has no interest in the wife's land liable for his debts. [14 B. Mon. 260.] Kenny therefore can not by any act of his prejudice his wife's right of survivorship, and his creditors have no power to deprive her of the enjoyment of the land while it remains undetermined whether she or he will ultimately become the sole owner in fee. But the interest of the husband may be sold by a court of equity and the proceeds applied to the payment of his debts, provided it be so done as to affect neither the wife's right of survivorship, nor her right to enjoy the realty during her life. This can not be done by a seizure and sale under execution, but only by a suit in equity.

MISREPRESENTATION OF AGE BY INFANTS AND RECISION OF CONTRACTS.

Value of Improvements—Stewart and wife vs. Disher. Louisville Chancery. Hardin, Chief Justice.

Mrs. Tunstall, who owned one hundred and ten acres of land in Jefferson County as her general estate, died, leaving her husband, with his courtesy, and an infant daughter the remainder. The daughter intermarried with Stewart, and in 1865 they, with Tunstall, sold and conveyed the land to Disher for $12,500, of which Tunstall received $5,500 as the value of his life estate. Tunstall having died in 1868, Stewart and wife brought this suit to set aside the deed to Disher, on the ground that it was made during the infancy of Mrs. Stewart, and was intended to convey only the life estate of Tunstall. Disher's answer denied these allegations, and charged that she had represented herself to be of age; that he had improved the land, and that part of the money paid by him had been used by them to discharge certain lien debts of Mrs. Tunstall on her land.

Held—The evidence tends to show that Mrs. Stewart was only in the twenty-first year of her age at the time of the sale. The deed plainly imports a sale of the entire fee simple interest in the land.

Section 1, article 2, chapter 47, Revised Statutes, forbids a sale of the wife's land by the husband, but he may rent it for not exceeding three years.

The mere execution of the deed could not work an estoppel, as the wife was an infant. She did nothing after arriving at age to ratify the contract. Tunstall and Stewart both misrepresented her age in negotiating the sale. There is no evidence of declarations or acts of hers immediately connected with the execution of the conveyance, from which it can be inferred that she deceived or misled Disher in relation to her age. But it is proved that she said to her aunt afterward that she knew she was not of age at the time of the conveyance, although she and her father had both voluntarily sworn that she was of age at that time and "that the oath was of no consequence to her; that she wanted money and got it." The rule is well settled that neither infancy nor coverture will constitute an excuse for the party guilty of conceal-

ment or misrepresentation, for neither infants nor married women are privileged to practice deception or cheats on innocent persons. (Story's Equity, 385; 7 Bush, 293.) But the party concealing or misrepresenting his rights must be fully apprised of them, and should by his consent or gross negligence encourage or influence the purchases before this rule will apply.

Whatever inference might be drawn from the testimony, it is too uncertain and unsatisfactory to constitute an estoppel. The price of the land was paid to the husband, and the wife received no benefit from it except what went in payment of her mother's lien debts. She was therefore not bound to tender a repayment of the price to Disher. Disher is entitled to a personal judgment against Stewart, and if he is insolvent, to be substituted to the rights of the lien creditors whose debts were paid with Disher's money. He is entitled to the value of improvements, to be estimated according to sec. 1, art. 1, chap. 70, Rev. Stat.

Judge Lindsay dissents as to the manner of estimating value of improvements.

Book Notices.

WIGRAM AND O'HARA ON THE LAW OF WILLS.

PART I.

A TREATISE ON THE EXTRINSIC EVIDENCE IN AID OF THE INTERPRETATION OF WILLS. By SIR JAMES WIGRAM, late Vice-Chancellor; with extensive additions to the text, and copious references to American cases, by JOHN P. O'HARA, Counsellor at Law.

PART II.

A TREATISE ON THE CONSTRUCTION OF WILLS, showing the points of Resemblance and Contrast between the American and English Rules of Testamentary Construction, with references to all the leading authorities in point. By JOHN P. O'HARA, Counsellor at Law.

As can be seen from the above, this is a work divided into two parts, or, rather two works, by two different authors, published in one volume. Of the first part, by Sir James Wigram, we find it superfluous, at this late period, to speak one word to the older members of the profession. This eminent author's work on Wills, like that of Jarman, has too long been recognized "authority" upon the subject it treats, and his seven propositions, applicable to the exposition of wills, and which embody the particular subject of the present investigation, are so clear and unmistakably correct, that their reproduction here is believed by us to be by far the better introduction of Wigram to the younger members of the bar, than any words of praise or comment we might bestow. These propositions are: 1. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

2. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. 3. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable. 4. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words. 5. For the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. 6. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases) will be void for uncertainty. 7. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description is insufficient for the purpose." These several propositions are separately examined by the author, and the best of English authorities cited to sustain them; and by the extensive additions to the text, and the copious references to American cases, by Mr. O'Hara, the American editor, the value of this work has been greatly enhanced. The second part, which treats upon "The Construction of Wills," is by Mr. O'Hara, and we cheerfully do him the justice in saying that in the performance of this arduous task he has acquitted himself most creditably, and in his presentation of the rules adopted by the American Courts, has been exceedingly successful and correct. To give the reader some idea of the scope of Mr. O'Hara's treatise, we give the titles of the chapters: Nature and Incidents

of Wills; General Principles of Testamentary Construction; Fraud, Accident, and Mistake; Meaning of certain Words and Phrases; Devises of Realty; Rule in Shelley's Case; Estates Tail; Dying without Issue; Joint Tenancy; Future Estates; Settlements of Personalty; Equitable Conversion; Resulting Trusts; Implied Gifts; Limitations to Trustees; Survivorship; Powers; Incumbrances; Election; Vesting; Conditions; Trusts for Separate Use; Gifts to certain Persons and Classes; Legacies; Administration of Assets; Void Testamentary Gifts; Suggestions to Testamentary Draftsmen.

This able work by Wigram and O'Hara—no less ably gotten up by the publishers, is a large octavo volume of 850 pages—best law-book style. Price, $7 50. Publishers: Baker, Voorhis & Co., 66 Nassau Street, New York. Sold also by Robert Clarke & Co., Cincinnati, Ohio.

WHARTON AND STILLE'S MEDICAL JURISPRUDENCE. A Treatise on Mental Unsoundness, embracing a general view of Psychological Law. By FRANCIS WHARTON, LL. D., author of Treatises on Criminal Law, and on the Conflict of Laws. Volume 1. Publishers: Kay & Brother, 17 and 19 South Sixth Street, Philadelphia, Pa. Sold by Robert Clarke & Co., Cincinnati, Ohio. Price, $7 50.

Professor Wharton requires no introduction, because, both as a legal writer and as a jurist, his name and reputation are familiar to every student of law. As a writer he is full and thoroughly informed, and his great experience and his varied readings, both so necessary to a public teacher, make his works no less entertaining than instructive. His Treatise on *Criminal Law* shows to great advantage the strength of his mind; his *Conflict of Laws*, its depth and discernment, and the treatise now under discussion, exhibits its wide range of thorough investigation in a field, the fruits of which must sooner or later revolutionize not only the criminal, but also the civil and common laws of civilization. The words "Mental Unsoundness," "Insanity," though full of meaning, scarcely, if ever, leave that impression upon the mind of the speaker, a deep reflection thereon should create. How far a party is responsible for crimes committed, and whether or not a person *can be sane* and be criminal, are questions of the gravest importance; but of no graver importance than the question as to how far insanity enters into the law of *punishment* itself. It is chiefly on these accounts that a reading of such works is recommended. It opens to the thinking mind a wide field of speculation, growing profoundly wider in its range at every progressive step. Professor Wharton, writing law for the profession, and for what is termed "a practical world," in this, like in all his other treatises, did not enter any speculative field, nor trespassed, obtrusively, upon the grounds devoted to the scientist, but judiciously examined the principles as recognized in law, and deducted from stubborn facts. This, his first volume on Medical Jurisprudence, treating on *Mental Unsoundness* and *Psychological Law*, is divided by the author into four chapters, and a most valuable and interesting appendix. In these chapters are respectively and separately discussed: 1. Mental Unsoundness, in its Legal Relations. 2. Mental Unsoundness,

considered Psychologically. 3. Treatment of Insane Criminals. 4. Psychical Indications of Crime. These four chapters contain 823 paragraphs, exclusive of the appendix, which embodies the exceedingly interesting Medico-Judicial Opinions, taken from Liman's Casper's Gerichtliche Medicin, Berlin, 1871. The first edition of this work appeared in 1855, the second in 1860, since which time the specialty of psychological law has taken a course which has made necessary the preparation of this third edition, containing a great deal of entirely new matter and a substantial revision of the older text. It is unnecessary to recommend this work. The subject is important and instructive; the author is a man of acknowledged ability; and as the publishers deserve great praise for the mechanical part, a brisk market for this work of 867 pages is reasonably certain.

THE LAW OF NEW TRIALS, and other Rehearings; including Writs of Error, Appeals, etc. By FRANCIS HILLIARD, author of "The Law of Injunctions," "The Law of Torts," "The Law of Contracts," &c. Second edition, revised and greatly enlarged. Publishers: Kay & Brother, 17 and 19 South Sixth Street, Philadelphia, Pa. Sold by Robert Clarke & Co., Cincinnati, Ohio. Price $7 50.

No lawyer can become a successful practitioner who is not familiar with all the remedies of which he may avail himself in order to obtain a rehearing of his case, should the decision of the court, or the verdict of the jury, in a previous hearing, have been adverse to him. To possess this knowledge is an advantage that can not be over-estimated. To supply the profession with this information, Mr. Hilliard had, in the year 1866, published the first edition of this treatise, which, having been well received, encouraged the author to publish this second edition, revised and greatly enlarged. The work is divided into twenty-three chapters, respectively treating of: 1. Definition, etc., of New Trial. 2. Grounds of New Trial. 3. Ground of New Trial—Harmless Error—Substantial Justice. 4. Terms of granting a New Trial. 5. Nature and Effect of the Motion for, and the granting of, a New Trial; Points of Practice; Successive New Trials. 6. Waiver. 7. New Trial in Criminal Cases. 8. Grounds of New Trial—Grounds relating to the Jury; Verdict. 9. Jury; Irregularities connected with, as Grounds of New Trial—Incompetency. 10. Jury—Misconduct. 11. Erroneous Rulings or Instructions. 12. Discretion. 13. Evidence—Admission or Rejection of Evidence. 14. Verdict against Evidence. 15. Newly-discovered Evidence. 16. Surprise. 17. Amount of Damages. 18. New Trials in Equity. 19. Other Forms of Rehearing than New Trial—Writ of Error. 20. Certiorari. 21. Appeal. 22. Audita Querela. 23. Mandamus. In the Appendix are some of the leading statutory provisions on the subject of New Trials in the different States. Throughout the whole work numerous authorities are cited and carefully examined, which give additional importance to this treatise, which is printed on good paper, and contains 796 pages.

THE

AMERICAN LAW RECORD.

VOL. 1. FEBRUARY, 1873. No. 8.

THE METAPHYSICAL AND POSITIVE METHODS IN JURISPRUDENCE.*

THE subject to which your attention is invited possesses an interest for the student of literature or science as well as of law. I propose to examine whether the philosophy of law has been affected by the great intellectual revolution of the sixteenth century, of which Lord Bacon may be taken as the exponent. Great as is the contrast between the rich harvest of truth gathered during the past two hundred years, and all that was done during the preceding ten centuries, it is not more striking than the wide interval that separates the thought of the middle ages from the thought of the present day. The revolution in astronomy, led by Copernicus, is a great landmark in the history of science; it parts off, on the one side, the men who took this little globe to be the center of the universe, and who estimated everything with reference to that center, from those who do not look even on the sun as a fixed point in the universal movement; but this vast difference in the stand-point of the ancients and the moderns is only one example of the revolution that has affected the spirit of speculation in every department of thought. Has this remarkable change penetrated the domain of law? Have the spirit and the philosophy of legislation been charged with the new life? Has jurisprudence thrown off its garments of metaphysical cobwebs, and clothed itself with the sober garb of true science?

There is an accidental but singular propriety in the development of this theme within the walls of University College.

The great representative of the modern spirit, the man who, to political and legal science, was all, and more than all, that

* Being the Introductory Lecture to the Faculty of Arts and Laws, University College, London. By Professor W. A. HUNTER. October 2, 1872.

Lord Bacon was to physical science, the man "who found law a jargon, and left it a science," was one whose earliest friends and disciples were among the founders of this institution. All that was mortal of the greatest jurist of this century, Jeremy Bentham, is now enshrined within these walls. If Bentham ought to be taken as the apostle of legal reform, the Roman jurists afford an equally happy instance of the old jurisprudence —the system that Bentham set himself with heart and soul to destroy. We may describe the method of the Roman jurisconsults as metaphysical, Bentham's as positive or scientific. Jurisprudence, therefore, like the rest of the sciences, has undergone an intellectual transmutation; it dwelt for ages in the cloud-land of metaphysics; it has now been brought to the earth and planted on a solid foundation by Jeremy Bentham.

The characteristic of the metaphysical method is that it proceeds in the explanation of nature by assigning as causes to events, not the physical antecedents of those events, but some abstraction. One of the favorite abstractions employed for a great variety of purposes was nature. Why does water rise in a pump when a vacuum is made? Because, said the metaphysical method, nature abhors a vacuum. This explanation, although really no explanation at all, but a disguised re-statement of the very fact to be explained, held its ground until Torricelli made his famous experiments. It was then found, by actual trial, that in a tube of water nature abhorred a vacuum up to about thirty-two feet, but no farther. The imaginary cause, the abhorrence of nature for a vacuum, was thus found no longer to answer; and the real cause, a physical fact, the weight of the atmosphere, took its place. The metaphysical gave way to the scientific explanation.

Although the abstraction "nature" was thus given up in the explanation of pumps, it has with many held its ground to this day in the explanation of law. The Roman jurisconsults borrowed the theory of a law of nature from the Greeks, through the Stoics, and from them it has descended as a heritage of modern jurists. This law of nature was made to serve two purposes: to explain historically how law originated, and to be a standard according to which the laws of any particular nation should be improved and corrected. The defects of law were explained as arising from a failure to copy nature. Now, if we ask what this law of nature is, we can find no better answer than before. It is an empty name. Nothing can be taken out of it, but what is first put into it. It may perhaps echo the voices addressed to it, but none the less is it a dumb oracle. How then, the question may fairly be asked, should an abstraction so barren as the law of nature not merely have retained its sway for ages, but have given birth to numerous and valuable principles of law?

Was it not the law of nature that Grotius invoked, when, after the close of the desolating thirty years' war, he called upon the nations of Europe to observe among themselves those rules of justice that distinguish civilization from anarchy and savagery? And was not this single service enough to raise the law of nature to a pinnacle of fame? Was it not the same spell that Rousseau invoked to shatter the edifice of the French monarchical oppression? How, then, could the law of nature, if it be indeed barren, give forth such fruits? In considering these facts, we are indeed perplexed, as when looking on a juggler who draws endless stores of ribbon from his mouth, or vomits forth volumes of flame; we feel sure that the thing is not what it seems, although we may be unable to explain how it seems to be what it is. To explain how the law of nature has accomplished the feat, it is necessary to go far back, and to trace it to its source.

To three ancient people are we indebted for the main factors of our social system. To the Greek, we owe our science and philosophy; to the Jews, our religion; to the Romans, our law. It is true, that our science is not the science of the Greeks; our religion, not the religion of the Jews; our law, not the law of Rome; but, nevertheless, it was their evolution that enabled ours to proceed. The special value of Roman law is in showing us how a people, with the genius for order possessed by the Romans, evolved out of a rude customary law a majestic system, capable of wielding together millions of people in the unity of a single state. Moreover, this system of law was not a mere mechanical extension, so to speak, of their early customs, but possessed new ideas and principles, which had this invaluable peculiarity, that they were consistent with economic progress.

A single but instructive example of their contribution to social progress, is the last will or testament The power of leaving one's property on one's death, a privilege without which we can scarcely imagine the possibility of great industrial enterprises, is, according to our ideas, so inherent in the very notion of property, that we suppose it to be coeval with the first institution of property. Yet the will was the discovery of the Romans; from them it has passed into modern law; and, but for their assistance, we might still have been without the least conception of a will. It might have transcended the inventive powers of our ancestors. The face of society would have been altogether changed by the absence of this single discovery.

In the laws of the Twelve Tables, the most ancient written law of Rome, we find the scanty rules characteristic of a primitive and patriarchal state of society. Free labor is unknown; the community is divided into two groups: a small one, consisting of heads of families, and a large one, containing all the rest

of the population—wives, children, and slaves, under their despotic authority. As each family supplied its own wants with only occasional assistance from its neighbors, commerce was very restricted. The law of property consisted of some precise and tedious ceremonies; the law of contract was scanty, and the Roman testament was just recognized. As the Romans proceeded in the subjugation of Italy, they had to deal with vanquished communities, whose customs, differing often in detail, resembled their own in rudeness. Later on, Rome became a center to which many strangers resorted for occasional business, or for employment. In the earliest times, the Romans probably strengthened themselves by admitting new tribes to the privileges of citizenship; the necessity of keeping up their numbers reconciled them to the admission of foreign elements. But a time came when Rome closed its gates, and henceforth the aliens that came to dwell in it, unless specially privileged, were excluded from the rights of citizenship, and refused the protection of law. A proud and jealous guide, such as the Romans formed, a brotherhood—of one blood, real or feigned—refused to share its laws with those who did not belong to the old Roman stock. Aliens were ignored by the law; they could not enjoy a legal title to property; they could not make contracts. At length, however, the existence of a large body of aliens in Rome, outlaws among a law-abiding people, became too great an inconvenience and danger to be overlooked. The remedy adopted was characteristic of a people at once proud of their achievements and tenacious of their privileges. Instead of admitting aliens to the privileges of their law, excluding them only from political rights, they appoint a judge (the Prætor Peregrinus) specially to administer justice where an alien was concerned.

This step had unforeseen consequences of momentous importance. The new judge refused to apply the laws of Rome—the jealously-guarded birthright of its citizens. But he possessed, as an acknowledged right of his office, a power that has often without acknowledgment been exercised by English judges: he could make law, as well as judge, according to the existing law. The prætor had, therefore, unlimited discretion in deciding cases in which aliens were parties. What happened was probably this. If the two litigants belonged to the same state, the prætor would give judgment according to the law of the country to which they both belonged; but if they came from different states, he must make such compromises between the rules prevailing in their respective countries as common sense and a desire to do justice would dictate. In the course of time, a body of rules was gathered together, to which the name of the law of nations (*jus gentium*) was given. In the strict and original meaning of the word, the law of nations was the collection

of rules formed by the Prætor Peregrinus out of the laws of the various communities whose members appeared from time to time before him. Such a body of law growing up under the care of one of the two highest judicial officers of Rome could not fail, sooner or later, to react on the peculiar law of Rome, and modify the estimate in which it was held. The effect was to some extent the same as might have been expected to happen if the fiction about the Twelve Tables had been actually true, if commissioners had been sent to Greece and the other countries known to the Romans, to inquire into the laws by which the various nations were governed. It was to open their eyes, as an acquaintance with foreign systems often does, to the imperfections of their own. The old customary law, from whose shelter aliens had been so rigorously excluded, was very cumbersome, ceremonial, strict, but misplaced in its strictness, looking to the form only, and little, if at all, to the substance of justice. Its pedantic formality afforded the opportunity, and created a temptation to fraud. A single illustration from the time of Cicero will place this matter in a clear light. A Roman knight at Syracuse was induced by a banker to buy some gardens from him at a price so exorbitant, that the sale would have been set aside for fraud. To prevent this, the wily banker took advantage of one of the rules of the old law. He persuaded the knight to allow him to enter the transaction as for money due in his books, by means of which the sale was merged in what English lawyers would call higher matter,—the written contract of the old civil law. This written contract could not be set aside on the ground of fraud, and so the unlucky knight was obliged to complete the bargain. A case like this, which exhibited in unfavorable contrast the civil law with the law of sale, the rules of which were derived from the law of nations, could not fail to impress on a people less tractable than the Romans the necessity of reform, and the direction that reform ought to take. The inherent superiority of the rules of the law of nations, a superiority constantly brought under the notice of the highest law-making authorities in Rome, could not fail to lead to the amendment of the old civil law. It was inevitable that the narrow and mischievous system of which the Romans were at first so proud should lose in their esteem, and that the laws of the despised aliens should become the chief corner-stone of Roman jurisprudence.

I must now advert to the manner in which the body of rules thus originated, the law of nations, became connected with the metaphysical abstraction, the law of nature. Th idea of natural law was taken from Greece. The sophists had asked whether the laws governing man's conduct originated from nature, or whether they were as artificial as dwelling-houses

and cooked food. Plato is full of such discussions. The Stoics took up the idea of nature from a moral point of view. Their famous maxim, which was to them what "Do unto others as ye would they should do unto you" was to Christianity, was "to live according to nature." This was the sum and substance of the moral law. But what is "nature?" That is a question to which the Stoic never could give a satisfactory answer. Nature, as we have seen, was an empty phrase; it taught and could teach only what they pleased it should teach. The word "natural," when opposed to "artificial," has a certain meaning; but it is just as likely to suggest shallow whimsicalities as sensible and useful improvements. Epictetus tells us, that by nature all men are free; but the confidence we feel in this dictum of nature is somewhat diminished when we learn from the same author that it is against nature to shave. It is putting oneself in antagonism to nature when one desires a rose in winter, says Seneca. "Do they not live contrary to nature," he confidently inquires, "who plant orchards on their turrets, so that trees may wave over the tops of their houses; and strike their roots in those places where it would have been presumptuous to hope to reach with their highest boughs?" Again, "Do not they live contrary to nature, who lay the foundation of their baths in the sea; nor think they can swim delicately unless the warm water be likewise ruffled with waves?" If it had ended with the Stoics, nature would have remained what it was from the beginning—a name for a collection of arbitrary principles; and the law of nature would have met the same fate as the Stoic Philosophy, and would not for so many ages have been a name to charm with

We know that many of the eminent Roman jurists adopted the Stoic Philosophy, and to them we owe the identification of the law of nature, with that very sensible collection of law made by the Prætor Peregrinus. Indeed, the identification was by no means difficult. Underlying the superficial differences of the customs of the various communities known at Rome, there was a common element, and, as it happened, out of that common element it was possible to draw rules of law very much better than the laws of any one of the communities. Now, if nature means anything, it must be the common and universal, and not the peculiar or particular. It was, therefore, a short step to say that the law of nature, if sought at all, must be sought in the common element. But the case does not end here. The Stoics held the doctrine of innate ideas—the theory that there are certain common principles or maxims impressed on all mankind from birth. What more easy, then, than the question, are not these common principles to be found in the law of nations, which has been derived by eliminating the idosyncracies of dif-

ferent systems of law, and bringing to light the substratum of truth underlying them all? This was a question that to a Stoic admitted of only one answer. The law of nations sprung from the customs of the despised aliens, was now invested with dignity and eminence, as the law of nature itself.

It has been suggested that the law of nations gained much by its association with the more dignified theory of natural law. There was nothing in a body of rules derived from the practice of various communities to excite the admiration of a citizen of the ruling state. Exclusiveness and privilege, distinctness from his neighbors, not likeness to them, were the favorites of a haughty burgess of Rome. Men in general are not over-fond of learning from their neighbors; and when we remember the disgrace involved in the opinion of many in what has been called "Americanizing our institutions," we can understand the repugnance that a Roman would feel to giving up the cherished heritage of his ancestors for a nondescript body of laws, made, in the absence of anything better, to suit a motley collection of foreigners. As a matter of fact, this nondescript body of laws was, from every point of view, better, a nearer approximation to ideal justice, than the municipal law of Rome, but the difficulty was to get the Romans to overcome their prejudices, and see the thing as it actually was. That the law of nature enabled them to do so, is claimed as its special service, and if the claim be just, a notable service it was. It was the law of nature, so it has been urged, that raised the law of nations out of its contemptuous neglect, and made it the model of a just and wise system. It was the talismanic touch of nature that converted the law of nations from being treated as the scum of law, to being regarded as the cream of all law. Or, to vary the figure, the law of nature found the *jus gentium* employed as a menial in the house, and proved that it was the true son and long-lost heir of the family. There may be some truth in this view, but it seems to us to be much less than has been supposed. The old civil law was so clumsy and inconvenient, as law, so thoroughly bad, and the law of nations was so manifestly good and excellent on the very points where the civil law pinched most, that it seems scarcely possible for the two to have existed long side by side without leading to an adoption of the better system. Nor must it be forgotten that the author of the law of nations was one of the two highest judicial officers; and that he, at all events, was not likely to remain blind to the merits of a system of his own creation. His colleague, the Prætor Urbanus, having full power to alter or amend the civil law, was not likely to remain long insensible to the discoveries of the law of nations. But the question does not rest upon conjecture. Long before Stoicism had any considerable influ-

ence at Rome, the task of superseding the old civil law by the law of nations was well begun. The contracts made by consent alone—or at least one of them, sale—were in existence before the time of Cicero, and probably very long before that time; but these were contracts of the law of nations superseding the clumsy nexual obligation mentioned in the laws of the Twelve Tables. If the Romans showed this alacrity in strengthening and reforming a very weak part of their civil law, by the law of nations, we can not doubt that, even if Stoicism and the law of nature had never been heard of, the law of nations would have modified, improved, and supplemented the very narrow jurisprudence of the early ages.

In this connection, it is interesting to observe how completely powerless was the law of nature to effect any reform, when it was not supported by the law of nations. Perhaps the only case of importance where a conflict arose between them was on the subject of slavery. The law of nature was credited by the Roman jurists with an abhorrence of slavery. This amiable opinion is what we should expect from the Stoics, especially from Epictetus, and the gentle emperor, Marcus Aurelius; but a different view was put forth by Aristotle. He considered it was as natural for the master to govern his slave, as for the soul to govern the body; that there must be a class of persons to do manual labor, whose bodies were suitable for the purpose, and whose minds were fit for nothing better. Slavery was thus determined by the fitness of things, and sanctioned by nature. Whether Aristotle or Justinian was correct in their interpretation of nature does not much matter; because the only thing of interest to us, is that Justinian should have held the opinion he did. But, whichever was right about nature, there could be no mistake about the practice of nations; all the countries in the ancient world, known to the Romans, had slavery; there was not a single institution that had a superior claim to a place in the law of nations. It is interesting to inquire whether the law of nature was able to correct the injustice of the civil law, when it was not assisted, but opposed, by the law of nations. As might be expected, it did and could do nothing. Even in the mouth of an emperor, the assertion that slavery was contrary to nature remained a barren protest.

It would be easy to show that while the theory of natural law as imported from the Stoics did not affect legislation, whatever good it appeared to accomplish was due really to the law of nations. But what is equally true, is that it was owing to an ignorance of this fact that the errors committed under the sanction of the law of nature have arisen. Those who inherited the tradition, without understanding the origin of the law of nature, ascribed to its dictates a universal sway. The mis-

chief of this error has been severely felt. One of the doctrines attributed to the law of nature was that things without an owner became the property of the first person who took possession of them. As a rule of the *jus gentium*, nothing could be more reasonable. Trifling articles abandoned by their owners, wild animals, pearls, gems, and jewels found in a state of nature, with good reason may be given as property to those who find them. The Roman jurists, however, stretched this rule much farther, and created a bad precedent for their mediæval commentators. They held that the property of an enemy, including his land, was to be regarded as without an owner, and the capturing foe as acquiring a right to them as first in possession. This fiction barely conceals the real motive of such a rule, which was simply the right of the stronger; but it is extremely moderate when we consider the lengths to which jurists went, upon the principle that what belongs to nobody is the property of the first possessor. When America was discovered, and laid open to Europeans, the whole Continent, despite its being peopled, was held to belong to nobody, and therefore to fall to the first-comers. Questions too knotty for jurists to decide speedily arose, and were cut with the sword. What constituted a possession? Did planting a flag on the mainland give a right to all the Continent; and if not to the whole, then to how much of it?

Not the least pernicious consequences of exalting the law of nature, has been the encouragement of a metaphysical treatment of political questions. The law of nature is, of course, unalterable; the rights it confers may be denied, but they can not be changed or modified. The rights of man are a given quantity, admitting neither increase, diminution, nor compromise. They are essentially extreme, and stand in the way of those temporary accommodations which are found so useful in smoothing the path of revolution. They form a class of "irreconcilables," who, unless completely victorious, are crushed under foot We may thus conclude this account of the law of nature, by the observation, that while itself is not capable of giving birth to any useful doctrines, and is of doubtful utility to those valuable principles that are taken under its wing, it often perverts them, and leads to abuse.

In striking contrast to the metaphysical abstractions of the Roman mediæval jurists, is the scientific or positive method of Jeremy Bentham. The words of Bentham supply us with amusing illustrations of this antagonism. Bentham, in one place, describes Roman law as a "mischievous and absurd system of jurisprudence;" and in another says its judicial procedure was prepared by jargon, and sown thick with iniquity, delay,

and vexation. Of Heineccius, who seems to have been almost the only writer he consulted on Roman law, he speaks in even stronger terms, "his school of fraud and nonsense." This language, although in an objective sense too strong or even unjust, does not misrepresent the contempt and loathing with which Bentham regarded every rag of metaphysical verbiage. If it displays a fervor and vigor of hatred which we do not look for outside the pale of theological controversy, we must remember that Bentham can plead the privilege of an iconoclast; his work was to shiver in fragments a mighty framework of jurisprudence that had lasted for ages, and had for ages encumbered the ground; and he thought more of accomplishing his task than of critically examining the edifice, to find some little corner that he could admire. We, however, seeing that Bentham has successfully begun and carried far on a great revolution, can afford to do justice to the fallen foe, without disparaging the great deliverer. Politically, Bentham's judgment was right: the system of the mediæval jurists was bad, and deserved to perish; historically, his judgment was unjust; he did not recognize the essential service that Roman law had bestowed on mankind; but in his defense it ought in fairness to be said that Bentham's standing-point was political, not historical.

It has been alleged that Bentham's famous aphorism, that the only proper object of legislation is the greatest happiness of the greatest number, is really as barren as the rejected law of nature. But for two reasons I can not admit this. In the first place, Bentham's maxim condemns by implication two of the besetting sins of all law-makers—the temptation to legislate not for the greatest number, but for small and influential cliques; and the danger of acting upon mere impulse or sentiment. If Bentham's maxim did nothing but nail to the ground those two cardinal vices of legislation, it would be of essential value. But, in the second place, the fruitful principle in Bentham's method is not the maxim of utility. It is induction. Undoubtedly happiness is the object of laws, just as truth is the object of science; and although it is important and sometimes necessary to keep in mind those elementary propositions, yet their recognition does not tell us how to find out truth, or how to secure happiness. According to Bentham, utility was the end or purpose of legislation, but experience was the guide to it. In the same way, as truth in physical science is gained by experiment and observation, so the legislator must depend on sound induction to enable him to make good laws; that is, laws whose tendency and effect are to increase human happiness or avert misery. Bentham, therefore, must be classed among the inductive philosophers; his special merit was to apply the scientific method with which men were familiar enough in physical science to jurisprudence.

The best testimony to the value of Bentham's principle is the success of it. When he studied law he found justice buried beneath a load of abuses. Lord Eldon's delays had made the procrastination of Chancery a proverb; and the Chancery procedure was so defective as in a great measure to impair the value of its excellent jurisprudence. The technical procedure in the common law courts strewed the path of the honest litigant with quirks and pitfalls, and in the same degree afforded to impudent rascality the means of defeating justice. The principle of the penal law was a barbarous severity of punishment, mitigated by barbarous caprice. The rules of evidence were so contrived as to place great and often insuperable difficulties in the way of finding out the truth. During the last forty years the worst abuses have been removed, and every department of law has felt the touch of the reformer. Comparatively few of the statutes made to improve the administration of the law can be mentioned on which in justice the name of Bentham should not be written. Nay, more, such reforms as Bentham advocated, and have not been adopted, may to a great degree be confidently reckoned among the Acts of Parliament that have yet to be passed. Space forbids any extensive illustrations of this subject; but there is one department of law on which Bentham has left a deep mark, and which affords a favorable means of comparison with the Roman law, and is sufficiently compact and narrow to admit a rapid survey. It is on the law of evidence that the value of Bentham's method receives one of the most conclusive proofs. Upon this subject I have also the advantage of being able to quote the impartial opinion of the greatest writer on the English law of evidence, the judge of the Greenwich County Court.

"Jeremy Bentham, at the commencement of the present century, in vain undertook to expose the abuses of this system (the exclusion of witnesses), and ventured to assert that, if the discovery of truth were the end of the rules of evidence, and sagacity consisted in the adaption of means to ends, the sagacity displayed by the sages of the law in defining these rules was as much below that displayed by an illiterate peasant or mechanic in the bosom of his family, as, in the line of physical science, the sagacity shown by the peasant was to that evinced by a Newton. Lawyers, wedded to a system which they arrogantly deemed the perfection of reason, listened with impatience to arguments which, if adopted, would compel them to unlearn the lessons of their youth; while the uninitiated, for the most part, regarded the controversy with indifference, as though, forsooth, it related to a subject in which they had no interest, or else refrained from expressing, if not from forming, an opinion upon matters respecting which they felt themselves incompetent to decide. The truth is, that when Mr. Bentham's work on evidence first made its appearance, the world in general regarded the author as a gentleman who delighted in paradox, and wrote bad English, while, in the judgment even of the discerning few, this great apostle of judicial reform ranked little higher than an ingenious theorist. But truth, though long discountenanced, will at length prevail; and thus by little and little, Mr. Bentham's opinions were at

first canvassed, then recognized as correct, and finally, in a great measure, adopted by the Legislature."*

The principle of the law of evidence, when Bentham began his judicial work, was to exclude from the witness-box every one who might be suspected, from his character or position before the court to be likely to tell lies. Husbands could not either in civil or criminal cases, give evidence for or against their wives, nor wives for or against their husbands. The Newgate Calender contains the trial of a shoemaker who was convicted on the evidence of his daughter of having hanged his wife. If he had hanged his daughter in the presence of his wife, he would probably have escaped, as his wife could not have been a witness against him. The parties to a cause, whether as plaintiff or defendant, could not give evidence. A debtor, let us suppose, pays his creditor when no one is present, and neglects to require a written receipt for the money. If the creditor were dishonest he could make the debtor pay the debt over again, because neither the creditor nor debtor, who alone knew anything of the payment, could give evidence. In the time of Bentham, Quakers were admitted as witnesses in civil but not in criminal proceedings; as if the law, not content with being wrong, must also be self-contradictory. In contrast with this caprice is one that the law subsequently made. A defendant in the Divorce Court was not allowed to give evidence in his own behalf, but he had only to cross the street, as it were, to indict one of the witnesses against him for perjury, and he was competent not only to testify on his own behalf, but even to have the witness punished for perjury. Thus a man who was regarded in one of her Majesty's courts as so untrustworthy that he could not be suffered to say a word in his own defense, was, in another of her courts, considered sufficient not only for his own exculpation, but deprive another man of his liberty. All those restrictions have been removed. Of all that Bentham inveighed against only two remain on the Statute Book The defendant in criminal proceedings, and the defendant's husband or wife, are incompetent as witnesses. But the days of this rule are numbered: if not in the next, at all events in a very early session of Parliament, this last remnant of exclusion will be swept away.

The English rule of evidence excluding witnesses were probably borrowed, directly or indirectly, from the Roman law. It is perhaps not quite fair to put the Roman law to the severe test of Bentham's principles of evidence. On the subject of evidence, Bentham is perhaps at his best; the Roman law is certainly at its worst. Its list of exclusions is long; and one

* Taylor on "Evidence," 5th edit., p. 1161, s. 1212.

wonders how it was ever possible to prove even the simplest fact in a Roman court of law. To begin with slaves. These were inadmissible as witnesses for or against their masters, and not even against other free men, unless no other testimony was forthcoming, and then only after they had been put to the torture. Even after they had been freed, slaves could not give evidence against their old masters. Parents and children could not appear for or against each other. Youths under fourteen could not be witnesses in any case; and those above fourteen, but under twenty, could give evidence in all civil cases only, not in criminal proceedings. All persons convicted of crime, and even gladiators, were stamped by the law as forever unworthy of credit in any causes whatever. Persons who had any interest in the result of litigation were inadmissible as witnesses in their own case. Religious antipathy, under the Christian empire, forged new chains. Jews and heretics were prohibited from giving evidence to injure any orthodox person; Pagans and Manichæans were treated with more severity, and were peremptorily excluded from the witness-box; while bishops were indulged with the privilege of giving evidence when it suited them, and withholding it if inconvenient. This is a formidable catalogue, but it does not exhaust the devices of the law to hinder the discovery of truth. After having reduced the possible witnesses to the lowest number, the law completed the mischief by refusing to admit any fact as proved, unless it were attested by at least two witnesses. The wonder is how, with such laws, justice could have been administered.

Some of the restrictions of the Roman law were justifiable in their origin, but were maintained for centuries after the justification had ceased. Thus women could not be witnesses to a will, because in the early period of Roman history wills were made in the *comitia* or parliament of the Roman burgesses, to which women were not admitted. But the making of wills in the *comitia* became obsolete at a very early period; and, notwithstanding, women could not be witnesses to wills, although they could appear and give evidence in the courts of law. So in the case of slave, the master had at first the power of life and death, and it would have been useless to examine the slave as a witness, when his master could kill him if he said anything to his disadvantage. But the rule of exclusion was kept up for hundreds of years after a master could have exercised so cruel a power. The same explanation applies to children, over whom their father had at one time the power of life and death; and the same observation may be made, that the exclusion subsisted for ages after the reason for it had gone. The intensely conservative character of the Romans, which opposed itself to every change in their law that did not seem urgent or necessary, was, in con-

tinuing the exclusion of witnesses, fortified by a feeling common enough at all times, the dislike of powerful classes to be worsted in a lawsuit, or convicted of a crime by the testimony of their inferiors. A curious evidence of this disposition is afforded by the terms applied by the Emperors Honorius and Theodosius to the testimony of freed slaves against their former masters. "We do not permit," say these guardians of the law, "a freedman to raise his unlawful and base voice against his old master, and shall punish him if he ventures to do so." In this law, public justice is set aside, as unworthy of comparison with the evil of convicting a criminal by the testimony of an old slave. Such is one way of looking at the purpose of judicial evidence.

We may well ask, Where was the law of nature all this time? Ancient abuses maintained, accidental errors turned into perpetual rules, gross ignorance of the purpose of judicial evidence in the highest quarters, constant miscarriages of justice, what stayed the arm of natural law, that it did not smite the fabric of error and injustice? Elijah did not with more confidence invite the priests of Baal to consume the sacrifice on the altar, than Bentham might have implored the devotees of natural law to sweep the Augean stable of legal procedure. The law of nature proved a dumb oracle; there was nothing in it; and out of nothing, nothing comes. It had not, as in other instances, been inspired by the law of nations; for the law of nations seems to have done little for the improvement of judicial procedure. The prætor, in deciding causes in which foreigners were parties, was compelled to consider the law of their country, but had no occasion to concern himself with any other rules of evidence than he was accustomed to at Rome. This is a distinction always preserved. For example, when an English court of law enforces a contract made abroad, it accepts the law of the country where it is made as to the validity of the agreement; but it compels the parties to adopt its own procedure. In the same way, we may conclude, from the manner in which the *jus gentium* grew up, that it would contribute little or nothing to amend the law of evidence; and thus the Roman law lost the inestimable advantage of comparison with foreign systems of procedure. Had it been otherwise; had the law of nations corroborated or confirmed the Roman practice, we should have found modern writers ascribing the rules of evidence to nature, and attributing to them infallibility. How plausible it would have been to say, that for a son to give evidence against his father is contrary to nature! It might have been alleged to be a natural right for a man to give evidence in his own favor but quite unnatural that he should be forced to speak to his own disadvantage. We should have had a great conflict among

jurists upon the subject of oaths, whether the swearing of witnesses is a dictate of nature, or only an institution of man. But the law of nature was dumb, and we have been spared those entertaining and endless controversies.

Now it is precisely when natural law is weakest, that the strength of Bentham appears. The object of all procedure and evidence must manifestly be to discover the truth and execute the law. It is a utility of means to an end, the end in question being precise and narrow. A good system of procedure is one that best accomplishes the objects of the lawgiver: a bad system is one that defeats his purposes, or delays or hinders them. When the object of utility is thus narrowed, it should not be difficult, after the experience the world has had of judicial institutions, to frame a system reasonably good, or at least to point out the errors of a bad system. The one indispensable condition of success is a faithful adherence to the end in view, and a suppression of all irrelevant sentiments. In England, for many years, the great penal law was deliberately employed as a weapon to crush the Dissenters from the Church Establishment. In Rome, also, the instances are not rare in which the law was turned aside from its legitimate objects, to forward the schemes of an ecclesiastical organization. At other times, law has been used by the few as a screen to hide their offenses against the many. But from all such perverting influences, Bentham was entirely free, and his success is due greatly to the unswerving fidelity with which he worked out the great problem of legal reform.

I have now concluded this attempt to portray the characteristics of the scientific method of jurisprudence. I shall not attempt to do justice to the great man who first showed us the true path of legal progress. The time has not yet come for such an effort. We are too near him; not until the lesser lights have fallen into the darkness of the past, will the splendor of Bentham be fully perceived. It may with some confidence be expected, as year by year his ideas are transferred from his writings to the statute book, and as his principles are better understood, that his fame will grow and his disciples increase. But the lesson to be drawn from the facts recited is of more importance than the reputation even of a great man. It is the overwhelming value, the necessity, of a *right method.* Even with all Bentham's intellect, with his leisure, his long life, and his unwearied devotion to work, he could not have accomplished a tithe of his achievements if he had not seized the true principle of legal reform, and adhered to it with perfect fidelity. His genius lay in discovering the right method. To us is given the easy but profitable task of using it aright. We enter into the splendid inheritance he has bequeathed to us, and the fruits of his genius and labor will remain with us.

MORTGAGES BY DEPOSIT OF TITLE-DEEDS.

The late Mr. Jarman, writing in 1839, after collating a number of cases illustrative of the fine distinctions, the doubts and difficulties, arising on the law of equitable mortgage by deposit of the title-deeds, says: "A cursory glance at the numerous preceding cases which have arisen in regard to depositing securities will strongly demonstrate the inexpediency of relying upon this species of security, which ought never to be accepted, unless, perhaps, in the case of small temporary loans. It is not a little surprising that some large banking and mercantile firms are in the habit of taking securities from their customers in this manner. They are always popular with borrowers, as avoiding the necessity of a formal deed of conveyance both on the occasion of the loan and of the repayment, and as leaving no trace of the transaction on the face of the title."

One of the dangers to which a mortgage by deposit is exposed is brought into prominence by the case of *Dixon* v. *Muckleston*, decided by Lord Romilly on the 18th of April, and reported 26 L. T. Rep. N. S. 752; the result of which can not be more succinctly summarized than in the head note which is as follows:—"In 1864, M. deposited title-deeds of 1774, relating to certain property, with A., and in 1868, M. deposited title-deeds of the same property, showing a title in himself from 1787, with B., without notice of the prior deposit. Held, that the deeds deposited with A. were material to the title, and that the charge thus created in favor of A. had priority over the equitable mortgage to B." It should also be stated that the deeds of 1774, which were held material, were the lease and release, by means of which the property was conveyed to a person through whom the mortgagor derived title and who settled them on the occasion of his marriage by the deeds of 1787. Lord Romilly says: "The deed must be a material deed, but I think that the word material means only that it must be a deed relating to the property. No one can say that this, which was a conveyance in fee of the property, and the root of the title, was not a material deed, though one of an ancient date. It is true that this will follow, and this argument is strongly urged, that the result of this will be that many equitable mortgages may be made of the same estate, and this unquestionably is true; but the sole answer to this is, that the person who lends money on this species of security must take care to be the first of such incumbrancers, and if he can not be sure of this he must not advance his money without the security of a legal mortgage." Whether the very wide sense attributed to the word "material" by the Master of the Rolls be correct or not—whether muniments whatever their age, and however slightly they may affect the property, are or are not to be deemed material—it is clear that the meaning to be given to the word "material" is wide enough to render the mortgage altogether dependent on the good faith of the mortgagor, and, which is of more importance, that the court will not weigh degrees of materiality in determining questions of priority. In many cases bankers and others mak-

ing advances deem the possession of the most material deed—the conveyance to the mortgagor, or the deed showing his immediate title—sufficient, and the case of *Dixon* v. *Muckleston* forcibly exposes the fallacy of this notion. Where a mortgagee chooses to accept a deposit-security, we think he may require from the mortgagor a statutory declaration that he has not created and is not aware of any incumbrance.

DEFINITION OF A BROKER.

The following is Mr. Justice Brett's definition of a broker. His Lordship came to the conclusion that a broker as such can not be sued by any one; but his view did not prevail in the case from which we quote—*Fowler* v. *Hollins* (27 L. T. Rep. N. S. 168; L. Rep. 7 Q. B. 617) :—"The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between other parties. If the contract which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belonged to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass until a subsequent appropriation of goods has been made by the seller, and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he signs the contract, his signature has no effect as his, but only because it is in contemplation of law, the signature of one or both of the principals; no effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times, in England, the broker has undertaken a further duty with regard to the contract of purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and, on its being signed, he passes it to the vendee. In so doing he still does no more than act as a mere intervener between the principals. He himself, considered as only a broker, has no possession of the goods, no power actual or legal of determining the destination of the goods, no power or authority to determine whether the goods belong to the buyer or seller, or either; no power, legal or actual, to determine whether the goods shall be delivered to the one or be kept by the other. He is throughout merely the negotiator between the parties. And, therefore, by the civil law, brokers "were not treated as ordinarily incurring any personal liability by their intervention unless there was some fraud on their part." (Story on Agency, sect. 30.) And if all a broker has done be what I have hitherto described, I apprehend it to be clear that he would have incurred no liability to any one according to English law. He could not be sued by either party to the contract for any breach of it. He could not sue any one in any action in which it was necessary to assert that he was owner of the goods. He is dealing only with the making of a contract

which may or may not be fulfilled, and making himself the intermediary passer-on or carrier of a document, which may or may not be obeyed, without any liability thereby attaching to him toward either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possessing of them, either on his own behalf or on the behalf of any one else. Obedience or disobedience to the contract, and its effect upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and in no way within his cognizance. Under such circumstances, and so far, it seems to me clear that a broker can not be sued with effect by any one.—*Law Times.*

EGYPTIAN LAW REFORMS.

A CONSTANTINOPLE correspondent telegraphs under date July 26:

"The following are the chief points of the report of the International Commission which met at Cairo to examine the reforms proposed by the Egyptian Government for the administration of justice in Egypt. The commission was presided over by Nubar Pasha, and the main object of the proposals of the Egyptian Government was principally directed to two distinct points: firstly, the reform of the civil and commercial jurisdiction, and secondly, of the criminal jurisdiction. The report adopts the views of the Egyptian Government for the establishment of one court both for the settlement of cases between foreigners and natives and also between foreigners of different nationalities. This court ought, says the report, to be composed in such a manner that in those cases which concern foreigners only, the majority of the magistrates should be foreigners. And also the decision of the courts of First Instance should be delivered by three judges, two of whom should be foreigners and the third a native. In the Courts of Appeal five judges, three of whom should be foreigners, should decide the cases brought before them. In commercial cases brought before a Court of First Instance, two judges, one a foreigner and the other a native, chosen by election, should be added to the number of sitting judges. The appointment and selection of the judges should, the report considers, be left to the Egyptian Government, but it should allow itself to be guided in the selection of the views of foreign Governments. At the same time the judges should be irremovable. In reference to the guarantees offered by the Egyptian Government, the report says: 'The Government has offered a certain number of guarantees, which it will be sufficient to sum up in a few words. Infraction of the penal law will be transferred to those tribunals which themselves have the right of ordering their prosecution. The police can not arrest, and the authorities can not issue a warrant of arrest, except in the case of a flagrant offense, public disturbance, &c. A person arrested must be taken before a judge of instruction within twenty-four hours of his arrest. Accused persons will always have the right of producing witnesses either during the preliminary examination or the public trial. The arrangement relative to the examination of witnesses and the appointment of official advocates will act as a protection for the defense of the accused person. Finally,

the principal guarantees will be found in the establishment of trial by jury, the accused person thus being certain of being tried by their peers.' The Commission, however, was unable to give any opinion as to the sufficiency of the guarantee offered by the Government before a penal code shall have been drawn up, as has been promised to be done very shortly. Finally, the conclusion arrived at by the Commission as to reforms required in the administration of criminal justice may be thus summed up: In the first place the Commission is of opinion that, first, simple breaches of the law should be judged by the new tribunal, or by judges delegated by them; secondly, that the judge should be a foreigner when the prisoner is a foreigner; and thirdly, that it should, in case where the penalty of imprisonment has been inflicted for a breach of the law, be legal to appeal against such decision. In the second place, in reference to the chief proposals of the Government the majority of the Commission were of opinion—first, that a unity of jurisdiction in all criminal and correctional matters was necessary for the preservation of general security; secondly, that such unity of jurisdiction should be subordinated to the examination of the guarantees resulting from a complete legislation comprising a penal code and a code of criminal instruction; thirdly, that the reform of justice—of civil justice, and the reform of penal justice, ought to be introduced at the same time, or at the latest that the penal jurisdiction should come into operation within one year of the civil and commercial tribunal commencing its functions."—*Irish Law Times.*

SOCIAL SCIENCE CONGRESS.

LAW REFORM.

The delivery of the address of Sir John Coleridge, Q.C., M.P., the Attorney-General, the president of the Department of Jurisprudence.

THE ADDRESS.

On taking the chair of this section — an honor which I owe to the fact of my filling for a time the office of Attorney-General—it is proper, and you will expect, that I should address to you a few words by way of opening; and my subject has been, I will not say dictated, but suggested, to me by those who asked me to take the chair. I was asked at the same time to address you upon law reform—a subject, indeed, of vast extent and great complication, one in which some persons take a keen and intelligent interest, in which many more profess to take an interest without knowing any thing about it but the name, and which, if newspaper criticism be correct, I am the very last man in England to handle—a lethargic amateur, knowing nothing about the law, and, if possible, caring less, altogether wanting in breadth of view and manliness of mind, perfectly satisfied with every thing as it exists, the indolent but inveterate foe of all improvement. Such is the flattering portrait drawn by candid and philosophical criticism of the chairman of this section of the Social Science Congress of 1872. It is very seldom worth the trouble to attempt a personal controversy; it certainly is not worth the trouble now;

but even if it were, this is not the occasion for it, nor are you the person to inflict it on. I propose, therefore, as I have been asked to do so, simply to lay before you some of the notions on this subject which have been in my mind for many years, careful only that the opinions shall be real, grounded on reasons which shall be stated, and capable of being practically enforced. With some exceptions—remarkable because they are exceptions—the English law, like the English people, is unscientific. It does not bear the impress of one age or of one set of minds, still less is it the creature of a single great act of legislation. This is not said in praise either of the law or of the people of this country. It is too much the fashion to boast with a good deal of self-sufficiency of the practical character of Englishmen, and their impatience of system, of accuracy, of science, as if in themselves praiseworthy and excellent. It is a bad fashion, the cause of much slovenly legislation, and of the toleration of much eccentric barbarism in our laws and customs. If things work fairly well, and result in no great or widely-felt grievance, nine Englishmen out of ten will be for leaving them alone.

THE JURY SYSTEM.

There are, however, many things in our law which do not work well, and do result in great and diffusive grievances, and these may be handled at once with good hope of success. Such a subject is the law relating to juries. A good system of juries is of infinite importance; our present law works very badly, and occasions a large amount of unjust, oppressive, and entirely needless inconvenience. It is a subject entangled with a multitude of details, and difficult to deal with. But I invite your attention to the Bill upon the subject which it became my duty to endeavor to pass through Parliament this year, as an example of the manner in which I conceive it to be practicable and right to reform the law where it is faulty. If the Bill ever passes—and if I hold office I shall try earnestly that it shall— it will contain the whole law of juries, and will introduce certainly very large, and I hope very useful, alterations into one of the most important of all our institutions. To apply remedies to those things which experience has shown to work injustice is no doubt far less showy, but I think is far more real, than to attempt reconstruction from the very foundation of our judicial system—for which, as it exists, much is to be said, which has great positive advantages, and which I firmly believe with certain obvious modifications, presently to be pointed out, may be made to do the work of the country to the reasonable satisfaction of reasonable men. In speaking of law reform we speak of that which has to do with two things perfectly distinct and separate from each other, not only in idea but in fact. I mean the law itself, and the procedure by which the law is administered. Both may be improved; but the last procedure is the handmaid of the first; law depends upon it. To my mind it is clear that you waste your time upon procedure if you have not clearly before your mind what the law should be, and what changes of principle, if any, you mean to make in it. No doubt you may make a bad law more endurable by administering it well,

but if you have any reasonable hope of changing the law itself, and altering it for the better, this is the first step in the law reformer's journey.

THE FUSION OF LAW AND EQUITY.

Take the fusion of our two systems of law and equity—a thing which is absolutely certain one day to be done. To have two sets of courts existing side by side, one main function of one set being to prevent the injustice which would result from the judgments of the other set, is in idea barbaric, and in practice highly inconvenient. But till you have settled, first, that law and equity shall be united, and next, at least, the leading terms of union, how can you possibly tell what courts will be wanted, or by what rule of procedure the courts shall be governed? It must be remembered always that the things themselves, law and equity, and the rights and liabilities arising out of them, are inherently distinct. The distinction is in the nature of things, and has not been created, nor can it be abolished by Act of Parliament. The courts which now respectively administer them have systems of procedure adapted, or intended to be adapted, to these respective jurisdictions. But if an entirely new system of law is to be evoked by legislation from the union of the two, the procedure by which it is to be administered will require the most careful framing; the principles, at least, of the new system must be determined and expressed in something like a code, or I venture to say that a confusion of years will follow, profitable to no one but to practising lawyers, and discreditable to a great country which will have the meaning of its law to be ascertained at the expense of suitors, instead of taking the trouble to have it clearly expressed by statute or code, to be sanctioned by Parliamentary authority.

A CODE OR A DIGEST?

I have often before said, and I have been laughed to scorn for saying, but I here deliberately repeat, that there is no reason why the law of England should not be expressed in a code. It would not, undoubtedly, put an end to litigation, nor prevent bad and conflicting decisions. It would not be an easy matter, and when done would be open to objections. But there is no difficulty inherent in the nature of English law, none which great and able lawyers might not well overcome. That we might have had it at this moment I am fully convinced, if we had spent upon the code the money, the time, and the labor that have been comparatively thrown away in feeble and ineffectual attempts to make a digest of English law. In general, with a few magnificent exceptions, of whom Lord Mansfield is the greatest, English judges having had to administer a system of unwritten law, except where it has been modified or created by statute, have brought to the task an almost superstitious reverence for decisions, and a determination to follow out a legal principle to its logical consequences, utterly regardless too often of moral and practical absurdities therefrom resulting. It follows that to all men not lawyers, and to most men that are, there is a multitude of decisions utterly worthless, to say the best of them, which for the credit of the law, had best be partly forgotten. It is of melancholy interest sometimes to trace the ingenuity with which courts

and judges have striven to evade the authority of a bad or unjust decision without in terms questioning its authority. Take, for instance, the struggle between courts as to the extent to which a principal can take advantage of a mistake or a fraud committed by his agent. A majority of one court, in a famous case, where a principal put forward an ignorant agent to tell a falsehood, by which he benefited, and the person injured pleaded the fraud as a fraud of the principal, said there was no legal fraud. Such an outrageous absurdity is too much for acquiescence of another court, which accordingly proceeds to accept the authority of the case, and at once to distinguish it, while accepting it, by a line too fine for any but a legal intellect to see and apprehend. Instances can be multiplied fiftyfold, but this is enough to show you what I mean, the worthlessness of a digest, as compared with a code; for all these decisions will be preserved in a digest, bad and good, sensible and foolish alike, and a plain and intelligent rule, if it can be drawn from them, will still have to be drawn out by the ingenuity of courts and judges. But these decisions will disappear in a code. A code cuts the knot which digest leaves to be disentangled. Between two conflicting principles it selects one, and clearness and simplicity, the two main elements in all good law, are at once and forever secured. That the thing can be done our own times have shown us. Perhaps the Code Napoleon can hardly be said in strictness to belong to our own times, but its date is only just before them. We have ourselves, in the last few years, enacted for India a code which in many respects is a model of what such a code should be. In New York a great code of procedure was enacted but a few years since, which I understand to have worked to the satisfaction of those who had to administer it. These examples are enough to show the possibility, at least, of an English code. But it will never be made by taking young barristers in no large practice, and setting them to make digests of different heads of the law. Such work is waste of time and money, and has led to disputes and heart-burnings much to be regretted. A code, if it is to be made at all, must be made by the first lawyers in the country, men of power and authority sufficient, not merely to digest the law, but, if need be, to make it. The code of Justinian was made by the greatest lawyers in the empire; so was the code of Napoleon; so was the code of New York. To pass a code clause by clause through the Houses of Parliament is utterly impracticable. But I do not think it is at all impracticable to pass a code (as bodies of statutes are often passed), made by competent men, submitted to Parliament, and acquiring the force of law, if Parliament does not dissent. Choose your men and pay them properly, and I believe a code, whether of law and of procedure, to be perfectly attainable. It would be the best return the country ever received for the expenditure of its money, and I believe there would be no difficulty raised by Chancellors of the Exchequer. I think I can answer for the present one. My plan would be something of this sort. Take three men, and, if you choose, four, of the very highest position; give them, if they have not it already, the rank of privy councillors, and the salary of judges;

make their services, in preparation of the code, count as judicial, and give them, if not otherwise entitled to it, at the expiration of their labors, the pension of a judge. In some such way I am convinced a code might be prepared and sanctioned in its integrity by Parliament—a triumph for the minister who achieved it, and of great and permanent advantage to the country. Whether the opportunity might be taken to make one system of law for the three kingdoms is a question for politicians rather than for jurists. That there is much in the Scotch law, and something in the Irish procedure, which we might probably borrow, I am sure; and, on the other hand, both Scotland and Ireland, it is possible, might with advantage adopt something which at present is to be found in English only. Such are my reasons for thinking a code possible—possible if aimed at in a practical spirit, and with due adaptation of the means to the object; and, if possible, it is manifestly the first thing to be taken in hand, because, if well accomplished, it will save the doing of many others. Should, however, a complete code, similar to what other nations have accomplished, be deemed too great an undertaking for the English people, there are certain heads of the law which lend themselves willingly to the great process of codification. Such are, for example, the law of evidence, the criminal law, the law of real property. If a complete code be beyond us, portions of it may not be unattainable, and if attained will render the great work easier accomplished. I have said in Parliament, and I here repeat, that if I can I will endeavor to deal with the law of evidence in this way next year. Through the labors of others, especially of Mr. Fitzjames Stephens, there is a mass of materials ready to hand, which a reasonable amount of trouble would without difficulty mould into a Bill. For reasons which will appear before I have done, I can give no pledge upon this subject, but at least I will try. I have pointed out already how only I think with any approach to scientific accuracy and completeness a single harmonious system of law and equity can be evoked from the present conflict of the two. If that be denied us, I should wish to try what can be done by working with our present materials. To fuse law and equity by an enactment that whenever they conflict equity shall prevail, appears to me (I say it with a sense that I may be quite wrong, when I remember the eminent men who proposed the clause) an utterly impracticable and slovenly way of dealing with the question. It would take twenty years of litigation, ten hecatombs of causes, to settle the meaning of one clause in a statute. I should propose to proceed experimentally, and to supplement the scheme as experience might show us what was wanted. Clothe each class of court with the whole jurisdiction of the other class, make every court of law a court of equity, and every court of equity a court of law, reserve certain special jurisdictions such as lunacy, bankruptcy, and, as now divorce and probate (I do not in the list enumerate the admiralty), and with these exceptions make every Superior Court a complete remedy to the suitors in it. Something of this kind was nearly twenty years ago among the great changes in their procedure forced upon the reluctant courts of law. But the great lawyers who then dominated Westminster Hall would none of it. They

summarily rejected it, and reduced the Act of Parliament to nearly a dead letter, as in this respect, though most beneficial in others, it has remained from that day to this. But clothe them in terms with full equitable jurisdiction, they could not refuse to exercise it. I know very well the stock objections—the courts have no machinery for exercising another sort of jurisdiction. If that turns out to be so in practice, give it them as they want it. A vice-chancellor trying a horse cause in a court of common law, or the latter court, dealing with a suit for winding up a company, would be respectively unfitted for the subject-matter before them very likely, but first such business as, in its very nature, is unfit for one tribunal, will never, as a rule, find its way before it. Next, do what you will, if you alter largely the present system, and make one court and one procedure, there will be a period of transition in which the judges will have to learn their work, and will not all be equally fitted for the discharge of every separate portion of their duty. There is no change to which an ingenious mind which dislikes the change can not make objections. There are very few objections which do not give way before a resolution to go on in spite of them. To such objections as I have made, and to the like of such objections, I answer, Try! Try what now exists already in most of our colonies, make every court a court of law and equity, and see what comes of it. You will find it, I believe, throw an unexpected light upon the number of courts, and the amount of judicial power which the country requires to do its business. Such is the contribution I presume to make to the solution of this vexed question, which has at least the merit of simplicity, which would cost the country nothing, and which, if it failed in practice, would interpose no obstacle to the creation of another system.

A SUPREME COURT OF APPEAL.

I do not pretend to be able to suggest a simple and perfectly inoffensive amendment of the court of final appeal, because these amendments are necessarily destructive. But there is no prescription in favor of two or three ennobled lawyers—ennobled often quite as much from political exigency as for legal distinction—sitting in appeal upon and reversing the decisions of all the judges of England; and I think (speaking, I hope, with due respect) that there is not any reason for continuing it, either personal or practical. I do not know what Lord St. Leonards would say now, but I know what Sir Edward Sugden did say in a great work reviewing the decisions of the House of Lords in real property cases. I have no means of knowing what the judges think of recent decisions overruling them, but I know what they thought and said of the *Brownlow* decision, and one or two others, which, from professional reasons, I refrain from mentioning. Moreover, small as the legal force of the House of Lords is at present it is subject to continual diminution. Small blame, indeed, to those who can obtain the powers of Lord Cairns and Lord Westbury for obtaining them if they can, for the decision of their private affairs as arbitrators. Most suitors would be glad to be so fortunate. But their absence materially reduces the

judicial strength of the court of appeal, and of this small and fluctuating body; and so it is that the court of appeal feels keenly the necessity of cloaking itself with what is in their case the unreal but imposing character of the House of Lords. They keep up the form of a deliberative assembly; the judgments are a debate; the decision is a vote of the House; and so tenacious are they, and from their point of view with good reason, of this utter unreality, that in the last proposal for a reform of the court of appeal, which we owe to Lord Cairns, the tribunal is to report both to the Queen and to the House of Lords, so that the judgment itself is proposed to be in one set of cases technically that of the Queen, in the other that of the House of Lords. Nay, more, a proposition in the select committee by Lord Redesdale, that the House should pass a standing order, "intrusting the hearing of appeals to a committee of peers selected by the House as specially qualified to do that duty," was (it is incredible, but true) negatived without a division. I said it was not easy to prepare a scheme for a supreme court of appeal which should not be open to objections. Yet the field is clear for us. The Judicature Commission, in its first report, pointedly, and of set purpose, abstained from saying a word about the House of Lords. The only scheme before the country is the one proposed by the House of Lords itself, or rather by a select committee of the House, of which committee every lawyer in the House, except Lord St. Leonards, was a member, though it does not appear that Lord Penzance ever attended. The scheme proposes the creation of a judicial committee, to exercise as far as the hearing goes, the functions of the present Judicial Committee of the Privy Council and of the House of Lords, to consist of the Lord Chancellor, four salaried officers at £7000 a year (£1000 a year being added to the original proposition on the motion of Lord Chelmsford), all law lords, the Chief Justices of England and of the Common Pleas, the Master of the Rolls, the Chief Baron, and the Lord Justices of Appeal in Chancery. None but the salaried members are to be obliged to attend more than twenty days in the year, and then only on the summonses of the Lord Chancellor. All the members "with a view," says the report, "to the greater dignity of the committees, should be Privy Councillors." With the same view it proceeds to recommend that they should be peers. But what sort of peers—peers for life? No, only while they remain members of the committee. Peers of Parliament? No; they may sit and vote in the committee, but not even sit, still less vote, "in any legislative or other proceedings of the House." The House is to keep its jurisdiction, and to exercise it through men not worthy to share its dignities and functions. These are to be preserved for the noble and learned Lords upon whose minds it has at least been forced that they can no longer with satisfaction to the public alone discharge one of the most important of them all. I ought to add that a proposition to make those who were to exercise the jurisdiction of the House of Lords themselves real members of it, was made by Lord Gray and Lord Redesdale, and was supported by Lord Salisbury, Lord Derby, Lord Powis, Lord Romilly, and others; but except Lord Romilly, (Lords Penzance and St. Leonards were not

present), every other lawyer in the House was against admitting brother lawyers to the same dignities and privileges as themselves. Where have these noble and learned persons been since they left the bar? What air have they breathed, what company have they kept, what waters of oblivion have they quaffed, that they should suppose that any Attorney-General, with one grain of self-respect, or with the slightest feeling for his great profession, would make to the House of Commons such a proposal as this? My suggestion shall be simple and direct. A court of eight members at the least, in which Scotland, Ireland, and the colonies should be represented, and of which all existing law lords should be *ex-officio* and unpaid members, should sit during all the present legal terms and sittings, in two divisions, if necessary; and I believe could well dispose of the business now disposed of by the House of Lords, the Judicial Committee, and the Exchequer Chamber. Whether it could also dispose of intermediate Chancery appeals, I am unable to say with confidence, but I should think it could. One source of supply for the future, I would make the ex-Lord Chancellors and Chief Justices, whose pensions, whether maintained at their present rate or reduced—as I think they might be—should be dependent until some given age—seventy or seventy-five, perhaps, or until permanent incapacity, on some fixed amount of attendance as members of the court of appeal. I, myself, think it very important to have on the tribunal of last resort some members who are not lawyers; but this is a matter as to which there is a great difference of opinion.

THE ARRANGEMENT OF COURTS.

This subject led me to consider, because it is so intimately connected with it, the very important question of the reconstruction of our judicial system; as upon those matters which the Judicature Commission has dealt with in its recent report on the character and work of the subordinate tribunals—from which an appeal is to be made—depend obviously the character and work of the court of ultimate appeal. Now, the question raised, not in terms but in substance, by this report, is very grave indeed. Shall we continue, as now, a central bar, with central judges sent around the country periodically to do the work, or shall we have provincial courts with provincial judges and a provincial bar, and with only an appeal in certain cases to the courts in London? A grave question, this is. Far more than most men think, is involved in maintaining, in even raising, if it might be, the character of our judges and our bar. The interests of the bar are the interests of those who have to employ the bar, and the higher the character of its lawyers, the better, in all ways and in all times, but especially in troubled times, for the country. I protest with my whole soul against the mischievous and foolish assumption which runs through too many writings and speeches on this subject, that the object of the whole of the judicial system is the cheap and speedy dispatch of the business of suitors. It is one great object; perhaps, taken singly, it is of all the greatest object—but it is not the only one, it is not to be pursued exclusively to the neglect of other objects, very great and very important.

Cheap law and quick decision are purchased far beyond their value at the expense of incompetence, of unchecked arrogance, of the suspicion, even far less the reality, of corruption. There is surely great force in what Mr. Justice Blackburn says, assuming it to be well founded. The opinion of the Profession, he says, is the only practical check upon the judges, and is a real check to any abuse of patronage by the Government. I hope what he says is well founded in all instances. He ought to know as to the judges, and if I seem to hint a doubt as to the fact, it is, perhaps, only because our opinion often fails to reach the heights on which they sit. If I doubt it as to the Government, I can do no more than appeal to legal memories whether, if this check had had real existence, many appointments made during the last twenty-five years could possibly have been made; and, further, as far as I can judge, the Government (I speak without distinction of party) neither knows much nor cares much for what lawyers think. But no sensible man can doubt the great importance of such a check, supposing it to exist in part. If possible, in the public interest, its strength should be increased, not lessened; whereas, with the multiplication and decentralization of bars and courts, some diminution of power in the bar and of authority in the court is all but inevitable. I admit all this; and because I admit it, I can not concur in the present scheme to raise the County Courts somewhat, and make them do the work which our Superior Courts now perform in the provinces. I retain the opinion which, together with Sir Montague Smith, I expressed in March, 1869, either that the present system, which is based on the existing division of counties, and which brings justice reasonably near to the houses of suitors, witnesses, and jurymen, should, with some modifications, be continued; or that the present system of circuit should be altogether discontinued and provincial courts established, with assigned districts, having judges who should go frequent circuits to convenient places within such districts, and with appeal in certain places to the Metropolitan court of appeal. I believe that with a more sensible distribution of the present judicial power, our thirty-one paid judges could do all the work now cast upon them with ease, and with largely increased dispatch and consequent satisfaction to the suitors. But if these arrangements can not be made (which I deny), then I come, with great reluctance, but I do come, to the conclusion, that England should be broken into provinces, and that there should be provincial courts, sitting in Banco, in the capital of each province, and going frequent circuits within it, as the County Court judges now do.

NEED OF A MINISTER OF JUSTICE.

Time warns me to refrain from entering upon the subjects of land transfer and registry, as to which, in some place and at some time, I should like to say a word. But there is one subject most intimately connected with law reform on which, as I have a clear opinion about it, and it can be shortly stated, I will speak before I end. The first great law reform I believe to be the creation of a minister who shall really be responsible for the administra-

tion of the law and for its amendment. There is such a minister in most foreign countries. There is such a person in many, at least, and those the most important, of our colonial possessions. Nay, there is such a person in substance, though not in name, in Scotland and in Ireland. In England his functions are divided between, and, if performed at all, are most imperfectly performed by, the Lord Chancellor, the Home Secretary, and the Attorney-General. The Lord Chancellor is a great judge; he has also a large and troublesome department of State to administer, and if he undertakes law Bills he must undertake them at such time as the routine, but most important work of his court and his department, leaves at his command. The Home Secretary in a country like ours is at least as hard worked as the Lord Chancellor, yet upon him recent custom has imposed the duty of undertaking many Bills which are certainly more properly the work of a minister of justice. The Attorney-General remains: whose official work is enormous and of unspeakable importance, since it is said, at least, that delay in a law officer's chamber is about to cost the country three millions of money, whose private practice ought to be considerable if he is to retain his proper weight in the courts and with the profession, of which he is the head, and whose position, if he is not a man of altogether extraordinary and commanding powers, is curiously and completely inadequate to the functions which some men expect of him. The Lord Advocate of Scotland is now a Privy Councillor, and has always been a great minister of state. He governs Scotland, and has the weight and authority due to such a position. The Irish Attorney-General is Privy Councillor also, but does not govern Ireland, nor is he consulted except by the Irish Government, and if he attends to Parliament has time for the consideration and the carriage of Bills through the House. The English Attorney-General, alone of the heads of profession in the three countries, has no rank beyond that of the First Queen's Council. He is not in the Cabinet; he is not consulted by, nor does he consult, the Lord Chancellor, and one of the very greatest and most powerful Attorney-Generals of modern times told me that he found his position in that respect utterly unsatisfactory, for that he often knew nothing whatever of law Bills till he was asked to support them in the House of Commons. Supposing that I had the best and most comprehensive measures of law reform ready in my chambers. I should in practice be dependent on the Secretary to the Treasury, and on such fragments as I could snatch of the Prime Minister's time, for any chance of getting them understood or recommended to the Cabinet, and of bringing them forward. With the creation of a minister of justice all this would disappear. He would have his chance with other ministers; he would be able in the Cabinet to compel attention to his measures; his office would collect about it a school of able and intelligent workmen, and if this year or next year he had to submit to the fate of other ministers, and to postpone his Bills, his time would come, and his Bills would have their turn. Do not let me be misunderstood. I am not speaking in the tone of personal complaint. I have nothing to complain of. I have enjoyed, if not the confidence, at least the

friendship of my colleagues, and I have had to do with a Lord Chancellor whose noble and gracious character makes it a privilege to be near him. My fate has been only the fate of former holders of my office, and unless things change, of future holders too. I have made out for you a list of measures which can hardly be called small or unimportant. A minister of justice; a code, if not a code, a codification of certain portions of the law; a system of precedure; a complete jury system; a court of appeal; a reconstruction of our tribunals; a simplification (on the Australian plan) of land transfer—these are all measures to which I am quite content to be considered pledged—pledged in this sense, that I have for years thought them desirable; and, as to some of them, I am now ready—as to others, if I saw any chance of success I would get ready to bring them forward; but it would be the idlest vanity, the grossest dishonesty, to lead you to believe that there is any probability of being able to deal with them. It is so easy for men who do not see the working of the machine, to say that this can be done and that can be carried and the other can be made law. I wish they had to try. In this country, to carry any large and complicated measure you require a great force of public opinion and great public interest. On this subject effective political leverage has yet to be created. Take the subject of legal education. It is an important and interesting one. Nothing, next to nothing, is now done for it. The Inn Court, with their great incomes and unequalled advantages, have touched the subject but feebly and slightly. It was taken up in the House of Commons by Sir Roundell Palmer, a man whose position in the House is unique, whose personal weight and influence is enormous, whose eloquence invests every thing he takes up with interest. There was full notice of his motion, and the House was hardly kept up to its compliment of forty members during his speech and the subsequent discussion. What is the use of railing against the Attorney-General in the face of fact like this? Mr. Vernon Harcourt, a very able man and a popular speaker, takes up the subject of Law Reform, and but for the spirit unexpectedly thrown into the debate by a most vigorous and uncompromising speech, enough to stir up any House, made by my excellent colleague, that debate, too, would have languished and collapsed. Take the case of the Jury Bill. There is a matter which does excite some public interest, for multitudes, if not classes, are annoyed and oppressed by the present law. It got through a select committee, and was pressed forward with such powers and influence as I possess. It was thrown over—and I admit the necessity—in favor of measures of greater political interest, which all sides of the House were far more eager to discuss. The truth is, law grievances, though they exist, and are quite undeniable, are not grievances which touch either multitudes or classes. How few men, taking England through, ever go to law at all. How very few go often. How very few, indeed, ever get so far as an appeal to the House of Lords. Of these also the great majority are thankful to have it over; they know nothing of their fellow-sufferers; they are too glad to get them gone and to hope that they may never hear the name of law again. I do not say

this to delay or to extenuate the grievance. But it is only manly and honest to state plainly the common sense of the matter, and to point out what surely is a simple fact, that nothing great and complicated can be done by a popular Government without a strong pressure of popular opinion. It is also to be remembered that the session of Parliament is limited; that the time at the disposal of the Government is limited, and that the absolutely necessary business of the country—I mean supply and other essential business—takes up most of the time which the Government has to command. More and more, the time of the House of Commons is not only consumed, but wasted, not by business, but by debate on all kinds of subjects which too often begin in nothing and end in nothing but a large consumption of time. Besides, a Government becomes pledged in character and honor to certain measures which it is then political necessity to bring forward. I speak without any special information, but it seems to me that Irish education, public health, and local burdens are matters which it is impossible the Government should not bring forward next session. The questions arising upon the subject of local taxation afford, if thoroughly dealt with, materials for a session by themselves. I leave all candid men to judge what is the chance of any great and disputed measure in the House of Commons in 1873, if these subjects should be undertaken by the Government. All I can promise is to do my best, to leave no opportunity unimproved, and to seize every chance to advance one or more of the measures which I have recommended to you to-day. One thing I will not do. I will not bring forward measures I have no chance of passing, and I will not be guilty of what I think the littleness of making speeches for the sake of a spurious popularity, which can only take up valuable time, and end in nothing. One word, and I have done. You and all of us have it in our power to do something to turn the public apathy on law reform into active and hearty sympathy. Let me urge you to do what you can. See very clearly what is the mischief you would remove. Do not suffer vague and historical phrases to stand in the place of practical knowledge. See very clearly also what is the practical remedy you would propose. The mischief and the remedy being very clear to your own minds, it is not very hard to make them clear to others. So, and so only, you can really help those in Parliament who are in earnest in the matter; and when Law reforms are carried, as sooner or later they certainly will be, the credit of them will be due not so much to those who have sailed upon the current, as to those who have created its volume and directed its flow. Forgive me that I have so long detained you, and forgive me that I have detained you with what has so ill-occupied your time.—*The London Law Times.*

COURT OF COMMON PLEAS,

OF LOGAN COUNTY, OHIO. APRIL TERM, 1864.

Thomas Davis and John M. Helmick vs. *Jeremiah M. Kelley as Administrator of Jeremiah Olinger, deceased.**

1. A surety who pays a debt, including usurious interest, after notice by the principal debtor not to pay the usury, can not recover from the principal debtor the usurious interest so paid, if he might have avoided its payment.

Civil action. Petition filed March 7, 1864, avers that on 1st of June, 1861, plaintiffs, as sureties for and with Olinger, drew bill of exchange at Urbana, Ohio, on The Importers' and Traders' Bank of New York, to the order of J. B. Brown, for $2,000 at sixty days, acceptance waived, with warranty of attorney to confess judgment and waive all error against the makers or any of them in any court, if not paid at maturity, that Olinger died intestate about the time of the maturity of the bill; that on 23d Feb'y, 1863, Brown caused judgment to be entered by virtue of said warrant of attorney in the court of Common Pleas of Champaign County, against these plaintiffs, Davis and Helmick, for balance unpaid on the bill of $746 75, and costs $3 40; that plaintiffs have been compelled to and have paid said judgment and costs; that defendant as administrator rejected plaintiffs' claim.

Prayer for judgment.

Answer—Avers that said bill was discounted by Brown at a greater rate than six per cent. interest, by reserving $33 34 discount; that on 27th of May, 1862, his administrator paid Brown $1,600; that on 25th of February, 1863, there was due to Brown, on said bill, $506 only, the sum of $240 75 balance of the judgment being for usurious interest, which defendant asks may be deducted from the same; that plaintiffs were notified before said judgment of said payment, and of the usury, and were required not to pay the same. Defendant offers to confess judgment for said sum of $506 and costs, and interest.

Demurrer—That answer does not state facts to make a defense.

Benjamin Stanton and *Charles W. B. Allison* for plaintiff, cited *Busby* vs. *Finn*, 1 Ohio St. R. 410; *Raines* vs. *Scott*, 13 Ohio, R. 107. Judgment can not be collaterally impeached for usury. Equity not relieve against a judgment The rule in *Russell* vs. *Failor*, 1 Ohio St., R. 330, only applies to voluntary payments. This is compulsory on a judgment.

Walker & West for defendant, cited *Whitehead* vs. *Peck*, 1 Kelly 140, 1 U. S. Au. Dig. 477. Where the surety has knowledge of that which amounts to a valid defense for him against the creditor, he is bound to avail himself of it, or give notice to the principal debtor so as to enable him to set up the defense, and in default of doing either he would be deprived of recourse against the principal." Burge on Suretyship, 367; *Russell* v. *Failor*, 1 Ohio St. R. 330.

*The editor thinks this case of sufficient importance to his respective readers for publication.

It makes no difference that this authority relates to a voluntary payment. If Kelly had been a party to the judgment, and neglected to make defense then he could not object here. A judgment is only evidence against parties and privies, 2 American Lead Cases, 441-1; American L. C. 442.

The case of *Ford* vs. *Keith*, 1 Mass. R. 139, is repudiated in *Russell* vs. *Failor* 1 Ohio St. R. 330. But *Ford* vs. *Keith* holds that *notice* of a defense to a surety deprives him of a right to pay.

Though judgment was entered on a warrant of attorney, yet this could be set aside to the extent of the usury. Civil code. §534.

CONKLIN & LAWRENCE, J. J.—*Held:*

That a surety who pays a debt, including usurious interest after notice by the principal debtor not to pay the usury, can not recover from the principal debtor the usurious interest so paid, if he might have avoided its payment.

Hays vs. *Ward*, 4 Johns. Ch. R. 122.

Demurrer overruled.

SUPREME COURT OF OHIO.

TO APPEAR IN 22 O. S. REPORTS.

BUILDING ASSOCIATION.

O. E. Lucas *vs.* the Greenville Building and Savings Association. Motion for leave to file a petition in error.

By the Court:

1. In an action by a Building Association against one of its members, to recover money borrowed by him of the company, the defendant is estopped from denying the legality of the organization of the company, on the ground that the certificate of incorporation was acknowledged before the Clerk of Court, and not before a Justice of the Peace, as the statute requires.

2. Such contract of loan is not usurious, although the rate of interest reserved exceeds the general rate allowed by law, provided it is within the limits and provisions of the act under which the association is incorporated.

Motion overruled.

BOND OF A JUSTICE OF THE PEACE.

Madison H. Place *vs.* Joseph Taylor, *et al.* Reserved in the District Court of Hardin County.

DAY, J.—

1. An approval of an official bond of a Justice of the Peace, signed by two trustees at the same date, if nothing appear to the contrary, will be presumed to have been done at a meeting of the trustees, and such approval will be a sufficient compliance with the statute, which requires the bond to be approved by the trustees of the township.

2. A condition in such bond, that the Justice "shall well and truly discharge the duties of Justice of the Peace according to law," though in general terms, in legal effect, covers only the ministerial acts of the Justice, and is a substantial compliance with the statute which requires the bond to be "conditioned that he will well and truly" do and perform every ministerial act that is enjoined upon him by law.

3. The duties required by law to be performed by a Justice of the Peace relating to the issuing of an order of arrest in a civil action, are of a ministerial character; and the issuing of such order, without an undertaking being previously executed as required by the statute, is a neglect to "well and truly" perform a ministerial act that will constitute a breach of the bond, and the person injured thereby may maintain an action thereon against the Justice and his sureties on the bond.

Judgment reversed and cause remanded for further proceedings.

COMMON CARRIER.

The Little Miami Railroad Company *vs.* H. H. Washburn. Error to the Superior Court of Cincinnati.

West, J.—*Held:*

1. A common carrier who undertakes to transport goods over the whole or any part of his own route, and then to forward them to a designated destination beyond, is bound to transmit with their delivery to the carrier next *en route*, all special instructions received by him from the consignor; and in default thereof in any material or substantive particular, to stand responsible for and make good the loss to which such negligence shall have contributed.

2. Marks or labels on the packages delivered will not supply the omission of such instructions from the accompanying shipping-bills, where they are shown not to have come to the actual knowledge of the next succeeding carrier, or his agent, charged with the duty of receiving and forwarding such bills.

3. Exceptions to the conduct of the Court in delivering manuscript instructions to the jury, instead of reading them in their hearing, if available at all, must be taken at the time.

Judgment affirmed.

DOWER—SALE OF LAND.

Jefferson Sweesy *vs.* Martha Shady, *et al.* Error to the District Court of Trumbull County.

Day, J.—*Held:*

1. Where land, in which a widow is entitled to dower, has been sold, as if free from incumbrance, upon judicial proceedings to which she is not a party, she may either retain her dower in the land, or, in lieu thereof, confirm the sale, and receive her dower from the avails of the sale; but if she elects to do the latter, and receives her dower from the proceeds of the sale, she is thereby estopped to claim dower in the land sold.

2. Where a guardian, who made such sale and received the avails thereof, in consideration of the election of the widow to be endowed of such avails, and at her request, invest one-third thereof in land, under an agreement with her that she should have a life estate therein in lieu of her dower in the land sold, and took the title of the land so purchased in his own name, he held such title in trust for the widow during her life; and, after having put her into the possession and enjoyment of the land, upon his denial of her right and an attempt to deprive her of the possession thereof, as against him, she is entitled, in equity, to a decree for the conveyance of the land to her during her life.

Judgment affirmed.

ENJOINING USE OF FIRM NAME.

The McGowan Brothers Pump and Machine Company, *et al.*, *vs.* John H. McGowan. Motion for leave to file petition in error to reverse a judgment of the Superior Court of Cincinnati.

By the Court—*Held:*

When on the dissolution of a firm composed of two members, the retiring partner sold and transferred to the other all the real and personal property of the firm, but without any mention of the good will, neither the continuing partner nor his assignee can so use the old firm name as to give third persons good cause to believe that the retiring partner is still associated therein, if such belief be injurious to him in his new business, and on application of the retiring partner the use of said firm name in such case will be enjoined. Motion overruled.

FIRE INSURANCE.

The United Life, Fire, and Marine Insurance Company *vs.* John T. Foote *et al.* Error to the Superior Court of Cincinnati.

McIlvane, J.—*Held:*

1. A policy of insurance against fire excepted from the risk and loss by an explosion. In an action on the policy it appeared that an explosive mixture of whisky, vapor, and atmosphere had come in contact with the flame of a gas jet, from which it ignited, and immediately exploded, whereby a fire was set in motion which destroyed the insured property. Held, That in such case it can not be said that the destruction was caused by a fire within the meaning of the policy, but, on the contrary, that the loss was by fire occasioned by the explosion.

2. In construing such policy wherein the exception embraces "any loss or damage occasioned by or resulting from any explosion whatever," the exception must be taken and held to include all loss and damage occasioned by any fire of which an explosion was the efficient cause.

3. Where such exception provided that the underwriter would not be liable for "any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal oil, gas, nitro-glycer-

ine, or any explosive article or substance, unless expressly insured against and special premium paid therefor," and the property insured is destroyed by a fire occasioned by the explosion of one of the explosive substances named, and notwithstanding it is made to appear that, at the time of taking the risk, such explosion, from the nature of the property insured, was in the contemplation of the parties, such loss falls within the purview of the exception; unless the particular peril by which the property was destroyed was expressly insured against, and a special premium paid therefor.

Judgment of reversal rendered at General Term reversed, and judgment rendered at Special Term affirmed.

HIGHWAYS—PRIVATE PROPERTY.

Joseph Recknor, Supervisor, &c., *vs.* Warren Warner. Error to the District Court of Hamilton County.

McILVAINE, J.—*Held:*

1. The act of January 27, 1853, S. & C. 1,289, entitled "An act for opening and regulating roads and highways," as amended April 8, 1856, S. & C. 1,301, is not repugnant to the provisions of the Constitution relating to trial by jury as contained in the 5th and 19th sections of the first article. The right of appeal, therein provided for, to the Probate Court, where a constitutional jury may be had, validates the statute; and the provision therein for an appeal bond with sureties conditioned for the payment of costs adjudged against the appellant, does not contravene the right of trial by jury as guaranteed by the Constitution.

2. The provision in the sixth section of the act of January 27, 1853, S & C. 1,291, declares a rule of evidence whereby a waiver on the part of the landowner of his right to compensation may be established, and does not conflict with the provision of the Constitution (Section 19, Article 1,) relating to the inviolability of private property. The rule contained in this proviso can not be regarded either as a statute of limitation, whereby a right secured by the Constitution is barred immediately upon the accruing thereof, or as a statute declaring the forfeiture of private property.

3. Relief in equity, by restraining the appropriation of private property for a public road under said statutes, will not be granted on the ground that compensation therefor has not been paid to the owner in money, in a case where the owner, having actual notice of the proceedings in which the property is sought to be taken, and of the time and place of the view, neglected or failed to present his application for compensation in writing to the viewers, and where it is not shown that the default was occasioned by inevitable casualty, or by other circumstances against which reasonable precaution could not have provided.

Judgment reversed and cause remanded.

INSURANCE.

John M. Newcomb, *et al.*, *vs.* the Cincinnati Insurance Company. Error to the Superior Court of Cincinnati.

WEST, J.—*Held:*

Where a loss partially covered by insurance is occasioned by a wrong doer against whom the assured, after payment of the insurance, recovers judgment for such loss in an action, to the prosecution of which the underwriter refuses on request, to contribute, the assured, in a subsequent proceeding against him by the underwriter for reimbursement, is answerable for no more, if for anything, than the surplus of the amount recovered from the wrong doer, which may remain after full satisfaction of his uncompensated loss and the expenses of the recovery.

Judgment of the Superior Court reversed, and judgment entered for the plaintiff in error.

INDICTMENT—SENTENCE.

Henry Picket *vs.* The State. Error to the Court of Common Pleas of Hamilton County.

WHITE, J.—*Held:*

An objection to an indictment on the ground that it is not indorsed, as required by Sec. 82, of the Criminal Code, should be made by a motion to quash, and where the accused, without making such motion, pleads guilty, the objection is waived. To constitute an unlawful sale of intoxicating liquor, under the first section of the act of May 1, 1854, [2, S. & C. St., 1,431,] it is not necessary that the premises on which the sale is made should be a place of public resort, and an indictment which charges the accused did unlawfully sell intoxicating liquors to a person named, to be drunk upon the premises where sold, sufficiently describes the offense. The term of a sentence of imprisonment ought to be so definite as to advise the prisoner and the officer charged with the execution of the sentence, of the time of its commencement and termination, without being required to inspect the records of another court, or the record of any other case. When imprisonment and a fine are adjudged against a party as punishment for a single offense, and part of the sentence is found to be erroneous, the whole may be reversed, and in such case, if the execution of the sentence has been suspended, pending the proceeding in error, the case will be remanded for sentence and judgment in accordance with law.

Judgment reversed, and case remanded for sentence and judgment.

JUSTICE OF THE PEACE—ERROR.

James Belford, administrator, *vs.* George Parrish. Motion for leave to file a petition in error.

By the Court—*Held:*

When the proceedings of a Justice of the Peace are taken on error to the Court of Common Pleas, and the judgment of the Justice is reversed, it is the duty of the Common Pleas, under Section 532 of the Code of civil procedure, to render judgment in favor of the plaintiff in error for the costs that have accrued up to that time, including the costs in the Justice's Court.

Motion overruled.

Supreme Court of Ohio.

MANDAMUS.

George McKenzie, *et al.*, *vs.* Wm. Ruth, Mayor, &c. Application for *mandamus*. Muskingum County.

By the Court—*Held:*

In a proceeding in mandamus the alternative writ must contain a statement of all the facts necessary to justify the order sought for by the proceeding, and, on the hearing, omissions in the alternative writ can not be supplied by the affidavit or application on which it was allowed.

Peremptory writ refused.

MECHANIC'S LIEN LAW—SUB-CONTRACT.

John Copeland, *et al.*, *vs.* J. & T. Manton. Error to the District Court of Lucas County.

DAY, J.—*Held:*

1. Under the mechanic's lien law, as it existed before it was modified by the act of May 1, 1871, the right of a sub-contractor, in the nature of a lien upon the amount due to the contractor on his contract with the owner, attached at the time, the sub-contractor delivered to the owner an attested account of the amount of his work performed or materials furnished for which the lien was sought; and, as between sub-contractors, the liens of those first in time, in serving the owner with such notice, were better in right, and entitled to priority in the order in which such notice was served.

2. The sub-contractor, by the service of such notice, was subrogated only to the rights of the contractor, and when the amount so due to the contractor had been in good faith previously assigned by him to another sub-contractor, in payment of a like amount due him for work done and materials furnished under the same contract, the assignment was not defeated by the service of such notice; and where in a suit between all the parties interested, the amount due on the contract is brought into court by the owner, the assignee is entitled to have the same adjudged to him.

Judgment affirmed.

MARRIAGE CONTRACT.

Henry Waymire, guardian of David Wiles, *vs.* Sarah A. Jetmore, *et al.* Error to Darke Common Pleas. Reserved in the District Court.

WEST. J.—*Held:*

1. The marriage contract of one affected with congenital imbecility of mind to a degree rendering him incapable of consent, is void, *ab initio*.

2. A Court of Chancery in the exercise of its ordinary powers will entertain jurisdiction at the suit of the imbecile's guardian to declare such marriage a nullity.

Judgment reversed and cause remanded.

Supreme Court of Ohio.

PROMISSORY NOTE.

J. H. Shryver *vs.* C. H. Hawkes and W. W. Bierce. Error to the District Court of Pickaway County.

WELCH, C. J.—

1. Where a note is signed blank, with marginal figures indicating the amount for which it is to be filled up, and the party to whom it is intrusted for filling up and negotiation, alters the figures, and fills up and negotiates the note for a larger amount, this is no forgery of the note; and the simple fact of alteration does not of itself and necessarily vitiate the note, although the party so signing in blank was surety, and known to the payee to have signed it as such.

2. Where the charge of the court is correct so far as it goes, but omits to state a proposition of law involved in the case, but to which its attention was not called otherwise than by a general exception to the charge, the omission is not error for which the judgment will be reversed, provided the jury are not misled by the charge.

Judgment affirmed.

QUO WARRANTO—CORPORATION.

The State of Ohio on relation of Attorney-General *vs.* Kent, C. J. Welch and others in *quo warranto*.

Where in a proceeding in *quo warranto*, certain named persons and others, said to be too numerous to be brought upon the record, were charged with using the franchise of being a corporation, and the defendants named plead that they were the Directors of the corporation, without denying that they were corporators therein, and averred the legal existence as the corporation:

Held—1. That in the absence of allegations, or proof to the contrary, the defendants are to be regarded as claiming to be members of the corporation.

2. The Legislature has no power, under the present Constitution of Ohio, to create corporations without securing the individual liability of their stockholders, at least to the minimum amount required by the Constitution; and if the act of incorporation does not secure this, either by express provision or by requiring from the corporation or stockholders such acts of organization or otherwise, as will subject them to the constitutional provision, the act will be unconstitutional and void.

3. Where a corporation in pursuance of an act of the Legislature transfers or conveys its franchise to be a corporation to others, the transaction in legal effect is a surrender or abandonment of its charter by the corporation, and grant by the Legislature of similar charter to the transferees or purchasers, and the charter so granted is subject to all the provisions of the Constitution existing at the time it is so granted.

4. The act of April 4, 1863, authorizing the purchasers of the property of a railroad company to acquire the franchise to be a corporation by deed from the company, is a general law within the meaning of Article 13, Section 2, of the Constitution.

5. But a deed made by such company to a corporation of another State, which corporation had become the assignee of property sold,—as contemplated in said act,—without any new organization or taking of stock under the deed, or as a corporation of Ohio, does not constitute the foreign corporation or its members an Ohio corporation, and, in so far as said act may assume to create them such, it is unconstitutional, for the reason that it does not secure the individual liabilities of the stockholders.

6. Under the present laws of Ohio, foreign railroad corporations whose roads lie partly in this State, are accorded the right to own and operate their roads in Ohio in the same manner as domestic railroad companies.

Judgment of ouster from the franchises of being an Ohio corporation, and judgment for defendants as to all the franchise in question.

QUO WARRANTO.

The State *ex. rel.* the Attorney-General *vs.* James McDaniel, *et al. Quo Warranto.*

WHITE, J.—*Held :*

1. The pleadings in *quo warranto* proceedings are not governed by the code Under the S. 63 of the practice act of 1831, the defendant in such proceedings may, by leave of the court, plead double, and where the charge against him is of usurping an office he may be allowed to set up several titles thereto.

2. Where a railroad corporation reorganizes under the act of April 11, 1861, and in the agreement therefor it is stipulated that certain bonds of the original corporation shall be assumed by the new company, and the holder thereof entitled to vote at all meetings of stockholders, upon condition specified, which he performed, the new company becomes liable to pay the bonds, and the holder thereof entitled to vote, without further action on the part of the new company.

3. An executory agreement to sell and deliver such bonds to a corporation, made subject to ratification by its directors and stockholders, does not, without such ratification, divest the holder of his title therein, nor of his voting privileges in virtue thereof, under the statutes and agreement before mentioned.

4. The resignation of defendants, after they have been served with process in a *quo warranto* proceeding in which they are charged with usurping an office, constitutes no answer to the information. Their successors, as to the unexpired term, stand in their shoes, and will be bound by the judgment.

5. Persons who, at an election for directors for a corporation, have a majority only of the votes received by the judges, can not upon a *quo warranto* information, be declared elected and inducted into office, although it appear that a number of other legal votes, sufficient to have made up a majority, were offered to be given in their favor, and were improperly rejected by the judges.

6. In a corporation reorganized under the act of April, 1861, it is not necessary that the directors should be stockholders. The statute only requires them to be residents of the State, and in the absence of a statute requiring it, the discretion of the stockholders in electing directors is not limited to stockholders.

Judgment will be entered for the defendants holding over, as set up in the first plea; and on the application being amended to conform to the facts found judgment will be entered for the relator on all the other pleas.

SET OFF.

Henry Wagner *vs.* D. W. Stocking, *et al.* Reserved in the District Court of Geauga County.

DAY, J.—*Held:*

In an action on a joint debt against principal and surety, a demand due from the plaintiff to the principal, under the provisions of the Code, may be set off against the claim of the plaintiff.

Judgment affirmed.

SALE OF INTOXICATING LIQUOR—EVIDENCE.

Alexander P. Andrews *vs.* The State. Error to the Court of Common Pleas of Lorain County. Reserved in the District Court.

WHITE, J.—*Held:*

1. Where in a prosecution for unlawfully selling intoxicating liquor, it appears by the evidence for the State, that the sale was made by the agent of the defendant in charge of the establishment where the liquor was sold, it is competent for the defendant to rebut the presumption of *prima facie* agency, which the evidence makes against him, by showing that the sale was, in fact, made without his authority, and against his directions.

2. But the direction to the agent forbidding the sale must be in good faith; for, however notorious or formal they may be, they can have no effect if they are merely colorable. The fact of agency is to be determined by the *real understanding* between the principal agent.

Judgment reversed, and cause remanded for a new trial.

TRIAL BY JURY—INTEREST ON OPEN ACCOUNTS.

The Averill Coal and Oil Company *vs.* Thomas Verner. Motion for leave to file a petition in error to reverse the judgment of the Superior Court of Cincinnati.

McILVAINE, J.—*Held:*

In an action for the recovery of money, wherein the only relief prayed for is a money judgment, either party is entitled to demand a trial by jury. Notwithstanding numbers of items of account or of claim and counter-claim are involved in the issue in such action, the defendant, in default of answer, is entitled, under Section 598 of the Code, to demand a jury to assess damages, and if it be irregular in such case for the court to make an order on the motion of the plaintiff, and against the objection of defendant, referring the cause to a referee for trial, and granting leave to defendant to answer generally at a future day, such irregularity is cured if the defendant, after answer is filed, appears before the referee, and, without protest or objection to his jurisdiction, submit his cause to him upon the issues and proofs. A motion to recommit the report of a referee, in order that a party to the suit may except to the findings of a referee, and tender a bill of exceptions for his allowance, is addressed to the sound discretion of the court, and the overruling of such motion does not constitute an error for which the judgment will be reversed, unless it appears that such discretion was abused. Interest from and after maturity may be allowed on items of wages or salary, payable monthly, but in computing interest it is an error to make annual rests, and, having found the balance, including interest then due, to carry the same as principal into subsequent statements and allow interest thereon to the party in whose favor such balance was found. On motion for leave to file a petition in error, the defendant will be permitted to remit, on the record of the court below, any excess that may be found in the judgment, and when such remittance is properly entered the motion will be overruled. Leave to file a petition in error will be granted unless the defendant in error, within thirty days, will enter a remittur on the record of the court below of excessive interest found in the judgment, in which event the motion for leave will be overruled.

KENTUCKY COURT OF APPEALS.

CONTRACT MADE ON SUNDAY—WHEN AND HOW FAR BINDING.

Campbell *vs.* Young. Adair. Peters, Judge.

Campbell loaned one Dillingham money on Sunday, paying part in cash and the residue by a check on a Lebanon bank, which was cashed three days afterward. At the same time the cash and check were delivered to him Dillingham, with Young, executed a promissory note to Campbell for the amount loaned, the whole transaction being completed on Sunday. None of the par-

ties were members of any religious society observing as a day of rest any other than Sunday.

Held—The general rule is that all contracts made in contravention of an express statute are void, and that no action can be maintained either upon the contract or for any thing done under it or growing out of it.

Contracts made on Sundays are, in some sense, an exception to the general rule. Such contracts are not tainted with illegality. They are illegal only as to the time in which they are entered into. When purged of this ingredient they are like other contracts. If closed on Sunday they are void, but if affirmed on a subsequent day they become valid. (6 Bingham, 653.) Where a contract made on Sunday is executory on both sides, it is simply void, until subsequently affirmed by mutual consent. Where either party has done any thing under such contract, for which, of course, he would have no remedy under the contract until it was subsequently affirmed, he may demand restitution, and where it is not, compensation. Thus the other party will be put to his election whether to affirm or disaffirm the contract. His declining to make restitution or compensation is, in fact, an affirmation of the contract.

The contract here was not fully executed on Sunday. The check was collected afterward, and the contract was thereby affirmed. Young, the surety, was active in securing the loan, and failed to disaffirm the contract. He must be regarded as affirming it.

CONSTRUCTION OF ACTS OF LEGISLATURE—PLEADING—ESTOPPEL—RESOURCES OF THE SINKING FUND.

Commonwealth *vs.* Todd. From Franklin. Lindsay, Judge.

Todd was re-elected keeper of the Penitentiary, his term to begin March 1, 1867, and on that day executed bond and took possession. The act of March 9, 1868, fixed the rental to be paid by the lessee at $16,000 per annum, and another act approved on the same day provided for certain improvements in the shops and cell-houses of the prison. Todd retained possession but executed bond under the later act. The act of March 7, 1858, allowed him until March 15, 1869, to pay rent for the first year; provided he would execute bond for $16,000 per annum. This condition was accepted and the bond executed. The act of 1869 released him from paying $16,000 per year and required him to pay $6,000 each for the first two years, and $8,000 each for the last two. Afterward this suit was brought to recover $32,000 claimed to be due for two years' rent. Todd pleaded that $16,000 of this had been released to him by the act of 1869, and that he had been damaged more than the amount of the residue, by the tearing down and rebuilding, by the State, of the hemp house, depriving him of the use of the machinery and the labor of many of the convicts. The judgment of the Circuit Court released him from the entire claims.

Held—According to the well-accepted rule of construction, the two acts approved March 9, 1867, relating to the same subject, must be construed as

one. (2 Bibb, 8*n*; 3 Mon., 80; 14 B. Mon., 244.) Todd's acceptance of the loan of money provided for in the act of 1867, and his execution of a new bond under the proviso, in the act of 1868, showing an intention on his part to consent to hold, under the act of 1867, increasing the rental, and these acts estop him from taking an opposite ground now, even though no estoppel was pleaded. A plea directly opposite to the tenor of the party's written undertaking, and controverting recitals of material facts therein, is inadmissible. (2. Litt. 211; 9 Dane, 317; 6 B. Mon., 615; 16 B. Mon., 5.)

Todd himself was the contractor who tore down the buildings and did the acts complained of, though he claims to have accepted the contract under protest. He can not be said to have acted under duress. No contractor had a right to force an entrance to erect the buildings, and might have been compelled to resort to law and test his right. When Todd accepted the contract to erect the buildings, he took it with all consequences, which at that time he knew would inevitably follow from its being done.

The act of February, 1869, releasing $16,000 to Todd, was not diminishing the resources of the Sinking Fund within the meaning of the Constitution prohibition. The act of 1838 set apart the profits of the Penitentiary to the Sinking Fund, and the Constitution prohibits the diminution of its resources. The consummation of the contract with Todd did not, *ipso facto*, convert the stipulated rental into a part of the Sinking Fund. The contract still remained subject to the control of the Legislature, and the Commissioners of the Sinking Fund could assert no claim under it until it was ascertained whether or not profit would accrue to the State. (7 Bush, 358; 8 Bush.)

Judge Peters delivered a separate opinion. Chief Justice Hardin dissents from the opinion as to the question of damages, holding that Todd's claim should have been set off as adjudged in the Circuit Court.

Judge Pryor did not sit, having decided the case in the lower Court.

DUTIES OF ATTORNEYS AT LAW IN ADVISING CLIENTS.

Dunn *vs.* Bradley. From Garrard County. Lindsay, Judge.

In this suit by an attorney against his client for fees, one item of the account was in these words: "Legal advice to place your property beyond the control of your creditors, $300." The proof shows that the advice as charged was to enable the client to convey fraudulently his property beyond the reach of his creditors.

Held—An attorney is in one sense an officer of the court, and owes a duty to it and to the law, as well as to his client. He violates this in advising or instructing those applying to him for counsel or instruction to attempt a dishonest evasion of the law. His official oath binds him to discharge the duties of his office according to law. Fidelity to the client neither requires nor excuses advice leading to a violation of the law, nor the commission of an act or acts involving moral turpitude. When such advice is given, or when the client is instructed as to the means by which his creditors may be defrauded, the attorney is not discharging the duties of his office "according to law," but

in direct violation of it, and a promise upon the part of the client to pay for such advice, will not be implied, nor will an express contract to pay for it be enforced.

ELECTION BY WIDOW TO TAKE UNDER OR RENOUNCE THE WILL OF HER HUSBAND—WHEN HER TIME MAY BE EXTENDED.

Mary E. Smither *vs.* Smither's executors. Woodford. Pryor, Judge.

Smither died childless, devising most of his property to his widow. The executor brought this suit against the heirs and devisees to settle the estate, alleging that the personalty was not sufficient to pay the debts, that some of the claims asserted were fraudulent, and seeking a sale of part of the realty. The widow answered that she desired to abide by her husband's will, but could make no election within twelve months as required by law without the aid of the Chancellor; that her husband is alleged to be largely indebted as a member of the firm of McClure, Rowland & Co., manufacturers of patent roofing, one claim which she believed to be false amounted to $24,000, and if allowed the estate would be insolvent; praying that she be allowed to hold under the will on the condition that the claim of $24,000 is disallowed, and if allowed that she be allowed to renounce its provisions.

Held—Section 13, of Chapter 30, Rev. Stat., is a mere enactment of that principle of equity recognizing the common law right of the wife to dower, but requiring her, when her husband has made a different provision for her, to abide by it, or adhere to her common law right. Formerly, if the widow, in making the election, acted in ignorance of her rights, and had no means of knowing what they were, a court of equity would grant her relief, and in cases where no election had been held, or could be made for the reason that the widow could not ascertain or know the condition or character of the estate, the Chancellor postponed an election until an account was taken and the condition of the estate ascertained.

Though the time may be limited by statute, no reason is perceived why, before an election is made, relief may not be granted when the Chancellor see that no intelligent choice can be made. It would be a great hardship on the widow, and a violation of a plain rule of equity, to deprive her of property intended for her use, in requiring an election to be made when the whole estate is imperiled by litigation.

But this is not applicable to every case. Here it appeared not only that the condition of the estate is such that no intelligent choice can be made by the widow within the time fixed by law, but also that the executor, by his suit in equity for a settlement of the estate, has brought the widow into court by making her a defendant, and the assertion of her right to postpone this election can, in no event, cause a delay in the progress of the suit for a final settlement, either for the purpose of distribution or the payment to creditors.

She is permitted to make the conditional election or postpone it until the condition of the estate can be ascertained.

DIGEST OF ENGLISH DECISIONS.

Account—Willful default—Laches—Action at Law—Injunction.—A company were bound by the Act incorporating them in case the annual income of a board should in any one year fall below £1000, to pay to them such an annual sum as should make up the deficiency, such annual sum to be paid in preference to the dividends payable by the company to their own proprietors. No demand was made by the board upon the company, in respect of the deficiency, until 1870, when an application was made, and subsequently an action was brought by the board against the company for an aggregate sum representing the deficiencies arising in the receipts of the board from 1847 to 1858, during which time dividends had been paid by the company. The company filed their bill charging willful default, and praying an account against the board on that footing, and also a declaration that the board were debarred from enforcing their claim for deficiencies previously to 1870: Held, that the company were not bound before declaring their own dividend to inquire of the board whether they had any claim against them in respect of the deficient income, and that the board were debarred by their own laches from enforcing any claim prior to 1858. And the court, being satisfied as to the willful default, directed an account on that footing from 1858: (*The Southampton Dock Company* v. *The Southampton Harbor and Pier Board*, 26 L. T. Rep. N. S. 828. V. C. B.)

Agreement for Lease—Death of Lessor intestate before Lease granted—Infant Heir—Specific Performance—Costs.—A. having agreed to grant a lease to B., died before granting it, leaving an infant heir. B. filed a bill against the infant for specific performances, which was decreed: Held, that each party should bear his own costs: (*Longinotto* v. *Morss*, 26 L. T. Rep. N^t S. 828. V. C. B.)

Bequest upon Condition—Refusal to Perform.—Testatrix gave an annuity for an unexpired term of years to W., "to bring up M., to whose care I commit her, and at the child's death to the said W." W. refused the care of M., and never made any application for the annuity; Held, that the administrator of W. had no title to the annuity: (*Pitt* v. *Pitt*, 26 L. T. Rep. N. S. 827. V. C. B.)

Costs—Witness brought over from Norway—Postponement of Trial—Materiality of Evidence—Decision of Taxing Officer.—A witness having been brought over from Norway was examined before the master. On his examination it was discovered that his evidence, though material in other points, was not sufficient for the required purpose; and trial was postponed for the purpose of sending out a commission, during which time he remained in London. In the meantime a compromise was entered into between the parties, so that it became unnecessary to try the cause. Upon taxation the master refused to allow the witness's costs, on the ground that the bringing him over

was premature: Held, that the taxing master was wrong, and that as the witness's evidence was material, the costs of his journey to and from Norway and the costs of his examination before the master should have been allowed. Also, that the court will not interfere in any case with the discretion of the taxing master, unless some principle is involved: (*Seymour* vs. *Saunders*, 27 L. T. Rep. N. S. 241. C. P.)

Charitable Gift—Insufficient Description—Latent Ambiguity.—Testator bequeathed £500 to "The Kent County Hospital." There was no institution strictly answering this description, and the legacy was claimed by (1) the Kent and Canterbury Hospital, situate at Canterbury; (2) the West Kent General Hospital, situate at Maidstone; (3) The Royal Kent Dispensary, situate at Greenwich; and (4) the Kent County Ophthalmic Hospital, situate at Maidstone. It appeared that the testator had some landed property situate at Greenwich, but there was no further evidence connecting him with any of the above institutions. Held, that the legacy must be divided equally between the Kent and Canterbury Hospital and the West Kent General Hospital: (*Re Alchin's Trusts; Ex parte Turley; Ex parte The Earl of Romney and others*, 26 L. T Rep. N. S. 825.)

Debtors' Act 1869 (32 & 33 Vict. c. 62, s. 4, sub-sect. 4—Solicitor— Costs of unsuccessful Application—"Sum of money"—Default in payment—Attachment.—Default by a solicitor in payment of the costs of an unsuccessful application is not default "in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order," so as to render him liable to attachment under the Debtors' Act 1869 (32 & 33 Vict. c. 62), s. 4, sub-sect. 4. A common order for taxation of his bill of costs having been made against a solicitor, he moved to discharge the orders and his motion was refused with costs. He then appealed, and his appeal was dismissed with costs: Held (reversing the decision of the Master of the Rolls), that he could not be attached for default in payment of these costs: (*Re Benjamin Hope*, 26 L. T. Rep. N. S. 815. Chan.)

Dissolution—Settlement—Deed of Separation—22 & 23 Vict. c. 61, s 35—By a post-nuptial settlement certain property belonging to the wife was settled on her. By a subsequent deed of separation the husband covenanted to pay his wife an annuity for life. The husband obtained a decree dissolving his marriage on the ground of his wife's adultery, and he applied to the court to vary the deed of separation so as to relieve him from the payment o the annuity. The court made an order that whenever any money should be payable to the respondent under the deed of separation the trustees should out of the moneys in their hands payable to the respondent under the post-nuptial settlement, pay a sum equal in amount upon the same trusts as would apply in case the respondent were dead and had died in the lifetime o the petitioner: (*Bullock* vs. *and Strong*, 27 L. T. Rep. N. S. 247. Div.)

Jurisdiction—Suit against Agent of Foreign Government—Power of court to protect Fund in this Country—Equitable Assignment—Contract—

Contractor's Right to relief.—The plaintiff contracted with the French Government for the supply of certain goods, and a firm of bankers, acting as the agents of the French Government in this country, informed the plaintiff by a letter, that "a special credit" for £40,000 had been opened by them in his favor, to be paid rateably as the goods were delivered, upon receipt of certificates by the officers of the French Government. Eventually, and before the completion of the contract, the French Government withdrew the credit, without the plaintiff's consent. Upon bill filed by the plaintiff against the bankers to restrain them from parting with the fund on the ground that the fund had been in fact assigned to him, and specifically appropriated for the payment of the contract moneys: Held (affirming the decision of Malins, V.C.), that the bankers were liable as stakeholders; that, although the fund had been deposited by a foreign government, which was not subject to the jurisdiction of the court, yet the fund itself had become subject to the jurisdiction of the court, and that the court had power to prevent its being withdrawn. Although no certificates of reception had been given, the plaintiff could not be deprived of his right to receive payment for all cartridges delivered under the contract; but as the cartridges had not all been delivered within the time stipulated, and there was no satisfactory evidence that the time had been extended, an inquiry must be directed on this point. The argument that the bankers might be held liable in France for any money which they might pay in pursuance of the Court of Chancery could not be regarded, as the comity of nations would no doubt cause any French court to respect the orders of this court: (*Lariviere* v. *Morgan*, 26 L. T. Rep. N. S. 859. Ch.)

Liability of Trustees—Settlement—Appointment by Will—Execution of Trusts of Will. By a settlement, a sum of £12,000, secured by mortgage, was vested in trustees, upon trust, as to £2000 for W. S. absolutely, and as to £10,000, the residue thereof, upon trust to pay the interest thereof, to E. S., the wife of W. S., during her life, and after her death to W. S., during his life, and subject as aforesaid, upon trust for such persons as E. S. should by deed or will appoint, and in default of appointment for W. S. E. S., by her will directed that W. S. should enjoy the income during his life, after paying two annuities, and on his death that certain legacies should be paid out of one moiety of the fund; and the other moiety and the residue of her property she gave to W. S., and appointed him executor. On the death of E. S., the trustees of the settlement paid over the whole trust fund to W. S., and part of the £5000 applicable to the payment of the legacies was lost by reason of his insolvency. Held, that the payment to W. S. discharged the trustees of the settlement, and that they were not answerable for the loss: (*Hayes* v. *Oatley*, 26 L. T. Rep. N. S. 816. M. R.)

Libel—Building Society—Publication containing alleged Libel as to —Damage to Property—Injunction refused.—On a motion on the part of trustees of a building society, which was also a bank for deposits at interest, for an injunction to restrain until an action at law for libel could be brought, the publication and sale of a book containing alleged libelous paragraphs in ref-

erence to the annual balance sheets and solvency of the society. Held, that inasmuch as no malice was proved, and that the paragraphs complained of, if false, were false as statements of principles, not of facts, an injunction could not be granted. Observation upon *Dixon* v. *Holden* (*infra*): (*Mulkern* v. *Ward*, 26 L. T. Rep. N. S. 831. V. C. W.)

Landlord and Tenant—Covenant not to assign the demised Premises.—Assignment by one Joint Tenant of his interest to the other Joint Tenant.—Plaintiff demised to A. for a term of years, A. covenanting in the lease not to assign the demised premises without plaintiff's leave, A., with plaintiff's leave, assigned to defendant and D. Defendant subsequently, without plaintiff's leave, assigned his interest to D. Held, a breach of the covenant: (*Varley* v. *Coppard*, 26 L. T. Rep. N. S. 882 C. P.)

Practice—Costs—Petition—Tenant for Life—Income—Corpus—Costs of Trustee's appearance.—Where a trust fund has been paid into court under the Trustee Relief Act, the costs of all parties, including the trustees, appearing on a petition by the tenant for life for payment of the dividends, are payable out of the income; but when the title of the tenant for life is clear, and he informs the trustees that the corpus is not sought to be affected, the trustees ought not to appear on such a petition: (*Re Marner's Trusts*, 15 L. T. Rep. N. S. 237; L. Rep. 3 Eq. 432, followed.) *Re Gordon's Trusts* (L. Rep. 6 Eq. 335) overruled: (*Re Evans' Trusts*, 26 L. T. Rep. N. S. 815. Chan.)

Practice—Fund in Court—Woman past Child-bearing.—When a woman having been married twenty-six years to her present husband, and being now aged forty-nine years and nine months, had no children, the court sanctioned payment out of a fund on the assumption that she would have no children by her present husband: (*Re Millner's Estate*,26 L. T. Rep. N. T. 825. V. C. M.)

Practice—Common Law Procedure Act, 1852, 15 & 16 Vict. C. 76 s. 18—Action against British Subject out of Jurisdiction—"Cause of Action" within Jurisdiction—The plaintiff and the defendant were British subjects, and the defendant carried on the business at establishments both in Paris and London. In December, 1866, the plaintiff entered into the defendant's service in Paris, under a contract in drawing of that date, made in Paris, and written in the French language, by which he agreed to serve the defendant in the capacity of manager of the defendant's business ("*employe interesse*" was the French phrase used), at a salary of 900 francs a year, payable monthly, and a commission of 10 per cent. on the balance of profits to be taken at the end of each year. In Oct., 1870, owing to the exigencies of the war in France, both plaintiff and defendant came over to London, and from that time the defendant's service in London, up to June 1871, when both returned to Paris, the plaintiff continuing on there, as before, in the defendant's service until Nov., 1871, when he was dismissed, there being a balance of nine months' wages due to him at that time. The plaintiff then commenced an action in this country against the defendant for a wrongful dismissal, having obtained a

master's order giving him liberty to proceed, which order Hannen, J., at chambers, being of opinion that a cause of action arose within the jurisdiction, declined to set aside. A rule having been obtained by the defendant to set aside the writ of summons and all subsequent proceedings on the ground that the cause of action did not arise within the jurisdiction, the court (Martin, Bramwell, and Cleasby, BB.) discharged the rule, upon the plaintiff undertaking to confine himself strictly to a cause of action arising within the jurisdiction, namely, the non-payment of the salary accruing due to him in respect of his services to the defendant in this country, following the course adopted by the Court of Exchequer in *Diamond* v. *Sutton* (13 L. T. Rep. N. S. 800; L. Rep. 7. Ex. 430; 35 L. J. 129, Ex.): (*Arrowsmith* v. *Chandler*, 27 L. T. Rep. N. S. 242. Ex. Ch.)

Practice—Fund to which Children are entitled contingently on attaining Twenty-one.—Under the will of their grandfather, four infants were entitled (subject to the life interest of their father in both realty and personalty) to certain realty as tenants in common in tail with cross remainders in tail, and also to certain personalty in equal shares, with a proviso that the share of any child in the personalty who should die under twenty-one and unmarried, should accrue to the survivors. The will authorized the application of the income of the testator's personalty toward the maintenance and education of the children presumptively entitled to such personalty, notwithstanding the ability of their father to maintain them. The total value of the property was about £100,000. The father had incumbered his interest, and the infants consequently could not be maintained or educated in a manner suitable to their expectations. Under the above circumstances the court sanctioned a scheme for raising £600 a year for the maintenance and education of the infants: (*De Witte* v. *Palin*, 26 L. T. Rep. N. S. 825. V. C. M.)

Purchase of Consols in Names of Trustees—Prior Settlement—Augmentation of Trust Fund—Appointment—Hotchpot.—By a marriage settlement £11,188 Consols were settled on trust for husband and wife, and the survivor of them during their lives, with a joint power of appointment among their children, and in default of appointment to their children equally, and the settlement contained a hotchpot clause. In 1858 the settlor directed his bankers to purchase £2000 Consols in the names of his trustees, and to add them to the former sum of Consols, and to pay the dividends on the whole to him. The trustees were not informed of this further purchase. In 1862 the husband and wife made a joint appointment of the £11,188 Consols, or the funds representing the same, to two of their four children. Upon the death of the husband and wife the trustees paid the £2000 Consols into court. Held, that the fund was subject to the settlement, and that it did not pass under the appointment, but under the hotchpot clause went to the two children to whom no share was appointed (or their representatives) in equal shares: (*Re Curteis' Trusts*, 26 L. T. Rep. N. S. 863. V. C. B.)

Trade-mark—Infringement—Use of Word forming Part of Trade mark.—F. made and sold shirts of a particular form invented by himself and

stamped upon the shirts the words "F.'s Eureka shirt." Another manufacturer made shirts of a similar form, and stamped upon them the words "The Eureka shirt:" Held (reversing the decision of Bacon, V. C.), that F. was entitled to the exclusive use of the word "Eureka," as applied to shirts as a trade-mark, notwithstanding the fact that he had always used his own name in conjunction with that word and that he was entitled to an injunction to restrain the other manufacturer from using the word "Eureka" upon shirts not made by F. *Kinahan* vs. *Bolton* (15 Ir. Ch. 25) approved of and followed. The test whether a word, to the exclusive use of which as his trade-mark a trader was originally entitled, has become *publici juris*, is whether the use of it by others than the original owner continues calculated to deceive the public, or any part of the public, so as to induce them to buy goods not made by the original owner, under the supposition that they are his goods. The original owner may retain his exclusive right to the use of such a word with regard to the general public, although the word has become *publici juris* as between the makers and the retail dealers of the article to which the word is applied. Although the facts that a trade-mark contained a false representation in itself would probably be defense to an action at law by the owner of the trade-mark, a collateral misrepresentation by the owner of the trade-mark would be no defense to such an action, nor would it preclude him from obtaining an injunction in equity against a person infringing the trade-mark. In certain advertisements, and in the headings of his invoices, F. had falsely described himself as "patentee" of the Eureka shirt: Held (reversing the decision of Bacon, V. C), that this was not such a misrepresentation as to prevent F. from maintaining an action at law, and that, therefore, it did not not disentitle him to relief in equity: (*Ford* vs. *Foster*, 27 L. T. Rep. N. S. 219. Chan.)

Trust—Cestui que trust resident out of the Jurisdiction—Appointment of Trustees out of the Jurisdiction.—A testator bequeathed a share of a fund in trust for his daughter and her children, power being given to the trustees to invest the same in the public funds of any colony or dependency of the United Kingdom. The daughter married a domiciled citizen of the Canadian dominion, and was permanently resident in Canada. It was proposed to appoint two persons, citizens of Canada, trustees, and to transfer the share of the trust fund to them for the purpose of investment in securities in Canada. On a petition under the 22 & 23 Vict. c. 35, s. 30, the court was of opinion that such proposed appointment and transfer might be made: (*Re Smith's Trusts*, 26 L. T. Rep. N. S. 820. M. R.)

Vendor and Purchaser—Specific Performance—Mistake.—A. entered into a contract to purchase from B. a house with a forecourt, situate in Queen's-road, Bayswater, in the belief that he could build upon the whole of the property. As afterward ascertained that by the Metropolis Local Management Act, 1862, no building can be erected, or alteration made in any existing building without the consent of the Metropolitan Board of Works, and that the Board had given a consent to the erection of a building on the forecourt, which was not to be of a greater height than ten feet, and he thereupon

repudiated the contract, the premises being useless for the purpose for which he required them. On a bill for specific performance of the contract against A.: Held, that the court would not enforce specific performance, the contract having been entered into by A. in the belief that he could build over the whole property without restriction as to height: (*Bray* v. *Briggs*, 26 L. T. Rep. N. S. 817. M. R.)

Will—Discretionary Trust—Power to select ten Objects.—A testator gave his property to trustees, in trust for his wife for life, and at her death he directed his trustees to pay the sum of £1000 equally between and among such ten of the children and grandchildren and other descendants of W. B. and H. B., as his trustees should, in their uncontrolled discretion, after inquiry, judge most to require the benefit of such a bequest. The trustees died without making a selection. There were no descendants of W. B. and at the death of the testator's widow there were only six descendants of H. B. living. Held, that the £1000 was divisible among them: (*Carthew* vs. *Enraght* 26 L. T. Rep. N. S. 834. V. C. W.)

Will—Construction—"Families"—Partition—Jurisdiction.—Testator devised freehold estate to his son C., and his heirs, and in case he should die leaving no issue, then the estate was to be equally divided between his surviving children or their families. Held, that the word "families" meant children, and not descendants of the testator, and that on the death of C. without issue, the other children of the testator and the families of such of them as were dead were entitled to the property: (*Burt* v. *Hellyar*, 26 L. T. Rep. N. S. 33. V. C. W.)

Will made before 1838—Construction of—Devise of Land to Wife without Words of Limitation—Gift over in Event of Wife's Second Marriage—Direction to Devisee (the Executrix) to pay a yearly Sum—Enlargement of Devisee's Estate to a Fee.—By will, dated in 1821, the testator devised copyhold lands to his wife, without words of limitation, and also appointed her his executrix and general legatee, and he directed (clause 1) that if she should marry again an inventory should be taken of all the lands, goods, chattels, and effects before mentioned, by certain persons therein named, whom he appointed guardians of his children, with power to them to take away the goods, &c., and to reserve them and the said lands for the benefit of all his children, until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole and divide the proceeds equally among his surviving children. The testator also willed as follows (clause 2): "It is also my will that my executrix shall pay my eldest son, W. P., the sum of 5*l.* a year for wages, so long as he shall continue to labor on the farm after my decease." In ejectment by the plaintiff, as heir-at-law of the testator, against the defendants as purchasers under the widow and devisee, the Court of Exchequer (Martin, Bramwell, and Cleasby, BB.), gave judgment for the defendants, on the ground that the word "executrix" (clause 2) was a *designatio personæ*, and that the effect of the charge was to enlarge her

estate to an estate in fee, defeasible on her marrying again; and they declined to express any opinion as to whether the limitation over in case of her marrying again (clause 1) had the effect of enlarging the indefinite devise to her to an estate in fee, there being no clear authority upon such a limitation, and it not being necessary for the decision of the case; and on error by the plaintiff, it was held by the Court of Exchequer Chamber, affirming the judgment of the court below, in favor of the defendants, that the testator's widow took an estate in fee. By Cockburn, C.J., and Wiles, J., that construing the will as a whole (clause 1) manifested an intention on the part of the testator that his widow should take an estate in fee, defeasible in the event of her marrying again. By Blackburn, J., on the ground that by the direction to pay £5 a year to the son (clause 2) the indefinite devise to the widow was enlarged to an estate in fee. By Mellor, Brett, and Grove, J.J., on both the above grounds: (*Pickwell* vs. *Spenser and others*, 27 L. T. Rep. N. S. 207. Ex. Ch.)

Will—Executrix of Property not named in the Will—Administration with Will annexed.—A testator by his will bequeathed certain specific legacies, but did not dispose of the residue of his property. He left his daughter executrix for all property whatsoever and wheresoever not named in his will, and nominated two other persons to be joint trustees. The court refused to grant probate of the will to the daughter as executrix, but made a grant of administration with the will annexed: (*In the Goods of Wakeham*, 27 L. T. Rep. N. S. 214. Ex. Ch.)

Will—Construction—Erroneous Orders—Power to rectify.—A testator bequeathed a legacy of £5900 to trustees to be applied by them in fitting his grandson (an infant) for any profession he might select to follow, and he expressly directed that the fund should be at the absolute disposal of his trustees, and should be expended by them for the benefit and advancement of his said grandson in such manner, at such times, and in such proportions as his trustees in their absolute and uncontrolled discretion should think fit. The testator also bequeathed a share of the income of his residuary estate to his said grandson for life on his attaining twenty-one, with power to the trustees to apply the same during the minority of his said grandson for his maintenance and education. Shortly after the death of the testator a suit was instituted for the administration of his estate, and orders had been made for the payment out of the legacy of £5000 of various sums which had been applied toward he advancement, maintenance, and education of the infant. Upon a petition by the grandson, who had since attained twenty-one, Held, that he was absolutely entitled to the legacy of £5000, and was also entitled to have the sums advanced thereout for his maintenance and education recouped out of his share of the interest of the residuary estate: (*Furley* v. *Hyder*, 26 L. T. Rep. N. S. 884. V.C. B.)

Will—Annuities—Gift over of Capital—Tenant for Life of Residue— Cesser of Annuities—Conversion of Reversionary Interest—Mourning.—Testator gave the residue of conversion, with power to postpone such conversion, and directed that a sum of £10,000 should be lent to W. at interest, and va-

rious life annuities paid out of such interest, and when all the annuitants should have died, that certain charitable legacies should be paid out of the £10,000. The residue of his estate to be invested, and the income paid to his wife for life. The £10,000 was lent to W., and subsequently paid off by him and invested by the trustees, and the dividends applied in paying the annuities. Some of the annuitants having died, Held, that the tenant for life was entitled absolutely to such part of the income of the £10,000 as had been and during her life would become released by the deaths of the annuitants. Part of the testator's estate consisted of a contingent reversionary interest in £3000, which was sold by the trustees seven years after the testator's death. Held, that the reversion must be valued as at the time of the testator's death, and interest on the valuation at four per cent. from testator's death paid to the tenant for life. A considerable outlay had been made in providing mourning and mourning jewelry for some of the legatees. Held, that the amount paid for mourning should be allowed, but not for the mourning jewelry. (*Gibbs* v. *Gibbs*, 26 L. T. Rep. N. S. 865. V.C. B.)

COMPANY LAW.

Injury by Accident—Master and Servant—Dangerous Employment— Liability of Master—Contributory Negligence.—The defendants, who were owners of a "factory" within the meaning of the 7 & 8 Vict. c. 15, employed B., aged 22, to lubricate the bearings between the fly-wheel and the spur-wheel of a steam engine in the engine-house of their factory. The bearings on which the shaft revolved were fixed on a place in the wall, in which there was a hole called the "wall box," for the purpose of holding them. The wall was 2 feet 3 inches thick. In order to do his work B. had to stand in this hole or "wall box," into which he crawled through the spokes of the fly-wheel, when the engine was at rest. The size of this cavity or "wall box" was 2 feet 3 inches wide, 5 feet long, and 4 feet high. The fly-wheel, 15 feet in diameter, was on his left hand, revolving in a wheel-race in the engine-house at the rate of fifty-six revolutions a minute, and the spur-wheel, 16 feet in diameter, was on his right hand, revolving at the like rate, in another room of the factory, and the utmost distance between the spokes of the two wheels was 2 feet 10 inches. The edge of the wheel-race next the wall, where B. was placed to do his work, was not fenced, nor was the fly-wheel fenced, but children or young persons were not liable to pass or to be employed near thereto. B. had worked there for five days successively, and while at work there the sixth day he was caught by the fly-wheel, whirled round, and killed. In an action by his widow and administratrix against the defendants, under Lord Campbell's Act, for negligence in not fencing the wheel-race, as required by sect. 21 of the 7 & 8 Vict., c. 21, it was found by the jury that B. had not been guilty of contributory negligence, either in undertaking to work, or in his mode of performing it, and a verdict was returned for the plaintiff. A rule having been granted, pursuant to leave, to set the

verdict aside, on the ground that there was no statutory duty on the defendants to fence the place in question, and that B. voluntarily encountered the risk of the employment, it was held (by Bramwell, Channel, and Pigott, B B.) that the plaintiff was entitled to recover, the defendants being bound (by sect. 21 of the 7 & 8 Vict., c. 15), to fence the spot in question, which was the edge of a wheel-race not otherwise secured within the meaning of that section, and that the danger was not so obvious as that B. must necessarily have been aware of it; nor, even if he were so, would that be sufficient to make him a "volunteer," so as to exempt the defendants from liability for the breach of their statutory duty. Under sect. 21 there was an absolute and unqualified duty on the defendants to fence the fly-wheel, whether or not children or young persons were liable to be employed or pass near it: (*Briton* v. *The Great Western Cotton Company*, 27 L. T. Rep. N. S. 125, Ex.)

MARITIME LAW.

Insurance—Stranding—Partial Loss—Mutual credit of Premiums— Set-Off.—Insurance was effected on a cargo of salt from Liverpool to Calcutta. From stress of weather the ship put into the Bristol Channel for safety. She lost both her anchors and her mainmast, and not being able to reach a harbor was, with the assistance of two steam tugs, towed on to a bank outside Cardiff. The salt was much damaged and stained, part of the cargo being destroyed. The salvors having instituted proceedings in the Admiralty Court to obtain payment for the services rendered by them, the cargo was sold by auction, but only fetched enough to pay the salvors and the expense of suit. The plaintiff had assigned the bill of lading and the policy of insurance for an advance, and he now sued on behalf of the assignment thereof. The plaintiff had since become a bankrupt, and executed a deed under the Bankruptcy Act 1861. The defendant denied that any sufficient notice of abandonment had been given him, and also assuming his liability claimed to set-off the money due on account of other premiums unpaid by the plaintiff. *Held*, that the plaintiff was entitled to recover for a partial loss. Also, that there was a stranding of the ship. *Held*, also, that the defendant was entitled to set-off the premiums by way of mutual credit: (*De Mattos* v. *Saunders*, 27 L. T. Rep. N. S. 120. C. P.)

Marine and Fire Insurance—Respective Liabilities of Carrier and Underwriter—Subrogation.—Where goods upon which an insurance has been effected are delivered to a common carrier, he is primarily liable for any loss which may occur, but is entitled to be subrogated to the rights of the assured as against the insurer. The principle of subrogation applies equally in the case of fire and marine insurance. Where a loss arises by the fault of the carrier, the insurer who pays the amount of it to the insured is entitled to use his name in a suit to recover damages against the carrier: (*Hall* v. *Nashville and Chattanooga Railway Company*, 27 L.T. Rep. 182. U. S. Sup. Ct.)

Digest of English Decisions.

Salvage—Agreed Compensation—Proceedings in Rem and in Personam.—A salvor by contract is not an agent of the owners, and has no claim against the property saved beyond the contract price. A contract by salvors with owners for an agreed amount to be paid in any event, creates only a personal obligation on the part of the owners. A wrecking company which had agreed to raise a sunken schooner for a certain proportion of her value, hired of the libellant a diver and certain apparatus. *Held*, that the libellant, having knowledge of the contract, could not maintain a libel *in rem*: (*The Schooner Marquette*, 27 L. Rep. 183 U. S. Adm. Ct.)

Barratry—Over-Valuation—Concealment of a Material Fact—Expected Profits—Fraud—Connivance—Innocence of Owner.—V., the owner of the ship, and D., shipped goods on a voyage from Hamburg to a port in Asiatic Russia. The adventure was expected to be enormously profitable. The whole cargo shipped was valued at £8000, but the total insurances effected amounted to £20,000, the profits being variously estimated at from 80 to 125 per cent. To secure these profits, it was admitted that the goods had been over-valued to the extent of 25 to 30 per cent., and there were heavy insurances of commissions. Among the cargo was a shipment of spirits costing £1000, but valued at £2800. The ship went down in fine weather in mid-ocean without any known cause. D. brought an action to recover commission, profits on charter, and £1800 of the £2800 insured on spirits. It was pleaded that the loss was not the consequence of perils of the sea; that the concealment of the over-insurance was concealment of a material fact, and that the goods were shipped with the fraudulent design of sinking the ship. Held, that an insurance on profits must be taken to mean possible profits. Held, further, that scuttling a ship with the knowledge of V., the shipowner, but without the knowledge of D., the freighter, was barratry, in respect of which D. might recover against the underwriters. Excessive valuation is almost conclusive evidence of a fraudulent intent. The slips mentioned that profits were to be insured, "however high they might be." No further notice of the over-insurance was given to the underwriters. The jury found that the over-valuations were excessive and material, and were concealed from the underwriters: (*Ionides* v. *Pender*, 27 L. T. Rep. N. S. 244. Hannen, J.)

Insurance—Reassurance—Meaning of Term to "commence from Loading as above"—Outward cargo to be homeward Interest after a certain Time.—Declaration upon a policy of insurance underwritten by defendants for 1000*l.* declared to be upon cargo, being a reinsurance subject to all clauses and conditions of the original policy, in the ship D., at and from any port or ports in any order on the west coast of Africa, to the vessel's port or ports of call and discharge in the United Kingdom, the insurance to commence "from the loading" of the goods at as above; that it was a clause and condition of the original policy that the insurance made by it should be for £1000 upon the cargo valued at £3500 of the said vessel D., at and from Liverpool to any ports, in any order backward and forward, and forward and backward on the eo st

of Africa, and thence back to a port of discharge in the United Kingdom, with leave to increase the valuation of the cargo on the homeward voyage; "outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge;" that goods were shipped at Liverpool, and the vessel, with goods on board, departed from a port on the west coast of Africa, and in the course of the voyage in the original policy described, and more than twenty-four hours after she had arrived at her first port of discharge, the goods were lost by perils insured against in the original policy. Demurrer on the ground that it appeared from the declaration that the goods were not loaded at any port on the west coast of Africa. Held, that the goods, though shipped at Liverpool, were within the policy of reinsurance after the lapse of twenty-four hours from the vessel's arrival at her first port of discharge on the west coast of Africa. As the policy was declared to be a reinsurance, subject to all clauses and conditions of the original policy, outward cargo was to be considered homeward interest twenty-four hours after the vessel's arrival at her first port of discharge, the words "from the loading" were not to be construed strictly: (*Joyce v. The Realm Marine Insurance Company*, 27 L. T. Rep. N. S. 144. Q. B.)

REAL PROPERTY AND CONVEYANCING.

Will—Charitable Legacy.—A testatrix bequeathed legacies to several persons, to be applied by each of them to such charitable purposes as each might deem most advisable: *Held*, that such legacies lapsed by the death of the legatees in the lifetime of the testatrix directed that a number of almshouses in different parishes should be erected at the expense of her residuary personal estate, when and as soon as land should at any time after her death be given for that purpose: *Held*, void on the ground of remoteness: (*Chamberlayne* v. *Brockett*, 27 L. Rep. N. S. 92. M. R.)

Power—Execution of Instrument —Will—Publication of.—The donee of a power, which was to be exercised by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be signed, sealed, and delivered in the presence of, and attested by, two or more credible witnesses, made her will reciting the power, and the same was signed, sealed, published, acknowledged, and declared to be her will, in the presence of and attested by three witnesses: *Held*, that the will was a good execution of the power. Publication of a will is equivalent to delivery of an instrument: (*Smith* v. *Adkins*, 27 L. T. Rep. N. S. 90. M. R.)

Principal and Agent—Ambiguous Instructions—Less Quantity than that ordered by Principal purchased and shipped by Agent—Construction.—The defendant, a merchant in Liverpool, wrote to the plaintiffs, commission agents at Mauritius, directing them to purchase for and ship to him 500 tons of sugar, at a certain limit to cover cost, freight

and insurance. The letter also contained this clause: "50 tons more or less, no moment if it enables you to get a suitable vessel." The plaintiffs used all diligence, but from the circumstances of the trade in Mauritius were unable to procure more than 400 tons, without exceeding the limit fixed by the defendant. The plaintiffs having bought and shipped this quantity, the defendant refused to accept the sugar on the ground that the plaintiffs had not followed the instructions given to them: *Held* (reversing the judgment of the Court of Exchequer Chamber) that the defendant was bound to accept the cargo; for that whatever might be the proper construction of the terms of the defendant's letter, the plaintiffs, having *bona fide* adopted a construction of which the document was fairly capable, were held responsible for the loss arising out of the transaction: (*Ireland and others* v. *Livingston*, 27 L. T. Rep. N. S. 79. H. of L. Cas.)

Tenant in Common—Action by one against the other in Trespass and Trover—Ouster—Account—Amendment. Plaintiff and defendant each had a lease of the same field from each of two tenants in common. The defendant entered the field, and cut, made into hay, and removed, a crop of growing grass. He also put a lock on the gate of the field, but there was no evidence that the gate was always kept locked. In an action of trespass and trover brought by the plaintiff against the defendant: Held, (affirming the judgment of the Court of Exchequer Chamber), that the action would not lie, the plaintiff and defendant being tenants in common, and nothing amounting in law to an ouster of the plaintiff by the defendant having occurred. Held, also, that the plaintiff could not amend by turning the action into one of account, since that would be to change the entire character of the action and the questions at issue: (*Jacobs* v. *Seward*, 27 L. T. Rep. N. S. 185. H. of L.)

Surety—Promissory Note—Co-Sureties—Agreement to Share Liability equally. C. having got into difficulties, four friends agreed to help him, and became liable for him on various bills, none of which were signed by all the four. By an agreement subsequently signed by the four friends, they appointed W. their joint solicitor, to act for them in all matters relating to the bills, with full authority to settle the same on the best terms he could, and, upon the amount being ascertained for which the liabilities could be discharged, they undertook to provide the same in proportion of one-fourth each. W. failed to effect any settlement: Held [reversing the decision of Malins, V. C.], that the agreement was not binding, inasmuch as the settlement in consideration of which it was made, could not be effected: [*Arcedeckne* v. *Lord Howard*, 27 L. T. Rep. N. S. 194. Chan.]

Will—Bequests to Confessor of Testatrix—Undue Influence—Onus Probandi Evidence. The doctrine in courts of equity in regard to gifts *inter vivos* does not apply to the making of wills. The natural influence which is created by the relations of parent and child, husband and wife, doctor and patient, attorney and client, and confessor and penitent, is not held to be "undue" by the Court of Probate, and it may lawfully be exerted to obtain a will

or legacy as long as the testator thoroughly understands what he is doing, and is a free agent. The testatrix, a Roman Catholic, bequeathed the bulk of her property to a Roman Catholic priest who had been for many years her confessor, and had resided in her house. Held, that undue influence could not be inferred from the relations between the two, combined with the disposal of the property, and that it was incumbent on those who pleaded undue influence in opposition to the will, to prove it affirmatively. To prove an issue it is not necessary to prove every fact or conclusion on which the issue depends. From every fact proved legitimate and reasonable inferences may be drawn. In deciding, therefore, whether there is evidence to go to the jury, the court has only to consider whether, assuming the facts proved to be true, and adding to them the inferences which a jury might reasonably draw from them, there is sufficient evidence to support the issue: [*Parfitt* v. *Lawless*, 27 L. T. Rep. N. S. 215. Prob.]

Negligence—Towing Path—Taking Toll—Liability to repair.—The defendants were corporated under private Acts of Parliament for the purpose of maintaining and protecting the navigation of the river Thames. They had power to acquire, for the public use, the towing paths along the river, and also to maintain and repair the same. In the exercise of their powers, they had provided a towing path for the use of the public, they invited the public to use it, and took toll, as they were authorized to do by their Acts, for the use of it: Held, that the defendants were bound to take reasonable care that the towing path was in a reasonably fit condition to be used as a towing path, and that an action lay against them for neglecting this duty, whereby the horses of the plaintiff, who was lawfully using the towing path with his horses, and had paid them toll in respect thereof, fell into the river and were drowned; (*Winch* vs. *Conservators of Thames*, 27 L. T. Rep. N. S. 95. C. P.)

Judgment Recovered -Joint wrongdoers—Judgment against one—Plea of, by the other.—It is a good plea in an action of tort to say that the tortious act was committed by defendant jointly with another, and that the plaintiff has sued that other in respect thereof and recovered judgment, which judgment still remains in force, and a replication that the said judgment always has been and still remains wholly unsatisfied is bad. Judgment of the Court below affirmed: (*Brinsmead* vs. *Harrison*, 27 L. T. Rep. N. S. 99. Ex. Ch.)

Costs—Taxation—Solicitor—Perusing Affidavits—Three Counsel—Retainer.— In each of fifteen suits instituted by a patentee to restrain the infringement of his patent, the plaintiff filed a substantially identical affidavit. The defendants all appeared by the same solicitor, who took an office copy of the affidavit in one suit only, and then attended at the Record office, and compared the copy with the affidavits filed in the other suit: Held (reversing the decision of Bacon, V. C.), that the costs of employing the first leader at the hearing could not be allowed upon taxation between party and party. (*Cousens* vs. *Cousens*, 25 L. T. Rep. N. S. 719; L. Rep. 7 Ch. 48) commented upon and distinguished: (*Betts* vs. *Cleaver*, 27 L. T. Rep. N. S. 85. L. JJ.)

Will—Construction—Vesting—Issue—"Then Living."—A testator devised his real estates to the use of several persons successiv ely in tail, with remainder to the use of trustees, upon trust to sell and divide the proceeds into three equal parts. And the testator directed his trustees to pay the income of one of such third parts unto his sister P., during her life, and after her decease to divide the same among all and every the children of the said P., who should be "then living," and the lawful issue of such of her children as should be then dead, leaving such issue, equally share and share alike, but so as such issue should have no greater share thereof than such as their, his, or her deceased parent would have had if living. And at the end of the will there was a proviso by which the testator, to prevent all doubts which might otherwise possibly arise, declared that if his real estate should ever be sold under the limitations thereinbefore contained, and the money arising thereby should ever become payable to the issue of his late sister A , and his sister P., or the issue of his nephew J., or any of them, and any one or more of such issue should be then dead having left lawful issue, then the issue of such issue as should be so dead should have and receive the part or share to which their, his, or her parent would have been entitled if living: Held (affirming the decision of Malins, V. C.), that the words "then living" referred to the children and issue of deceased children of P., living at her death, and that these vested gifts were not divested by the proviso at the end of the will: (*Hesaman* vs. *Pearse*, 27 L. T. Rep. N. S. 89. Chan.)

Contract for Sale of Shares—Action for Breach in not accepting Transfer, and notice of Willingness to Transfer—Tender of Transfer.—In an action for a breach of contract in refusing to accept, at the time appointed by the contract, and to pay for, certain shares in a water, gas, and market company (such shares being by the company's Act of Parliament made personal estate, and a form of transfer under seal being thereby given), it is sufficient to aver that the plaintiff (the vendor) "had always been ready and willing to do all things, and that all things had happened, &c., necessary to entitle him to the performance by the defendant of his said agreement;" and notice to the defendant of the plaintiff's readiness and willingness to transfer the shares is not necessary, or a condition precedent, to the plaintiff's right to recover, it being, on the contrary, the duty of the defendant (the purchaser) to prepare and tender a transfer for execution by the plaintiff; and a plea of want of such notice is bad, and no defense to the action. So held, on demurrer, by the Court of Exchequer, Kelly, C B., and Martin, Bramwell, and Cleasby, B.B., on the authority of *Stephens* vs. *De Medina* (4 Q.B. 422; 12 L. J., N. S., 120, Q.B.; 3 G. & D 110); *Doogood* v. *Rose* (9 C.B. 132; 19 L. J. 246, C. P., distinguished): (*Cobbold* v. *Peto*, 27 L. T. Rep. N. S. 130, Ex.)

Winding-up—Proof of Debt—Statute of Limitations.—The Statute of Limitations does not run against the creditors of a limited company after an order has been made to wind-up the company; but, till all the assets have been distributed, any creditor whose debt was valid at the date of the wind-

ing-up order may prove his debt, without, however, being entitled to disturb any dividends already paid. Decision of the Master of the Rolls (26 L. T. Rep. N. S. 755) reversed: (*Re The General Rolling Stock Company*, 27 L. T. Rep. N. S. 88. L.JJ.)

Increased Capital—Liability of Shareholders to contribute Money by way of Loan.—The P. Company was registered as a company with limited liability under the Act of 1862. The memorandum of association stated the capital to be £100,000, divided into 100 shares of £1000, each. All these were allotted, and had been fully paid up. The company's articles of association provided that in case increased funds should be necessary for the purpose of the undertaking, the same, to an extent not exceeding £200 per share, should be contributed by the shareholders for the time being of the 100 shares rateably in proportion to the number of their shares, and that such increased funds should be treated as a debt from the company to be repaid with interest previous to the division of any profits, at such rate of interest and in such manner as the committee might think fit. Increased funds became necessary for the purpose of the undertaking, and thereupon a resolution was duly made by the proper representatives of the company, that in accordance with the above articles a call of 200*l.* per share be made; that the amount be treated as a debt from the company to be repaid with interest at the rate of 7½ per cent. previous to the division of any profits. This resolution was duly notified to defendant, who at the time was the registered holder of four shares in the company. Defendant refused to contribute any money which he was thus called upon to contribute to the company, and thereupon this action was brought to enforce the payment of £200 per share by the defendant as a debt due from him to the company as a member thereof, under sect. 16 of The Companies' Act 1862). Held, that this mode of raising contributions from the share-holders by way of loan was not an alteration made by the company in the conditions, as to the amount and limit of its capital, contained in its memorandum of association, so as to be illegal within the meaning of sect. 12 of The Companies' Act 1862. Held, also, that the passing and service of the above resolution made the sum of £200 per share payable by the shareholders, and recoverable from them by the company by action under sects. 16 and 17 of the Companies' Act 1862, as a debt due from the members to the company in the nature of a specialty debt.

Liability of Surety — Discharge by Creditor's Laches — Equitable Plea.—In an action upon a deed, defendant pleaded and proved that the plant and stock in trade of a debtor were assigned to plaintiffs as security for money advanced, and that defendant was a mere surety for the repayment of the money. The plaintiffs had power to enter and seize upon default of payment by the debtor, but they neither entered nor registered their deed of assignment for six months after the first default. When the debtor became bankrupt, the subject of the assignment was taken by the trustee. The defendant knew nothing of this security, nor of the plaintiff's neglect to seize or register; but the

plaintiffs were well aware of all the debtor's affairs, and acted as his attorneys in the bankruptcy: Held, that the defendant was not liable for the amount which would have been covered by the security, if the plaintiffs had seized immediately upon default, and had registered the assignment: (*Wulff* v. *Jay*, 27 L. T. Rep. N. S. 118. Q. B.)

Book Notices.

BUMP ON FRAUDULENT CONVEYANCES.—A Treatise on Conveyances made by Debtors to defraud Creditors. Containing references to all the cases, both English and American. By Orlando F. Bump, Counsellor at Law. Publishers: Baker, Voorhis & Co., 66 Nassau Street, New York. Price, $7.50.

We are much pleased with Mr. Bump as a writer on law. His work on Bankruptcy was well received by the profession, not so much for the exhaustive treatment of the subject, as for the terse statement of the law, the total absence of impractical theories, Mr. Bump being satisfied in giving correctly the many authorities on the exposition of the bankrupt act. Scarcely ever is the reader reminded of the author when referring to his pages. He has, as it were, continually kept himself in the back-ground, showing up, with no little tact, the questions and points of law raised and decided by this or that court, without unnecessarily intruding his own opinions to gratify the all-important "*ego*." And in this particular he is so much more welcome than many other "text-writers" who have assumed the position of teacher of the profession ere they had studied the *science* of the law of which they treat. We will be pardoned for saying that the legal profession is greatly suffering on account of its incessantly increasing text-writers. It is a mistaken impression of these gentlemen to suppose that simply because they are successful in giving the various and greatly conflicting authorities on certain points that they are equally successful in harmonizing what appears conflicting, in assigning the reasons for those variances, and establishing upon principle the correct rule for the interpretation of the law. We have too many mechanics and not enough artists. It is the scientist only who should dare to attempt to write on law, and others should be satisfied in being permitted to perform less responsible duties. Mr. Bump, in presenting his "Fraudulent Conveyances" to the American lawyer, added another laurel to his wreath of legal labor, and we will be much mistaken if the Bar will not appreciate his valuable services. The treatise before us refers to both the English and American authorities, and cites nearly five thousand cases. It is, therefore, as a book of reference of the law and to the authorities to sustain it, of incalculable worth; and we fully agree with what the author states in his preface, "that the subject which is considered and treated in this

work is one that has never been made the object of a special treatise or discussed in the light of a thorough and exhaustive collection of the authorities. It is more than seventy years since the last edition of Roberts on Fraudulent Conveyances was printed. May's Voluntary and Fraudulent Conveyances, and Hunt's Fraudulent Conveyances, are of a later date. These works, however, treat of the statute of 27th Eliz., as well as the statute of 13th Eliz., and are confined to the English cases. It is manifest that the subject of conveyances to defraud creditors is of sufficient importance to require a separate treatise, and those who are at all familiar with the subject, or who will take the trouble to examine this work, will know or see that the American authorities are very numerous and important. This work is therefore confined to conveyances to defraud creditors, and contains references to all the cases upon the subject." The author further on adds "that he does not expect that his views will be adopted. Where eminent courts, after careful discussion, reached different conclusions, it would be presumptuous to assert that he has accepted the better opinion, for he also is fallible. All that he has aimed to do has been to present a systematic and consistent theory of the law, and to so arrange and classify the authorities as to unfold that theory. Conflict was there before he began his investigations, and will continue after his labors have ceased. All the merit he claims is simply that of presenting the law in a compact, accessible shape, and thus lightening the labors of a profession whose toils are arduous amid the ever-increasing multiplication of reports." Mr. Bump has done all this and more, as a reference to the pages of this treatise will show. There are twenty-six chapters in this book, treating respectively of 1. History of the Law of Fraudulent Conveyances; 2. What constitutes a Fraudulent Conveyance; 3. Fraudulent Intent; 4. Badges of Fraud; 5. Possession; 6. When Possession is Fraud per se; 7. Preferences; 8. Bona Fides of the Transfer; 9. Consideration; 10. What Transfers are within the Statute; 11. Voluntary Conveyances; 12. Nuptial Settlements; 13. Subsequent Creditors; 14. Assignments for the benefit of Creditors; 15. Assignments exacting Releases; 16. How far a Fraudulent Transfer is void; 17. Bona Fide Purchasers; 18. Who are Creditors; 19. International Law; 20. Executions, Judgments, and Attachments; 21. Executors De Son Tort; 22. Remedies; 23. Evidence; 24. Extent of Grantee's liability. After which follow Cases from the Year-books, Statutes of the various States, and a copious index. The volume is nicely gotten up and contains 657 pages.

REPORTS OF CASES argued and determined in the Supreme Court of the State of Oregon, from 1869 to 1870, and in the Circuit Courts of Oregon, from 1867 to 1870. By Joseph G. Wilson, Ex-Justice of the Supreme Court, and Official Reporter. Vol. 3. A. L. Bancroft & Co., Publishers, San Francisco, Cal.

This is a volume of reports of exceedingly interesting and well-considered cases, which will find a ready market on the Pacific coast. Indeed we can not imagine how a lawyer, practicing in those courts, can well dispense with it,

and the practitioner on this side of the Pacific can find much valuable and useful information by perusing the various cases. The volume contains 641 pages, is handsomely printed on excellent paper and from clear type. The index, following the reported cases, is very complete, and will serve as a ready and convenient digest for points sought for. We intend to give in our next issue several abstracts of the most important decisions. We understand that the publishers have in press some very valuable law treatises, which will shortly be ready for the profession, and which we shall with pleasure review as they are issued and received by us.

TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS. By John F. Dillon, LL. D, Circuit Judge of the United States for the Eighth Judicial Circuit, Professor of Law in the University of Iowa, and late one of the Justices of the Supreme Court of Iowa. Octavo, 808 pages. Law Binding. Published by James Cockcroft & Company, Chicago. 1872.

Seldom are the members of the legal profession indebted to one of their number as they now are to the Hon. John F. Dillon for his very able work on the Law of Municipal Corporations. The subject is important, treating as it does of the mutual rights and liabilities of individuals, and the municipalities in which they reside, or with which they may be brought in contact. The author is a man of ability, and peculiarly fitted for his self-imposed task, by reason of his having been a Justice of the Supreme Court of Iowa, a State in which questions concerning the responsibilities, powers, and duties of Municipal Corporations have been, and are, constantly arising.

The author designed to present a work to the profession which—by reason of the inapplicability of the English treatises on this subject, to many cases arising in this country—should fill the void so long existing in the literature of the law in this country. Knowing how really practical a work of the kind would be, Judge Dillon has, successfully, endeavored to present an American treatise on this topic, which should contain, not only the law as settled in this country, with a reference to the cases decided in the Supreme Courts of the different States, but also give a reference to the leading English authorities, and show the difference between English and American municipalities, that thereby the English decisions should receive their proper weight and just consideration in connection with judicial investigations in the United States.

The plan of the work adds in no small degree to its value. Knowing that access to complete law libraries can not always be had, the author has made the text and notes contain, without prolixity, the essential parts of the judicial decisions to which references are made. Taking into consideration the fact of there being a distinctive digest of the subject treated, and no American work similar to his own, Judge Dillon so planned his treatise that, although it is a complete text-book of the subject, it also forms by its index and notes a really useful digest of English and American authorities on the law of which it treats.

The book is divided into thirteen chapters, which are subdivided into sections, with head-lines showing the particular matter treated of in each. The opening chapter is devoted to an "Introductory Historical View of Municipal Corporations," briefly presented in about twenty-five pages. The scope of the work is extensive, the author having, in a masterly manner, defined and classified corporations, and treated of their several kinds, together with the manner of their creation, both in England and in the United States. The distinction between public and private corporations, and the extent of legislative power over their property, is ably discussed.

The subject of municipal charters has been considered in connection with the principles upon which they are construed, and the general nature of the powers conferred by them upon the corporation or upon its legislative or governing body. A short chapter is devoted to the subject of the dissolution of Municipal corporations, and another to corporate names, boundaries, and seals. The masterly control the author has of his subject is shown in his treatment of it, under the heads of Municipal Elections and Officers—Corporate meetings, Records, and Documents—Ordinances or By laws—Courts—Contracts and Corporate property. The subjects of Eminent Domain—Dedication—Streets—Taxation and Local Assessments—Mandamus—Quo Warranto, and other important topics, each receive the consideration to which they are respectively entitled. Propositions of law seem crystalized in the text, while the foot-notes containing authorities in support of, or contrary to the author's views, are of the greatest practical importance. The volume contains an alphabetically-arranged index of cases cited, to the number of four or five thousand. The mechanical work is in keeping with the character of the book, the binding is well done, the type large and clear, and the paper of so fine a quality that, although the volume contains over eight hundred pages, it is smaller and presents a neater appearance than most recent law publications. The publishers' work is worthy of commendation.

The ability of the author, and the practical character of the work, will insure it a careful consideration by the profession, and consequently a place in the library of all practitioners who desire to keep themselves informed concerning the rapid advancement being made in this particularly important branch of the law. We know of no work from which one can gain so much information concerning the law of Municipal Corporations and with so little labor as from this treatise of Judge Dillon's.

We herewith acknowledge the receipt of No 1, Vol. 1, of the "*American Civil Law Journal*, published by Diossy & Co., New York, and edited by R. H. Chittenden and David C. Van Cott. It is a handsomely gotten up monthly of 28 pages and is devoted to the discussion of the principles of the civil law and to legal reform. May it have a safe and prosperous existence, and be an honor to the profession in whose interest it is started.

THE

AMERICAN LAW RECORD.

VOL. 1. MARCH, 1873. NO. 9.

THE INFLUENCE ON THE MIND OF THE STUDY AND PRACTICE OF LAW.

By H. R. FINK.

"A DIALECTICA Aristotelis libera nos Domine!" Such was the pathetic supplication of a certain class of students, who, it is said, prayed in the language of St. Ambrose, for deliverance from the study of the logic of Aristotle. The distaste for the Aristotelian dialectic was undoubtedly great; but scarcely can this aversion be said adequately to measure the horror in which the study of law has been held by many, even the most strong-minded of men. Instead of the logic of Aristotle, the student has at all times been willing to pray for deliverance from the subtilties of Coke upon Littleton. No study has invoked such implacable hatred. Such being the fact, what are the inducements to its cultivation? Apart from its value to the statesman and the publicist, and its necessity to the lawyer, there remains but one incentive to the pursuit, namely, its capacity for exercising and developing the higher mental faculties.

Chiefly as a mental discipline, therefore, does this study claim the respect of the student; and it is probably this view of it, which alone can encourage its extensive and, consequently, its intensive cultivation. Its capacity once recognized as a mental gymnastic, it will not fail to attract, outside the academy and mere profession of the law, such minds as have recourse to the most laborious studies, for the sake only of self-improvement. Meanwhile it may be asked what the special influence of this study is on the mental habits. "The difference," says Sir William Hamilton, "between different studies in their contracting influence is great. Some exercise and, consequently, develop,

perhaps one faculty on a single phasis, and to a low degree, while others from a variety of objects and relations which they present, calling into strong and unexclusive activity the whole circle of the higher powers, may also pretend to accomplish alone the work of catholic education." If the testimony of certain writers be accepted, the study of law may claim the highest rank among the sciences as a mental discipline. Dr. Johnson, for instance, says, "Law is the science in which the greatest powers of the understanding are applied to the greatest number of facts." Edmund Burke, again, terms it, "the pride of the human intellect," and declares that "it does more to quicken and invigorate the understanding than all the sciences put together."* Coming to our own day, we find, that to this study is assigned a capacity for giving employment to the range of the higher faculties:—"Now there are two subjects of thought," says the author of 'Ancient Law,' —the only two, perhaps, with the exception of physical science, which are able to give employment to all the capacities which the mind possesses: one of them is metaphysical inquiry, which knows no limits, so long as the mind is satisfied to work on itself; the other is law, which is as extensive as the concerns of mankind."† Opinions such as these, which may be found scattered up and down the writings of the most competent judges, are, however, open to the most serious misapprehension. At the present day, when the law is less cultivated, less liberally as a general science, more exclusively as a special practice, an indiscriminate application of such opinions is likely to mislead the student, and keep out of view the positive dangers which attend the study. Nothing at the same time ought to encourage its extensive and scientific cultivation more than a clear conception of the twofold and opposite influence which this study is likely to exercise upon the mind; contracting and enfeebling it, as the study becomes shallow and practical, and stimulating its higher powers, as it becomes a scientific pursuit. But the history of legal study so prominently exhibits it, in its one practical tendency, that it is not surprising to find the opinions which exist regarding its incapacity as a mental exercise, formed almost exclusively with reference to its narrow and partial cultivation. To some of these opinions I propose to refer in this paper.

Meanwhile, it may be remarked, that there is no science which affords a more striking resemblance to law in its influence on the mental habits, than the science of mathematics. In-

* Burke's Speech on American Taxation: Works, vol. i., Bohn's ed., p. 407.

† Main's Ancient Law, p. 360.

deed, Dugald Stewart finds no subject bearing so close an analogy to mathematics itself, as a hypothetical science, as a code of municipal jurisprudence. It has accordingly been asserted, that the one study affords a cultivation as one-sided and contracted as the other. Nor has the analogy been held good merely with reference to the general tendency of those studies, but also with reference to some particular habits of mind, which, in an equal degree, they are said to exercise and encourage, to the exclusion and neglect of others. The first that may be noticed is that which Von Weiller ascribes to mathematics:—"By the mathematics, the powers are less stirred up in their essence than drilled to outward order and severity; and consequently manifest their education more by a certain formal precision, than through their fertility and depth." To the same effect is the testimony of Hallam with regard to the study of law in its practical bearing:—"The application of general principles of justice to the infinitely various circumstances which may arise in the disputes of men with each other, is in itself" (says this writer) "an admirable discipline of the moral and intellectual faculties. Even where the primary rules of light and policy have been obscured in some measure by a technical and arbitrary system, which is apt to grow up perhaps inevitably in the course of civilization, the mind gains in acuteness though at the expense of some important qualities."* Coleridge again, a competent judge on this subject, notices the one-sided development to which the study of law conduces, and recommends the study of metaphysics as likely to counteract this tendency. "I think," says Coleridge, "that upon the whole the advocate is placed in a position unfavorable to his moral being, and indeed to his intellect also, in its highest powers. Therefore, I would recommend an advocate to devote a part of his leisure time to some study of metaphysics of the mind or metaphysics of theology; something, I mean, which will call forth his powers, and center his wishes in the investigation of truth alone, without reference to a side to be supported. No studies give such a power of distinguishing as metaphysical; and in their natural and unperverted tendency, they are ennobling and exalting. Some such studies are wanted to counteract the operation of legal studies and practice, which sharpen indeed, but, like a grinding-stone, narrow while they sharpen."† And A. J. St. John asserts, on authority of Lord Bacon himself, that "a laborious study of law has a natural tendency to narrow and enfeeble

* Hallam's Literary History, 7th ed. vol. i., p. 61.

† Coleridge's "Table Talk, pp. 4-7."

the mind."* So much then for the contracting and enfeebling tendency of this study.

It is admitted, however, without much controversy, that the study on either hand sharpens, and renders the mind remarkably acute (special qualifications of the lawyer, which very probably the reader has already discovered on his own account, without the evidence of either Mr. Hallam or Mr. Coleridge). That the lawyer, of all men, is sharp, is proverbial; and to correct, what evidently is a vulgar error on this subject, it becomes necessary to state, once for all, that this sharpness has nothing akin to the handicraft skill of the practitioner who dips his fingers into a gentleman's pocket in a crowd. In what, then, does this sharpness consist? Chiefly, it may be said, in a certain mental dexterity and quickness of conception, and the ability (as LordBrougham remarks) to produce suddenly the mind's resources at the call of the moment. Qualities such as these have placed the lawyer in the foremost rank of masters in the art of disputation. Burke accordingly remarks that the study of law "renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources."† The tendency of the rudiments of mathematics to produce a similar effect has been noticed by Professor Klumpp, who says "that a legitimate progress in these aids, sharpens, and delights the mind."

But the question arises, as one of grave importance, whether qualities, such as these, when cultivated to any considerable extent, are truly beneficial; and whether they can be regarded as indications of intellectual superiority To this question Dugald Stewart furnishes a satisfactory reply. "For my own part," says the philosopher, "so little value does my own individual experience lead me to place on argumentative address, when compared with some other endowment subservient to our intellectual improvement, that I have long been accustomed to consider that promptness of reply and dogmatism of decision which mark the eager and practiced disputant as almost infallible symptoms of a limited capacity; a capacity, deficient in what Locke has called (in very significant but somewhat homely terms), large, sound, roundabout sense. In all the higher endowments of the understanding this intellectual quality (to which nature as well as education must liberally contribute) may be justly regarded as an essential ingredient. It is this which, when cultivated by study and directed to great objects, or pursuits, produces an unprejudiced, comprehensive, and effi-

* Milton's Prose Works, edited by A. J. St. John: Article, "Education."

† Burke's Works, Bohn's, ed. vol. i., p. 468

cient mind; and where it is wanting, though we may occasionlly find a more than ordinary share of quickness and information, a plausibility and brilliancy of discourse, and that passive susceptibility of polish from the commerce of the world, which is so often united with imposing but secondary talents, we may rest assured that there exists a total incompetency for enlarged views and sagacious combinations, either in the researches of science or in the conduct of affairs.* More to the point, however, is the testimony of Lord Brougham, who, in tracing the career of Sir William Scott (Lord Stowell), says:—"Confining himself to the comparatively narrow walks of the consistorial tribunals, he had early been withdrawn from the contentions of the former, had lost the readiness with which his great natural acuteness must have furnished him, and had never acquired the habits which forensic strife is found to form,—the preternatural powers of suddenly producing all the mind's resources at the call of the moment, and shifting their application nimbly from point to point, as that exigency varies in its purpose or its direction. But also had he escaped the hardness, not to say the coarseness, which is inseparable from such rough and constant use of the faculties, and which while it sharpens their edge and their point, not seldom contaminates the taste and withdraws the mind from all pure and generous and classical intercourse, to matters of a vulgar or technical order."†

It would appear that some of the prominent intellectual vices of the mere mathematician are attributable to the lawyer, owing in some measure probably to the analogy supposed to exist between mathematical and legal reasoning, and the identity of their effects on the mind. Among the most prominent of these vices is the proneness of the mathematician to the admission of data as the grounds of his reasoning, without questioning their validity. With the lawyer the same facility in the admission of his premises may be said to arise from the necessity imposed on him of reasoning upon fixed principles and definitions, whether right or wrong. Dugald Stewart adduces this instance in his strictures on the Aristotelian logic, as a proof of the inutility of the mere syllogism in the discovery of truth, and as an exercise of reason in its highest sense. "It is an observation," says Dugald Stewart, "which has often been repeated since Bacon's time, and which it is astonishing it was so long in forcing itself on the notice of philosophers, that in all our reasonings about the established order of the universe, experience is our sole guide, and knowledge is only to be acquired by

* Dugald Stewart's "Elements," vol. ii., p. 221.

† Brougham's Statesman, ed. 1845, vol i., p. 91, 2d series.

ascending from particulars to generals, whereas the syllogism leads us invariably from universals to particulars, the truth of which, instead of being a consequence of the universal proposition, is implied and presupposed in the very terms of its enunciation The syllogistic art, therefore, it has justly been concluded, can be of no use in extending our knowledge of nature. To this observation it may be added, that if there are any parts of science in which the syllogism can be advantageously applied it must be those where our judgments are formed in consequence of an application to particular cases of certain maxims which we are not at liberty to dispute. An example of this occurs in the practice of law. Here the particular conclusion must be regulated by the general principle, whether right or wrong.*

Not only is the syllogistic art an inefficient organ for the discovery of truth, but, as affording an exercise of reason in its highest sense, its capacity is open to doubt. "To exercise with correctness the powers of deduction and of argumentation, or, in other words, to make a legitimate inference from the premises before us, would seem to be an intellectual process which requires but little assistance from rule. The strongest evidence of this is the faculty with which men of most moderate capacity learn in the course of a few months to comprehend the longest mathematical demonstrations; a faculty which, when contrasted with the difficulty of enlightening their minds on questions of morals or politics, affords a sufficient proof that it is not from any inability to conduct a mere logical process that our speculative errors arise."†

A reverence for the authority of great names is also said to be a fruit of this species of culture, which, instead of encouraging that spirit of free inquiry which the study of philosophy cultivates, tends to lead the mind to the acceptance of established precedents as the guide and the rule. The study and practice of law is said by Lord Brougham to have instinctively this peculiar tendency. Speaking of that class of technical lawyers, among whom Sir Vicary Gibbs stands prominent, Lord Brougham says:—"They are even in some respects not to be termed lawyers. They are acquainted with the whole of the law, which they have studied accurately, and might also be admitted to have studied profoundly, if" (adds this celebrated writer) "depth can be predicated of those researches which, instinctively dreading to penetrate the more stubborn and more deeply lying vein of first principle, always carry the laborer to the shallower and softer bed that contains the relics of former workmen, and

* Dugald Stewart's "Elements," vol. ii., p. 202. † *Ibid.*, p. 204.

makes him rest satisfied with these patterns as the guide and the rule. All that has been said or written by textmen or judges they know; and of it all much practice has given them great experience in the application."* The tendency of mathematical studies to produce similar effect on the mind is observed by Dugald Stewart, himself an accomplished mathematician:—"I think I have observed," says this great philosopher, "a peculiar proneness in mathematicians on occasions of this sort to avail themselves of principles sanctioned by some imposing names, and to avoid all discussions which might lead to an examination of ultimate truth, or involve a rigorous analysis of their ideas."†

Accustomed thus to one particular method of reasoning, from received and notorious principles, it would seem that the mind is peculiarly incapacitated for other modes of ratiocination. It has been observed by the mere lawyer, that his reasonings apart from his favorite sciences, are marked by that imbecility which characterize the mathematician when he attempts to travel beyond his legitimate province. Dugald Stewart and, following him, Lord Macaulay, while expressing just admiration for the remarkable specimens of logical argumentation which are to be found in the efforts of our greatest lawyers, exhibit a contempt for their performance outside the forum; and indeed, where the discussion turns even upon those problematical questions which arise out of the very postulates of their favorite study. "The habits of thought besides," says Dugald Stewart. "which the long exercise of the profession has a tendency to form on its appropriate topics, seem unfavorable to the qualities on which the justness or correctness of our opinions depends. They accustom the mind to those partial views of things which are suggested by the separate interest of litigants, not to a calm, discriminating survey of details in all their bearings and relations. Hence the apparent inconsistencies which sometimes astonish us in the intellectual character of the most distinguished practitioners—a talent for acute and refined distinction; powers of subtle, ingenious, and close argumentations; inexhaustible resources of invention, of wit, and of eloquence; combined not only with an infantine imbecility in the affairs of life, but with an incapacity for forming sound decisions even on those problematical questions which are the subject of their daily discussion. The great and enlightened minds whose judgment have been transmitted to posterity as oracles of legal wisdom, were formed, it may safely be presumed, not by the habits of their professional warfare, but by contending with those habits and shak-

* Brougham's Statesmen, ed. 1845, vol. i., p. 153, 1st series.
† Dugald Stewart's "Elements," vol. iii., p. 217.

ing off their dominion."* So very similar is the testimony of Lord Macaulay as to this intellectual defect of the mere lawyer, that I am tempted in this place to reproduce it, although it must already be familiar to the student. Referring to Dr. Johnson's power of reasoning so ably upon premises foolishly assumed, he says; "The same inconsistency may be observed in the schoolmen of the middle ages. Those writers show so much acuteness and force of mind in arguing on their wretched data, that a modern reader is perpetually at a loss to understand how such minds came by such data. Not a flaw in the superstructure of the theory they are rearing escapes their vigilance. Yet they are blind to the obvious unsoundness of the foundation. It is the same with some eminent lawyers: their legal arguments are intellectual prodigies, abounding with the happiest analogies and the most refined distinctions. The principles of their arbitrary science being once admitted, the statute-book and the reports being once assumed as the foundation of reasoning, these men must be allowed to be perfect masters of logic. But if a question arises as to the postulate on which their whole system rests, if they are called upon to vindicate the fundamental maxims of that system which they have passed their lives in studying, these very men often talk the language of savages or of children."‡

Sir William Hamilton, in his now celebrated controversy with Dr. Whewell on the beneficial intellectual influence of mathematical studies, notices the fact (mentioned by his opponent) that an extraordinary number of persons who, after giving more, than common attention to mathematical studies at the university, have afterward become eminent as English lawyers. The fact of the consecution is not doubted by Sir William Hamilton, but he discovered in the argument a fallacy technically called the "*Post hoc ergo propter hoc.*" "Because a great English lawyer," says Sir William Hamilton, "has been a Cambridge wrangler, it is a curious logic to maintain that mathematical study conduces to legal proficiency. † But that this precisely was Dr. Whewell's meaning it is difficult to admit. Meanwhile, it is admitted by Sir William Hamilton himself, that success in the study and practice of law requires what elsewhere he apparently allows to be the sole legitimate effect produced on the mind by mathematical studies, namely, a strong memory, and acapacity of the most continuance and most irksome application —in other words, a strong memory, and the power of continuous attention. In this sense, therefore, the influence of math-

* *Ibid*, p. 208. † Macaulay's Essays, vol. i., p. 185.

‡ Hamilton's Discussions on Philsophy, p. 337.

ematical study has really, to some extent, operated in conducing to legal proficiency. But whether this influence is wholly beneficial may be doubted. How far, and in what respect, have mathematical studies influenced the intellectual habits of the lawyer? is a question of considerable interest, and one which no writer has (so far as I am aware) sufficiently noticed. Lord Brougham, however, in his sketch of that class of inferior though able lawyers, among whom he places Lord Chief Justice Gibbs, draws attention to this influence, as it manifests itself in their peculiar mental tendencies. "Their education," says Brougham, "has not been confined to mere matters of law. It has indeed been very far from an enlarged one; nor has it brought them into a familiar acquaintance with the scenes which expand the mind, make it conscious of new powers, and lead it to compare and expatiate and explore. Yet has this course of instruction not been without its value, for they are generally well versed in classical literature, and often acquainted with mathematical science. From the one, however, they derive little but the polish which it communicates and the taste which it refines; from the other they only gain a love of strict and inflexible rules, with a disinclination toward the relaxation and allowances prescribed by the diversities of moral evidence. From both, they gather a profound deference for all that has been said or done before them, an exclusive veneration for antiquity, and a pretty unsparing contempt for the unlettered and unpolished class which form, and must ever form, the great bulk of mankind in all communities. A disrespect for all foreign nations and their institutions has long been another appointed fruit of the same tree; and it has been in proportion to the overweening fondness for every thing in our own system, whether of policy or mere law. . . . . But still, the precise dictates of the English statute, and the dicta of English judges and English text-writers, are with them the standard of justice; and in their vocabulary, English law is as much a synonym for the perfection of wisdom, as that of Dean Swift's imaginary kingdom, Houynhm, was for the 'perfection of nature.' . . . They often make high pretense of eloquence, and without attaining its first rank, are frequently distinguished for great powers of speech, as well as extraordinary skill in the management of business. Their legal reputation, however, is the chief object of their care; and in their pursuit of oratory, they aim far more at being eloquent lawyers than orators learned in the law. Hence their estimate of professional merit is all formed on the same principle and graduated by one scale. They undervalue the accomplishments of the rhetorician without despising them, and they are extremely

suspicious of any enlarged or general views upon so serious a subject as the law. Change, they with difficulty can bring their minds to believe possible, at least any change for the better, and speculation or theory on such matters is so much an object of distrust, rather of mingled contempt and aversion, that when they would describe any thing ridiculous or even anomalous in the profession, they can not go beyond what they call 'a speculative lawyer.'"*

The tendency of mathematical studies to inspire a love for strict and inflexible rules, and to create a disregard for any but the highest degree of evidence, is noticed by the logician, Kirwan, who observes that "the habit of mathematical reasoning seems to unfit a person for reasoning justly on any other subject; for accustomed to the highest degree of evidence, a mathematician frequently becomes insensible to any other."† And Warburton, on the same subject, says: "In this science whatever is not demonstration is nothing, or at least below the sublime inquirer's regard. Probability, through its infinite degrees, from simple ignorance up to absolute certainty, is the *terra incognita* of the geometrician. And yet here it is that the great business of the human mind is carried on—the search and discovery of all the important truths which concern us as reasonable creatures. And probability accompanying every varying degree of moral evidence requires the most enlarged and sovereign exercise of the reason. But the harder the use of any thing, the more of habit is required to make us perfect in it. Is it then likely that the geometer, long confined to the routine of demonstration—the easiest exercise of reason where much less of the vigor than of the attention of mind is required to excel—should form a right judgment on subjects whose truth or falsehood is to be rated by the probabilities of moral evidence?"‡

Is then the study of mathematics of no avail as a preparation for the study and practice of law? It may be remarked that, toward the close of the last century, mathematical study was considered essential by several writers, who would have borrowed Plato's inscription for every modern school of law. But then these writers may be found advocating (in the words of Finch) "all the sciences in the world; and accordingly we find the law-student of a century ago burdened with Greek philosophy and poetry, Roman oratory, the physical sciences, and a host of studies, all having a mysterious connection, and all, in

* Brougham's Statesmen, vol. i., p. 154, first series.

† See Kirwan's Logic, Preface, p. iii.

‡ Julian, Preface, p. xix; Works, vol. iv., p. 345.

some manner, conducing to the proficiency of the law. The reader will remember in the pages of "Eunomus" a somewhat pleasing discussion on the merits of mathematical study, and its utility to the lawyer. There the algebraic or symbolical part of mathematics is advocated in preference to the geometric or ostensive, the writer waggishly remarking, by way of argument, that the poet was happy in his idea when he said—

> "Full in the midst of Euclid dip at once,
> And petrify a genius to a dunce."

Coming to our own day we find writers (Mr. Austin, for instance) disavowing the utility of mathematics altogether as preparation for legal study. "With regard to mathematics (except in as far as the methods of investigation and proof are concerned, and which would form a branch of a well-conceived course of logic), I can not see why men intended for the law, or for public life, should study them; or why any men should study them who have not a peculiar vocation to them, or to some science or art in which they are extensively applicable. To all other men the advantages derivable from them as a gymnastic to the mind, might be derived (at least in a great measure) from a well-conceived course of logic, into which, indeed, so much of mathematics as would suffice to give those advantages would naturally enter."*

But the reader may find reasons to differ somewhat from this opinion. There is perhaps after all great significance in the fact stated by Dr. Whewell, that an extraordinary number of persons who, after giving more than common attention to mathematical studies at the university, have afterward become eminent as English lawyers. There is perhaps no fallacy here of *Post hoc ergo propter hoc.* Sir William Hamilton, at least, supplies the force for dispelling any fallacy of that sort, that may be found lurking in the argument. "English law," he says, 'has less of principle and more of detail than any other national jurisprudence. Its theory can be conquered not by force of intellect alone; and success in its practice requires, with a strong memory, a capacity of the most continuous, of the most irksome application. Now, mathematical study requires this likewise; it tests no doubt to this extent, 'the bottom' of the student."† If, then, mathematical study requires a strong memory and the capacity of continuous attention, it must be admitted also to stimulate and develop these powers—powers which, when brought to the study and practice of law, conduce to proficiency and success. Nor do these powers rank

* Austin's Lectures on Jurisprudence, vol. iii., p. 368.

† Hamilton's Discussions on Philosophy, p. 337.

low among the capacities of the mind. "If a man's wit be wandering," says Bacon, "let him study the mathematics; for in demonstration, if his wit be called away never so little, he must begin again."* But a fixed and continuous attention is a power apt to be estimated of little value, and yet it is certain that this power alone has been the distinguishing excellence of great and eminent minds. "Even in that branch of knowledge," says Coleridge, "on which the ideas, on the congruity of which with each other the reason is to decide, are all possessed alike by all men, namely, in geometry (for all men in their senses possess all the component images, namely, simple curves and straight lines), yet the power of attention required for the perception of linked truths, even of such truths, is so very different in A and in B, that Sir Isaac Newton professed that it was in this power only that he was superior to ordinary men. . . Was it an insignificant thing to weigh the planets, to determine all their courses, and prophesy every possible relation of the heavens a thousand years hence? Yet all this mighty chain of science is nothing but linking together of truths of the same kind, as the whole is greater than its parts; or if A and B=C, then B=C, then A=B; or 3x4=7, therefore 7x5=12, and so forth. X is to be found either in A or B, or C or D. It is not found in A, B, or C, therefore it is to be found in D. What can be simpler?"†

For training the mind to think long and closely the capacity of mathematical studies has been admitted, even by those writers who deny to such studies any utility whatever. It is also remarked (as we have seen) of the study of law, that it requires the most continuous and irksome application; and hence it may be said with equal justice, that the power of steady and concatenated thinking is strengthened as much by the one study as other. It may be admitted, therefore, that the study of law, more than any other pursuit, demands an exclusive devotion and an intense mental application Sir William Jones remarks, that success in the pursuit "depends on the exclusion of all other objects." And it is thus by fixing the attention that the study has held the merit of curing the vice of mental distraction. Much of the well-kown aversion to this study lies in the severe discipline it imposes on the mind; hence Sir William Jones tritely remarks: "I do not know why the study of law is called dry and unpleasant, and I very much suspect it seems so to those who would think any study unpleasant which required

* Bacon's Essays.

† "The Friend," Bohn's ed., p. 99. *See* also pp. 7 and 31.

a great application of the mind and exertion of the memory."* For this reason it may justly be said that the study of law comes specially recommended to such minds as are most averse to it. It rectifies the vice of mental distraction which at the outset creates a distaste for the study itself.

The dependence of memory on the attention has been asserted by the highest authorities. "Nec dubium est," says Quintillian, speaking of memory, "quin plurimum in hac parte valeat mentis intentio et velut acies luminum a prospectu verum quas intuitu non aversa." In the same degree, therefore, as the study of law captivates the attention does it educate the memory, and hence it is that this study demands the exercise of both these capacities of mind. But to the student at the outset of his pursuit this exercise of memory becomes irksome, inasmuch as the study presents at first sight a mass of unconnected facts without apparent coherence or relation. To this circumstance does Dugald Stewart refer the aversion of most minds to this study; and especially of those who (like the famous antiquary, Spelman), after perseverance in the pursuit, have risen to eminence.*

I have now in this paper merely brought together a few scattered opinions from the writings of well-known authors, bearing on the question of the influence which legal study and practice are likely to exercise on the mind. The importance of the subject is great, inasmuch as it recognizes in the study a value apart from that which attaches to it, merely as a necessary means for the exercise of a particular profession. The evils pointed out by the several writers whom I have quoted, so far from depreciating the value of legal study as an exercise of mind, seem rather to expose the dangers to which a partial and merely practical study of it is likely to lead. And even here it would not be wrong to say, that the evils pointed out are to some extent exaggerated. In the application of law merely, the advocate, for instance, is not supposed to go through the same process exactly as the mathematician, when he is found linking one evident truth to another in a series of demonstrations. But here, even, whatever be the exercise of mind involved in such a process, the *rationale* of law is capable of affording such exercise. "With regard to lawyers in particular," says Austin, "it may be remarked, that the study of the *rationale* of law is as well, or nearly as well, fitted as that of mathematics to exercise the mind to the mere process of deduction from given hypotheses." This was the opinion of Leibnitz: no mean judge of the

* Roscoe's Lives of Eminent Lawyers, p. 310.

† Dugald Stewart's "Elements," vol. ii., p. 208.

relative values of the two sciences in this respect. Speaking of the Roman lawyers, he says, "Digestorum opus (vel potius auctorum unde excerpta sunt, labores) admiror; nec quidam vidi, sive rationum acumen, sive dicendi nervos spectes; quod magis accedat ad mathematicorum laudem. Mira est vis consequentiarum, certatque ponderi subtilitas."† But more than this; in the mere application of law, the process involves more than what mathematical exercises can afford; for mathematical truths admit of no exceptions, and the science knows nothing of arguments based upon analogy. Austin, therefore, truly says, with regard to an accurate and ready perception of analogies, and the process of inference founded on analogy, '*argumentatio per analogiam*,' or '*analogica*'—the basis of all just inferences with regard to mere matter of fact and existence—the study of law, if rationally pursued, is, I should think, better than that of mathematics, or of any of the physical sciences in which mathematics are extensively applicable. For instance, the process of analogical inference in the application of law: the process of analogical consequence from existing law, by which much of law is built out; analogical inferences with reference to the question of expediency on which it is built; the principles of judicial evidence, with the judgments formed upon evidence in the course of practice; all these show that no study can so form the mind to reason justly and readily from analogy as that of law. And accordingly it is matter of common remark, that lawyers are the best judges of evidence with regard to matter of fact or existence."†

A remedy for the intellectual defects of the mere lawyer may safely be sought in that liberal and scientific study of jurisprudence itself, which is so much wanting at the present day. For such a study involves not merely an investigation into the peculiarities of this or that one system of law, but of those necessary and general principles, which may be abstracted from all positive systems, and which form the permanent framework of all human laws in all ages and in all countries. Nor is the province of this science confined within these bounds. It leads us still higher to the domains of philosophy itself, where we may engage ourselves in investigating the very origin and nature

* Austin's Jurisprudence, vol. iii,. p. 5. *See* also the extract: "Dixi sæpius, post scripti Geometrarum nihil extare, quad vi ac subtilitate cum Romanorum Jurisconsultorum scriptis compæari possit, tantum nervum inest tantum profunditatis," &c. Leibnitz, *Epist ad Kestnerum.*

† Austin's Jurisprudence, vol. iii., p. 370.

of those conceptions which are involved in, and form the foundations of, the science of law and of morals. The speculations of Leibnitz and Kant and others, prove the wide extent of the field which lies open to the philosophic jurist. Nor is the intellect here confined to the mere process of deduction from fixed and admitted maxims and definitions, as is the case in the mere practice of law. Rather is the mind compelled to seek out and establish those principles upon which the science itself proceeds, and instead of departing from definitions already admitted, "with the definition we here usually end."

But to counteract the tendency of legal study and practice, Coleridge has recommended some such study as the metaphysics of the mind or metaphysics of theology. And probably no subject offers such an antithesis to law as the science of the mind. The one is practical, exerting its influence on life and action; the other is speculative, dealing with ideas purely.

The influence of the one study, therefore, may be presumed to be unlike the influence exerted by the other, on the mental habits. But whatever advantages attach to the speculative sciences, as a mental gymnastic, may be gained in the study of that department of jurisprudence which connects itself with metaphysics. Coleridge himself, who had wandered far and wide into the fields of German philosophy, had risen on the one hand to the transcendentalism of Kant, and, on the other, burrowed deep into the mysteries of the Teutonic theosophist, Jacob Behmen, must have known that in Germany, at least, metaphysics had already been evolved out of the stones and flints of such an unproductive science, even as that of law. Coleridge of all men would have been least surprised to have found there the most peculiar systems—systems of cookery say, or even ship-building—reared upon foundations more or less metaphysical. Meanwhile, it is a fact, not noticed by Coleridge, that about the close of the last century Immanuel Kant had already published his "Metaphysische Anfangs gruende der Rechts Lehre," or the Metaphysical Principles of the Science of Law."* At this time Germany possessed a juridical literature,

* It is easy to understand why speculations, such as those of Kant and Fichte, should prove an aversion to minds preoccupied with the study of positive law, *i.e.*, law as it is, and as it ought to be applied. Mr. Austin's estimate of Kant's work, while it shows this aversion, contains a just appreciation of the merits of a treatise, "darkened," says Austin, "by a philosophy which, I own, is my aversion, but abounding, I must needs admit, with traces of rare sagacity. He (Kant) has seized a number of notions, complete and difficult in the extreme, with distinctness and precision which are marvelous, considering the scantiness of his means. For of positive systems of law he had scarcely the slightest tincture; and the knowledge of the principles of jurispru-

which, in its purely philosophical cast and tendency, had no counterpart in the juridical literature of any country, even of France. The scholastic theologians and moralists of the age preceding the Reformation had discussed juridical questions in theology and in ethics. Leibnitz, toward the close of the seventeenth century, had contributed much toward the science of jurisprudence; and after him the names of Wolfius, Chancellor de Cocceue, Kant, and Fichte, were associated with a class of speculations known as the philosophy of law.

I know of no reason why there should not be a more extensive study of these speculations by the practical lawyer. If Coleridge desired a field for the advocate, where truth alone may be investigated, and an unfettered spirit of inquiry stimulated and encouraged, the systems and theories of the Continental jurists, more than the metaphysics of mind, or the metaphysics of theology, while they may be said to open such a field, are at the same time calculated to restrain and counteract the thoroughly practical tendency of legal study at the present day.

The highest utility probably which may be ascribed to the study of law as an exercise of mind is its tendency to the formation of logical habits. There is scarcely any branch of human knowledge in which the rules and processes of logic are more extensively applied; and hence the art of reasoning (as the Queen of Arts), has long been venerated by the lawyer as it was worshiped by the school-men :—

"Utque supra Etheros Sol aurens emicat ignes
Sic inter artes prominet hæc logica;
Quid? Logica superat Solem; Soi namque, diurno
Tempore, dat lucem, nocte sed hancce negat;
At Logicæ sidus nunquam occidit; istud in ipsis
Tam tenebris splendet, quam redeunte die."

To a love of this art must be attributed the refined casuistry of law. At a time when the Aristotelian philosophy prevailed in Europe, the tendency to the introduction of the most subtle refinements in law owed its existence to this philosophy. It exerted its influence on life itself, and on the sciences more immediately connected with life. A door was opened by it to an intricate scholastic jurisprudence, to all the learned subtilty of

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dence, which he borrowed from other writers, was drawn for the most part from the muddiest sources: from books about the fustian which is styled the Law of Nature."—*Austin's Jurisprudence*, vol. iii., p. 167.

An interesting and just criticism of Mr. Austin's views has been given to the world by Mr. J. S. Mill. See his "Dissertations and Discussions," vol. iii., p. 206.

processes, and interminable logic of law.* Its influence also may still be traced in the antiquated refinements which existed early in English jurisprudence; and especially in the law relating to real property. The endless subtilties, for instance, which load the doctrine of "contingent remainders," and renders Fearne's treatise on the subject a severe exercise of the reasoning powers, are due mainly to the prevalence of this much admired dialectic.

The notorious distinction between a common and double possibility appears to have owed its origin to what Mr. Williams calls "the mischievous scholastic logic," which was then rife in our courts of law.† This logic, so soon after demolished by Lord Bacon, appears to have left behind it many traces of its own existence in our law; and perhaps it would be found that some of those artificial and technical rules, which have most annoyed the judges of modern times, owe their origin to this antiquated system of endless distinction without solid differences.‡

On the other hand, the logician borrowed much from the law. It is not to be wondered at that the earliest writers on logic not only pointed to the practice of the law, as best illustrating the rules and processes of that science, but introduced into their treatises examples and illustrations borrowed almost exclusively from the pages of law-writers. Before Aldrich or Crackenthorpe had contributed toward the encouragement of the study of logic, the "Lawyer's Logicke" of Abraham Fraunce appeared, having the singular merit of doing service both for logic and for law. No mortal book was ever in such a predicament. It was claimed and referred to by the logician on the one hand, and by the lawyer on the other; and as to whom it belongs no final adjudication has as yet been ventured upon by Westminster Hall. Later still, the works of Kirwan are full of a large number of legal forms and processes which the writer employs to illustrate his meaning. Logic he deems to be an indispensable aid to the study and practice of law. "It is," he says, "of the highest importance in all controversies wherein reason alone presides, particularly in the commonest of all legal controversies. The science of special pleading in particular is founded on the strictest observation of its rules, so is also the art of taking just exceptions to answers, of detect-

* See Schlegel's Philosophy of History, p. 377.

† "The Casuistical subtilties," says Hume, "are not perhaps greater than the subtilties of lawyers; but the latter are innocent, and even necessary. See Hume's Essays, vol. ii., p. 558.

‡ See Williams, on the Law of Real Property.

ing the fallacies of arguments, of briefly collecting and presenting them, in laying down and applying the rules of evidence according to the subject-matter, in assigning and applying the due interpretation of words or clauses in statutes, covenants, agreements, deeds, devises, etc." It is not surprising, therefore, that in assigning to law a rank among the sciences, Sir William Jones considers it to belong "partly to the history of man, partly to dialectics."

As training to close and logical reasoning, therefore, the study of law claims special advantages. Ritso, in speaking of the Tenures of Littleton, says, that it is a "better book than the Analytics and the Categories for exercising and disciplining; and I apprehend," he says, "it will readily be conceded by all parties that if we must necessarily be ignorant either of the one or the other, it is far better that we should be strangers to the Ethics of Aristotle, than that to which Aristotle himself describes to be the principal and most useful branch of ethics, 'the laws and constitution of our country.'"* And if we were to turn to the exhibitions of logical reasoning in the ranks of our greatest lawyers, it can scarcely be doubted that the claims of the study in this particular respect are well established. "As admirable a display," says Brougham, "of logical acumen, in long and sustained claims of pure ratiocination, is frequently exhibited among their ranks as can be seen in the cultivators of rhetoric, or the student of any branch of science."

But an admiration for the logic of law led to the most serious exaggerations. Several writers, for instance, attempted to transfer to the law the certainty that belongs to mathematical truth alone. The law and mathematics were alike placed in the category of exact science. Ritso, one of the most extravagant writers on this subject, declares that a proposition in law is as capable of being resolved and demonstrated as a proposition in mathematics; the theorem that by the extinction of a fee in a seignory, a particular estate for life in that seignory is also extinguished, is as certain as the theorem that the square of the subtending side is equal to the two squares of the containing sides of a right-angled triangle.† Similarly Locke and Dr. Clarke attempted to introduce into the science of morals the methods of mathematics. "I doubt not," says Locke, "but from self-evident propositions, by necessary consequences as incontestable as those in mathematics, the measures of right and wrong

* Ritso's Introduction to the Science of Law, p. 161.

† Ritso's "Introduction to the Science of Law." Mr. Austin, under the head of *necessary truth*, includes mathematical truths, and the truth of certain legal consequences, following upon certain law cases, as such.—Lectures, vol. iii., p. 259.

may be made out to any one that will apply himself with the indifferency and attention to the one as he does to the other of these sciences." But the greater part of Locke's disciples, as Dr. Whewell points out, disregarded altogether those suggestions respecting a morality founded upon ideas and established by means of demonstration. The same fate awaited the suggestions and speculations of jurists, who treated mathematically the science of jurisprudence. Among these Wolfins, the disciple of Leibnitz, may be regarded as the leader. The Wolfian philosophy exercised a great influence, direct and indirect, over the jurists of Germany. The great defect in this system (as Reddie mentions), was that its author and supporters attempted to demonstrate many truths which must be derived from quite different sources by mere philosophical reasoning, and ultimately for the most part only from gratuitously or arbitrarily assumed positions, while to them it appeared sufficient for the foundation of a science, if a series of ideas and propositions were tied together in a sort of a reciprocal dependence, and were wrapped up in exterior garb of so-called proof or demonstration. The causes which led to this class of speculation have been attributed to the habits of abstraction produced by the doctrines of the Aristotelian philosophy, previously so powerful among the learned, and partly to the opinion of the greater certainty which attends mathematical truth (which is mere abstract consistency), than what is produced by the evidence of physical fact: as Wolfins indeed thought he could make the rules of the *jus naturæ* more certain by dressing them up in the garb of quasi-mathematical definitions and demonstrations.* The result of these speculations is well known.

Thus in the construction (if I may so speak) of the science of law itself, may be found the conditions of a logical exercise of the reason, and of all well-known systems of law, in none more than in the Roman jurisprudence, which doubtless exhibits the greatest precision and elegance. It is a remark of Dugald Stewart, that the nearest approach to mathematics as a hypothetical science is to be found in a code of municipal jurisprudence, or rather may be conceived to exist in such a code, if systematically carried into execution, according to some general or fundamental principles. Whether these principles should or should not be founded on justice or expediency, it is evidently possible by reasoning from them consequentially, to create an artificial or conventional body of knowledge, more systematical, and at the same time more complete in all its parts, than in the present state of our information any science can be rendered, which

* See Reddie's "Inquiries in the Science of Law."

ultimately appeals to the eternal and immutable standards of truth and falsehood, of right and wrong. "This consideration," says Stewart, "seems to throw some light on the following very curious parallel which Leibnitz has drawn (with what justness I presume not to decide) between the works of the Roman civilians and those of the Greek geometers. Few writers certainly have been so fully qualified as he was to pronounce on the characteristical merits of both."

"I have often said that after the writings of geometricians there exists nothing which in point of force and subtilty can be compared to most of the Roman lawyers. And as it would be scarcely possible from mere intrinsic evidence to distinguish a demonstration of Euclid from one of Archimedes or of Apollonius (the style of all of them appearing no less uniform than if reason herself was speaking through their organs), so also the Roman lawyers all resemble each other like twin brothers; insomuch that from the style alone of any particular opinion or argument hardly any conjecture could be formed with respect to the author. Nor are the traces of a refined and deeplymeditated system of natural jurisprudence anywhere to be found more visible or in greater abundance. And even in those cases where its principles are departed from either in compliance with the language consecrated by technical forms, or in consequence of new statutes or of ancient traditions, the conclusion which the assumed hypothesis renders it necessaryto incorporate with the eternal dictates of right reason, are deduced with the soundest logic and with an ingenuity which excites admiration."*

* Leibnitz, tom. iv., p. 254.—But apart from the mere study of law, it is clear that the application of it in the course of practice, affords the conditions for the highest exercise of the reasoning powers. The common law, which has grown out and expanded in the course of the administration of justice, is spoken of as a body of reasoned truth rigidly and carefully evolved. As out of the contentions of the forum this body of reasoned truth has been evolved, it must be allowed that in those contentions alone the discipline of the lawyer is such as no other pursuit or profession can afford. "After all the certainty," says Paley, "that can be given to points of law, either by the interposition of the Legislature, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater of legal controversies may be resolved, will remain still, namely, '*the competition of opposite analogies.*' When a point of law has been once adjudged, neither that question, nor any which completely, and in all its circumstances, corresponds with *that*, can be brought a second time into dispute. But questions arise which resemble *that* only indirectly, and in part, and in certain views and circumstances, and which seem to bear an equal or greater affinity to other adjudged cases: questions which can be brought within any fixed rule only by analogy, and which hold an analogy by relation to different rules. It is by the urging of the different analogies that the contention of the Bar is carried on." (*See* on this subject "Austin's note on Interpretation," and the "Excursus on Analogy."-

U. S. DISTRICT COURT, N. D. OF ILLINOIS.

Opinion delivered January 28, 1873.

John V. Farwell, *et al.*, *v.* Joseph D. Kinkead and E. A. Kinkead his wife.

In Bankruptcy.

THE POWER OF MARRIED WOMEN TO MAKE VALID CONTRACTS, AND THE JURISDICTION OF A COURT OF BANKRUPTCY OVER THEM—PARTNERSHIP.

1. Partnership—At Common Law.—At common law a married woman could not as a general rule enter into copartnership or make a valid contract of any kind.

2. The Modern Rule.—That this rigid rule of the common law has been very much relaxed by the action of courts of equity and by legislation on the subject; that the modern doctrine in equity now seems to be that a married woman may hold her separate property, can control or dispose of it, incur liabilities on the credit of it, and that it can be subjected to the payment of debts contracted in and about the management, improvement, or purchase of such property, and thus far courts of equity seem to have gone without reference to the statute.

3 Rights under Act of 1861.—The court comments upon the act of 1861, and the decision of the Supreme Court of Illinois in Cookson *v.* Toole, and says that now the wife retains the control of all the property she had at her marriage, and which she acquires after marriage from any person other than her husband, and may make contracts in regard to the same during coverture, which can be enforced at law or in equity the same as if she were *sole*.

4. Earnings—May engage in Trade.—At common law the earnings of the wife belonged to the husband; now she is mistress of her own earnings, and may sue for the same in her own name, and it seems to the court she may engage in trade either with or without her husband's consent; certainly with his consent, using her own property in the enterprise, and may bind herself by all contracts she makes in her business.

5. Wife as Partner of Husband.—The court can see nothing in the relation of husband and wife which would prevent the wife from being her husband's partner in business, if she could be a partner with any other person; that the logical effect of the statutes and the decisions thereon in this State tend inevitably to this conclusion, and the court can see no sound reason for stopping short of that.

6. The Wife a Partner.—Mrs. Kinkead could be and was a member of the firm of Kinkead & Co., and it was a valid partnership at the time it was adjudged a bankrupt.

7. Partnership and Individual Creditors.—The court states the rights of partnership and individual creditors.—Ed. Legal News.

The opinion of the court was delivered by Blodgett, J.

On the 7th of December, 1871, J. V. Farwell & Co., of this city, filed their petition in this court, setting forth that they were creditors of Joseph D. Kinkead, and A. E. Kinkead, his

wife, who were then doing business as copartners under the firm name of Kinkead & Co., at Pontiac, in the county of Livingston, in this district, and alleging that said firm of Kinkead & Co. had been guilty of certain acts of bankruptcy set forth in the petition. To this petition a general denial was filed, and the issue thus made was tried by the court on the 16th of February, 1872, resulting in finding said firm of Kinkead & Co., and the J. D. Kinkead guilty of the acts of bankruptcy charged against them, and an adjudication of bankruptcy was entered in accordance with this finding.

There was no plea of coverture interposed by Mrs. Kinkead, but inasmuch as it appeared from the petition, and also from other papers and proofs in the case, that she was a *feme-covert*, no specific adjudication was entered against her.

It appears from the proof in the case that said J. D. Kinkead and his wife had been engaged in the mercantile business at Pontiac for several years immediately prior to the commencement of these proceedings in bankruptcy against them, and that they had both given their attention and skill to the business, but it does not appear how much each of them had contributed to the capital stock of the firm, nor, in fact, whether any capital other than their credit and labor was furnished by either.

At the time said firm was adjudicated bankrupt they were indebted for goods furnished in the course of their trade as merchants to any amount exceeding $6,000, while the assets of the firm do not, as the court is at present advised, amount to much over $4,000, and no assets of said J. D. Kinkead individually have come to hands of the assignee of the said firm. An assignee was duly elected by creditors, who had proven their debts on the 29th of May last, and at a subsequent date, Miles Manser, of Kentucky, appeared before the Register and proved debts against the said J. D. Kinkead amounting in the aggregate to over $15,000, and, at the second meeting of creditors, said Manser demanded to be paid a dividend out of said copartnership assets on the claims he had thus proved against the estate of said J. D. Kinkead. To this the copartnership creditors objected, and, at the request of the assignee, the Register certified the questions raised by said demand and objections to the court for hearing and decision. These claims against Mr. Kinkead were contracted long prior to the formation of the copartnership between himself and wife.

At the hearing had upon said matter it was contended on the part of Mr. Manser that Mrs. Kinkead, being a married woman, could not enter into a contract of copartnership with her husband, and that although the business at Pontiac was transacted in the name of Kinkead & Co., yet, as the pretended partner-

ship was void and inoperative by reason of the inability of Mrs. Kinkead to make a binding contract, the said J. D. Kinkead was in effect a sole trader, and the assets of the firm were in law the assets of said J. D. Kinkead.

The questions thus raised are important, not only in this case, but in many others which may arise touching the powers of married women to make binding contracts, and the jurisdiction of a court of bankruptcy in the premises.

There is no doubt of the soundness of the proposition advanced by the claimants' attorneys, that at common law a married woman could not, as a general rule, enter into copartnership or make a valid contract of any kind.

But this rigid rule of the common law has been very much relaxed, both by the action of the courts of equity and by legislation on the subject.

The modern doctrine in equity now seems to be that a married woman may hold her separate property, can control and dispose of it, incur liabilities on the credit of it, and that it can be subjected to the payment of debts, contracted in or about the management, improvement, or even purchase of such property. Thus far courts of equity seem to have gone without reference to statutes on the subject. Mitchell *v.* Carpenter, 50 Ill., 470.

By the act in relation to the rights of married women, adopted by the Legislature of this State in 1861, full control is given to a married woman of all real and personal property owned by her at the time of her marriage, or which she acquires during coverture from any person other than her husband.

In the exposition of this statute, the Supreme Court of this State has, finally, in the late case of Cookson *v.* Toole, 5 LEGAL NEWS, 184, decided that a married woman can be sued at law on a contract made in relation to her separate property.

By the act of the Legislature of this State, passed in 1869, a married woman is invested with the full control of her own earnings, with the right to sue for and collect the same in her own name.

This legislation and the interpretation thereof by the courts, has wrought a most substantial change in the rights of married women under the laws of this State. At common law all a woman's personal estate, and the control of her real estate during coverture, passed, on her marriage, to her husband. She could make no contract during coverture, and contracts made even while unmarried could not be enforced at law, and only in a few exceptional cases in equity. Now the wife retains the control of all the property she had at her marriage, and which she acquires after marriage from any person other than her hus-

band, and may make contracts in regard to the same during her coverture, which can be enforce dether at law or in equity to the same extent as if she was sole.

At common law the earnings of the wife belonged to the husband, and he alone could sue for and collect the same.

Now the wife is absolute mistress of her own earnings, and can bring suit in her own name to collect them.

She may superintend her separate property; make binding contracts in relation thereto; devote her time to such occupations as is most congenial to her tastes, and control her earnings.

She may, therefore, it seems to me, engage in trade either with or without her husband's consent, certainly with his consent, using her own property in the enterprise, and may bind herself by all contracts she makes in her business. She may own the whole stock of merchandise or the machinery and furnishings of a manufactory, and have the entire profits and be liable for the losses, and if she may own the whole there is certainly no obstacle to her owning a half or any other share of the stock. In other words, she may become a partner with another person, and why not with her husband? I can see nothing in the relation of husband and wife which would prevent the wife from being her husband's partner in business if she could be a partner with any other person. The logical effect of the statutes and decisions thereon in this State tend inevitably to this conclusion, and I can see no sound reason for stopping short of that point. I conclude, therefore, that Mrs. Kinkead could be and was a member of the firm of Kinkead & Co., and that it was a valid partnership at the time it was adjudged bankrupt.

In the case before me, Kinkead and his wife held themselves out to the world as partners in the trade of merchants—a relation which I think, as the law stood at the time, they had the right to form. In that capacity they obtained credit and contracted debts to a large amount. The firm had assets, on the faith of which credit had been given them. In the absence of positive proof upon the point, the court must presume that Mrs. Kinkead contributed her portion of the capital to start the business, and that she, as she lawfully might, has devoted time, skill, and business ability to the affairs of the firm. Her earnings, in other words, have gone into this business. If the business had proved successful she would have been entitled to her share of the profits, and a court of equity would have compelled an account between herself and husband in relation to the partnership transactions.

It is impossible for the court to say to which one of the individual members of this firm the credit was given, or rather it is not correct to say it was given to either. The credit was to the firm, and the copartnership assets are a trust fund for the payment of the partnership debts; and no individual creditor of either partner can be paid until the firm debts are paid. Mr. Manser the creditor before the court, has not trusted this firm, and has not, in my opinion, any legal or equitable claim to any part of this fund till the copartnership creditors are paid. His debt was not contracted upon the faith of the assets now in the hands of the court, while the copartnership debts proved were many of them contracted in the purchase of the identical assets which came to the hands of the assignee.

For the purpose of this case, it is not necessary to decide that a married woman may be sued at law on her contracts or undertakings, as a court of bankruptcy is clothed with all the powers of a court of equity. And if Mrs. Kinkead, with the consent of her husband, could enter into copartnership with him or any other person, then she might be declared a bankrupt on the petition of creditors, or at least the firm as a business entity may be so adjudged for the purpose of distributing the assets among creditors. Here is a firm with assets and liabilities. Insolvency intervened, and the creditors of the firm have the first right to the assets. These a court of bankruptcy will marshal and distribute in the manner required by the bankrupt law, as a court of equity would do in the absence of a bankrupt law; that is, it will apply the assets to the payment of the debts, which are an equitable lien on those assets, without regard to whether the creditors have any remedy at law or otherwise to enforce any unpaid balance.

The fact that Mrs. Kinkead was not individually adjudged a bankrupt does not in my view change the aspect of the case. Such an adjudication could only be necessary for the purpose of reaching her individual property, if she has any, which is not alleged, and she may yet be so adjudged if it becomes necessary in the course of these proceedings.

ON THE CAUSES OF CRIME.*

BY HON. HORATIO SEYMOUR.

The name of this Association fails to give a full idea of its scope and aims. In terms they seem to be limited to that class of men who have brought themselves under the penalties of the law; but the moment we begin to study the character of criminals and the causes of crime

* Address before the National Prison Association of Baltimore.

we find that we are forced back to a scrutiny of our social system and of the weakness as well as the wickedness of our fellow-men. It is because the subjects of pauperism and crime thus lead to an analysis of human nature and to the consideration of social aspects that they have been made the matters of profound thought by able publicists and large-minded statesmen. At first thought it seems that the condition of a small body of men who have offended local laws should be left to the thoughtful control of local authorities, but it is soon found that the considerations involved are as broad as the spread of the human race. For these reasons leading men of different nations were drawn together at the late International Convention at London, and for these reasons this Association was formed. Crime knows no geographical limits, no boundaries of states. It is its nature to war with the welfare of the human family. It must be opposed by the united wisdom and virtue of all nationalities and of all forms of civilization. While local laws must frame penal codes, and local societies do the work of lifting up fallen men, still much is gained by a wide-spread sympathy and co-operation. There are many things which are beyond the reach of state action, in a moral point of view—things which do not come under the cognizance of laws, but which deeply affect the welfare of the whole country. At the first view our efforts seem to be limited to the justice which punishes crime, and to the charity which tries to reform the criminal, but we are soon led into a wider field of duty. We are apt to look upon the inmates of prisons as exceptional men, unlike the mass of our people. We feel that they are thorns in the side of the body politic which should be drawn out and put where they will do no more harm. We regard them as men who run counter to the currents of society, thus making disorder and mischief. These are errors. In truth they are men who run with the currents of society and who outrun them. They are men who in a great degree are moved and directed by the impulses around them. Their characters are formed by the civilization in which they move. They are in many respects the representative men of a country. It is a hard thing to draw an indictment against a criminal which is not in some respects an indictment of the community in which he has lived. An intelligent stranger who should visit the prisons of foreign countries, who should hear the histories of their inmates, would get a better idea of the inner workings of their civilization than could be gained by intercourse with a like number of their citizens moving in more conventional circles of society. As a rule, wrong-doing is the growth of influences pervading the social system, as pestilences are bred by malaria. Our study into this subject soon teaches us that prisons are moral hospitals where moral diseases are not only cared for, but science learns the moral laws of life—where it learns what endangers the general

welfare of the community, what insidious, pestilential vapors permeate society, carrying moral disease and death into its homes. Prisoners are men like ourselves, and if we would learn the dangers which lurk in our pathways we must learn how they stumbled and fell. I do not doubt that some men are more prone to vice than others, but, after listening to thousands of prayers for pardon, I can hardly recall a case where I do not feel that I might have fallen as my fellow-men have done if I had been subject to the same demoralizing influences, and pressed by the same temptations. I repeat here what I have said on other occasions—that, after a long experience with men in all conditions of life, after having felt, as most men, the harsh injustice springing from the strife and passion of the world, I have learned to think more kindly of the hearts of men, and to think less of their heads. If we find that crimes are in a large degree the hot-bed growth of social influences; if the weakness of human nature is always open to their attacks; if they may at any time enter into our homes and strike at our family—then we must at least guard against them as we do the pestilence. To protect the public health and to learn the laws of life, we build and sustain with liberal hand hospitals where the sick and wounded can be cured. The moral hospital should be regarded with an equal interest. In each of them we should seek to cure the inmates. In each of them we should seek to find out the secret cause of disease. With regard to both we should in a large-minded way feel that the laws of moral and physical life are a thousand times more important to the multitudes of the world at large than they are to the few inmates that languish in their gloomy walls. The public hold in high honor the man of science who treads the walks of the hospital to find out the facts which will enable him to ward off sickness and death from others. This Association appeals to the public for the same sympathy and support for those who labor to lift up their unhappy brethren from moral degradation, and at the same time to do the greater work of tracing out the springs and sources of crime, and of warning the public of its share of guilt in sowing the seeds of immorality by its tastes, maxims, and usages. We love to think that the inmates of cells are unlike ourselves. We should like to disown our common humanity with the downcast and depraved. We are apt to thank God we are not like other men; but, with closer study and deeper thought, we find they are ourselves under different circumstances, and the circumstances that made them what they are abound in our civilization, and may at any time make others fall who do not dream of danger. It is a mistake when we hold that criminals are merely perverse men, who are at war with social influences. On the other hand, they are the outgrowth of these influences. Crimes always take the hues and aspect of the country in which they are committed. They show not

only guilty men but a guilty people. The world holds those nations to be debased where crime abounds. It does not merely say that the laws are defective and the judges corrupt, but charges the guilt home to the whole society. This is just, for most of the crimes which disgrace us could not be done if there were not an indifference to their causes on the part of the community. As certain plagues which sweep men into their graves can not rage without foul air, so many crimes can not prevail without wide-spread moral malaria. It is the greed for gold, the love of luxury in the American people, which have caused the legislative frauds, the municipal corruptions, the violations of trust which excite alarm in our land. It is the admiration of wealth, no matter how gained, which incites and emboldens the desperate speculator in commercial centers to sport with the sacred interests of labor, to unsettle the business of honest industry, by playing tricks with the standards of value. Those who use the stocks of great corporations as machines for gambling schemes are more deliberately and artfully dishonest than the more humble swindler who throws his loaded dice. Many of the transactions of our capitalists are more hurtful to the welfare of our people than the acts of thieves and robbers. In the better days of American simplicity, honesty, and patriotism, these things could not have been done. No one would then dare to face a people indignant at such rapacious greed. Such influences have led to frauds, defalcations, breaches of trust. They have filled our prisons and overwhelmed many households with shame and sorrow. Yet the authors of such things are honored for their wealth, and we ask with eagerness how rich do they get, and not how do they get riches. To make the public feel that criminals are men of like passions with ourselves, and that crime is an infectious as well as a malignant disease, that its sources are not so much personal inclination as general demoralization, are the great first steps toward reform. When we feel the disease may enter our own houses and seize upon the mental and moral weakness of those we love, we are ready to study its causes and its workings. We shall then uphold and honor those men of humanity and true statesmanship who study out the cause of moral stains as we honor and support those men of science who search out in sick-rooms and hospitals the cause, and cure the complaint, which kills the body. He who masters the diagnosis of crime gains a key to the mysteries of our nature and to the secret sources of demoralization which opens to him a knowledge of the great principles of public and private reform —the true methods of a good administration of the laws. Pauperism and crime have been the subjects of earnest thought by the best and wisest men of the world, not only on account of their direct interest, but also on account of their relationship to all other matters of good government. Neither of them can be driven out of existence. They

will always be problems to vex statesmanship, but they must always be battled with. In the social edifice they are like fires ever kindling in its different parts, which are to be kept under by watchfulness and care. If neglected, they burst out into the flames of anarchy and revolution, and sweep away forms of government. These subjects must be studied directly, and in their moral aspects. There is a pervading idea in our country, that the spread of knowledge will check crime. No one values learning more than I do; but it is no specific for immorality and vice. Without moral and religious training, it frequently becomes an aid to crime. Science, mechanical skill, a knowledge of business affairs—even the refinements and accomplishments of life—are used by offenders against law. Knowledge fights on both sides in the battle between right and wrong. At this age it lays siege to banks. It forces open vaults stronger than old castles. It forges and counterfeits. The most dangerous criminal is the educated, intellectual violater of the law, for he has all the resources of art at his command—the forces of mechanics, the subtlety of chemistry, the knowledge of men's ways and passions. Learning by itself only changes the aspect of immorality. Virtue is frequently found with the simple and uneducated, and vice with the educated. Surrounded by glittering objects within their reach, our servant girls resist more temptations than any other class in society. We must look beyond the accidents of knowledge or ignorance if we wish to learn the springs of action. To check vice, there must be high moral standards in the public mind. The American mind must move upon a higher plane. To reform convicts, their hopes must be aroused and their better instincts worked upon. I never yet found a man so untamable that there was not something of good upon which to build a hope. I never yet found a man so good that he need not fear a fall. Through the warp and woof of the worst man's character there run some threads of gold. In the best there are base materials. It is this web of entwined good and evil in men's character which marks the problems and perplexities of the Legislature and judge, while there is no honest dealing with this subject unless the American people are charged with their share of guilt; and, while Christian charity leads us to take the kindest view we can of every man, it does not follow that crime should be dealt with in a feeble way. *Let the laws be swift, stern, and certain in their action.* What they say let them do, for CERTAINTY *more than severity carries a dread of punishment.* Let the way of bringing offenders to justice be direct, clear, and untramelled. The technicalities of pleading, proof, and proceedings, in many of our States, are painfully absurd. To the minds of most men a criminal trial is a mysterious jumble. The public have no confidence that the worst criminal will be punished. The worst criminal cherishes at all times a hope of

escape. In every part of our country there is a vague idea that certain men of legal skill can extricate offenders without regard to the merits of their case. This is a fruitful cause of crime. There is not in the minds of the American people a clear, distinct conception of our penal laws, their actions, and their results. Not less hurtful to justice are those fluctuations of the public mind, which shakes off spasmodically its customary indifference and fiercely demands a conviction of those who happen at such times to be charged with crime, and thus make popular clamor take the place of judicial calmness and impartiality. No one feels that there is in this country a clear, strong, even flow of administration of criminal law. The mood of the popular mind has too much to do with judicial proceedings. The evils connected with the administration of justice in our land are due in a good degree to the swift changes fn the material condition of our country. An increase of our numbers of more than 1,000,000 each year, of more than 2,500 each day, of more than 100 each hour, explains many of the causes of our overburdened system of penai laws. Framed for a different state of society, our perplexities are increased by the fact that more than one-quarter of this daily addition to our population is made up of those who come from other countries, strangers to our customs and laws, and in many instances ignorant of our language. History gives no account of such a vast increase of the numbers of any country by constant peaceful action. Conquest rarely makes as many prisoners of war as we make captives to the peaceful advantages of our continent. They bring us wealth and power. They also bring us many problems to solve. British laws deal with British subjects. French courts decide upon the guilt or innocence of Frenchmen. Germany keeps by its usages and customs the ideas of right and wrong in the minds of the Teutonic race. But we in America have to deal with and act upon all nationalities, all phases of civilization. While these facts palliate the defects of our penal laws and their administration, they certainly make more clear and urgent the duty that we keep pace with the swift changes going on around us. More than this, it enables us to take the lead in the great work of reform as we deal with more plastic materials than are found in the fixed conditions of older nations. Here, too, we have a broader field filled with men of varied phases and aspects of different civilization, in which we can study the wants and the weaknesses, the virtues and the vices, of the human race. For a series of years nearly 300,000 immigrants are annually landed at the harbor of New York. Disorder and crime are always active along the line of march of great armies. I believe there is no instance in history of a movement of the human race so vast and long continued. I am glad to state a fact which in some degree palliates the disgrace which attaches to the administration of justice and the conduct of public affairs

in that great city, but I should fall short of telling the truth if I did not also say that *the discredit of that great city mainly springs from the sad fact that its men of wealth as a body lack that genuine self-respect which leads to a faithful, high-minded performance of the duties each citizen owes to the public.* Is there any other basis upon which we can found this great work of patriotism and philanthropy than the one contemplated by this Association? It may at first view seem to be limited to a small class, but it opens up into a broad field of unpartisan, unsectarian labor. The objects we have in view, although they make our prisons their starting-point, are so wide in their bearing that they brought together at the London International Association, in the interests of our common humanity, men of the best minds of most countries of Europe and America. These, in spite of the differences of religion, language, and form of civilization, could act in accord in devising measures to lift up the fallen and to spread the principles of morality and justice among the peoples of the world. It is found that true statesmanship, like true religion, begins with visiting the prisoners and helping the poor. It is certain that in our own country Edward Livingston, the public man who ranks high in European regard for intellectual ability, gained his position by his great work on the penal laws of Louisiana. When it was the fashion in the scientific world to hold that men and animals were dwarfed on this continent, this work was brought forward by our friends in Europe as a proof that statesmanship was full-grown here. It is a remarkable fact that an able foreign writer selected the Louisiana code and the proclamation of General Jackson against the doctrine of secession as the two ablest productions of the American mind, not knowing that they both came from the same pen. An exposition of Mr. Livingston's system has lately been published in France by M. Charles Lucas, a member of the Institute, and formerly president of the Council of Inspectors of the Penal Institutions of that country. M. Lucas is a distinguished writer and leader in the work of criminal reform. He belongs to that body of large-minded, philanthropic men, who seek to benefit humanity by wise systems of legislation. A certain breadth and reach of mind seem to mark those men who have entered upon the study of penal laws and the reformation of criminals. While there is much to condemn in our system of laws and in their administration, there is much to admire in the practical workings of many of our prisons. In some respects we are in advance of other people. Much has been done in many of our States to improve the condition of our criminals, and much more to rescue the young from vice and destruction. I should be glad to speak of the instances of ability and self-devotion shown by men who have charge of public or private charities established for the reformation of offenders. They would lend a weight to my argument

which my reasoning can not give, but I must leave these things to be brought out by the discussions of this congress. I only seek to show the ends at which it aims; I only seek to make for it the sympathy and support of the public in its efforts to combine and organize the forces of those who, in different parts of our country, are working in this field of philanthropic and patriotic labor. Crime has its origin in the passions which live in every breast, and the weakness which marks every character in its nature. It concerns each of us, as clearly as the common liability to fall prematurely before disease and death. No man can know human nature, no man can be a great teacher to his fellow-men, no man can frame laws wisely and well, who has not studied character in convict-life. There he can best see the lights and shadows of our natures, see in the strongest contrasts what is good and what is bad. The prisons, to which all vice tends, are the points from which the reform can be best urged which seeks to find out where vice begins. Starting from the sad ends of crime and running back along the tracks, it is seen that in a large degree they are engendered by public tastes, habits, and demoralizations. It is in our prisons we can best learn the corrupting influences about us which lead the weak as well as the wicked astray, ay, and sometimes make the strong man fall into disgrace and misery. In these moral hospitals the thoughtful man, the philanthropist, and the statesman, will look for the causes of social danger and demoralization. When we begin at the prison and work up, we find opening before us all the sources of crime, all the problems of social order and disorder, all the great questions with which statesmanship, in dealing with the interests and welfare of a people, must cope when it seeks to lift up high standards of virtue and patriotism. In the most highly civilized countries the subjects of pauperism and crime secure the most attention and thought. They turn men's minds from selfish to unselfish fields of labor. Those who enter those fields will find in them marks of toil and care by the best human intellects. The grandest minds have worked at their intricate problems. The ambition of the first Napoleon sought to gain immortality in his code of laws as well as in victories on the fields of battle. Much has been done in many of our States to improve prison discipline. Something has been done toward reforming prisoners, but the largest view of the subject, which looks to the moral health of society, and the baleful influences at work in its organization, have not received the attention they deserve. When prisons are visited by men of mind, when prisoners are looked upon with kindly eyes by those who can study their characters and learn from them the virtues, vice, and wickedness which mark our race; when, tracing back the courses of their lives, they shall find the secret sources of their errors and their crimes—then we shall have not only our laws justly enforced and

reformed, wrong-doers punished, but, more and better than these, we shall gain a public virtue and intelligence which will secure the safety and happiness of our homes and the glory and stability of the republic. Then wealth gained by unworthy means will no longer be respected. No one can recall the events of the past few years, particularly those of the great commercial centres, without feeling there is an ebb-tide in American morals. Not a little of the glitter of our social and business life is a shining putrescence. Fungus men have shot up into financial prominence to whom a pervading, deadening moral malaria is the very breath of life. They could not exist without this any more than certain poisonous plants can flourish without decaying vegetation. While I have tried to present in clear terms the claims of this Association upon the public sympathy and support, it must be understood that we claim for it only the merit of being a useful auxiliary to moral and religious teachings. If those who take part in its work should fall short of its broader and higher objects of a national character, they will at least get this great gain: they will learn to think more humbly of themselves, more kindly of their fellow-men, and to see more clearly the beauties of Christian charity.

SUPREME COURT OF OHIO.

TO APPEAR IN 22 O. S. REPORTS.

ADVANCEMENTS.

Thomas Scallon, administrator of Elizabeth Dittoe, deceased, *vs.* Geo. Wellen and Dennis McElroy, executors of Miles Cluney, deceased. Error to the District Court of Perry County.

WEST, J.—*Held:*

1. The partial disposition of an estate by will does not exclude the operation of the statute regulating advancements, in the distribution of the intestate residuum.

2. A gift to a son-in-law, intended by the ancestor to be charged as an advancement against his daughter, and not subsequently converted by him into a gift absolute, will be charged against her in the distribution of his intestate property, if she, knowing the act and intention of the gift, shall have acquiesced therein.

3. Such acquiescence may be shown by evidence of express assent, or inferred from facts and circumstances inconsistent with the absence of such knowledge and assent.

Judgment affirmed.

FRAUDULENT PURCHASE—TITLE.

O. Dean *vs.* Alonzo C. Tates, *et al.* Error to the Common Pleas of Portage County, reversed in the District Court.

McILVAINE, J.—*Held:*

1. In an action to recover damages for the fraud of defendant in obtaining certain goods from the plaintiffs under a contract induced by the false and fraudulent representations of the defendant, a writ of attachment was issued and levied upon a portion of the goods alleged to have been obtained, together with other goods of the defendant.

Held—That such a levy and sale thereunder do not necessarily constitute a waiver of the fraud and an affirmance of contract by the plaintiffs.

2. Where a contract for the sale of goods is induced by the fraud of the purchaser, but no delivery is made under the contract, and the purchaser afterward wrongfully obtains possession of the goods without the assent or knowledge of the seller, the title remains in the seller, not only as against the fraudulent purchaser, but also as against his vendee, although the latter purchased for a valuable consideration and without notice of the defect in the vendor's title.

3. In an action where the allegation of the petition is that the defendant, by means of fraud, obtained the goods of the plaintiff and converted them to his own use, and where the only proof in support of the allegation shows the defendant to be a *bona fide* purchaser from one in possession of the goods, but without title, the plaintiff can not recover. Such case is one of failure of proof under section 133 of the code, and not one of immaterial variance under sections 131 and 132. See 10 Ohio St. 621, and 21 Ohio St. 668.

Judgment reversed and cause remanded.

MORTGAGE—DOWER.

Hadassa Folsom, *vs.* Daniel P. Rhodes *et al.* Motion for leave to file petition in error.

By the Court:

Where the purchaser of land executes a mortgage to the vendor for unpaid purchase money, and the land is afterward, and during the lifetime of the purchaser, sold under judicial proceedings for foreclosure of the mortgage, the widow of the purchaser, although she did not sign the mortgage, and was not made a party to the foreclosure, is not entitled to dower in the premises, or to redeem the same.

Motion overruled.

CRIMINAL PROSECUTION—DISCHARGE.

Ex parte James McGehan, application for writ of *habeas corpus*, from Preble County.

WELCH, C. J.:—

Where the defendant in a criminal prosecution is discharged under the 161st or 162d sections of the Criminal Code, on the ground that he has not been brought to trial within the time therein limited, the order

of discharge is to be regarded, not as a temporary release of the prisoner from confinement, but as a final judgment in the cause, and a bar to all subsequent prosecutions for the same crime or offense.

2. Where the Court erroneously refuses to grant such order of discharge, and instead thereof remands the prisoner to jail, and continues the cause, the order remanding the prisoner to jail, so long as it remains unreversed, is a valid and legal authority to the Sheriff for retaining the prisoner in custody, and the order can not be reviewed and reversed, or the prisoner discharged out by a proceeding in *habeas corpus* before another tribunal.

3. To entitle a prisoner to such discharge, on the ground that he has not been brought to trial during the time limited by section 161 or 162 he must make application to the Court therefor, and if when he make such application, whether during the time so limited, or at a subsequent term of the Court, the State is ready to proceed with the trial, or makes the showing specified in section 163 for a continuance, he will not be entitled to be discharged.

Writ refused.

LEASE—APPRAISERS.

Peter P. Lowe *vs.* Henry L. Brown. Motion for leave to file petition in error to the Superior Court of Montgomery County.

DAY, J.—

Where it was stipulated in an indenture by which a building lot was leased for ninety-nine years, renewable forever, that, at the expiration of each successive period of twenty years, the "ground" should be revalued by "three disinterested men"—one to be selected by the lessor, one by the lessee, and the third by the two thus chosen—who should appraise the same "at its true value," and report the amount in writing, and that eight per cent. thereon should be the annual rent for the succeeding term of twenty years; and where appraisers so chosen could not agree, and only two of them made a report of such appraisement; *Held*—

1. In order to the valid execution of the power thus intrusted to the appraisers, they must all unite, and a majority can not make a valid report.

2. If they can not agree, and two of them only make a report of their appraisement, and one party to the lease refuses to select new appraisers in accordance with its provisions, the other party may bring his action to set aside such invalid report, and for the valuation of the leasehold ground.

3. In such action, the Court may refer the case to a master, to take testimony, and report therewith the "true value" of the ground.

4. The value contemplated by the lease is not the rental value of the ground, but its real worth at the time it is required to be appraised, excluding all improvements on the premises.

Motion overruled.

Supreme Court of Ohio.

EXCESSIVE DAMAGES.

The Pendleton Street Railroad Company *vs.* John Rehman. Error to the Superior Court of Cincinnati.

WEST, J.—*Held:*

Where the damages assessed by a jury are excessive, but not in a degree to necessarily imply the influence of passion or prejudice in their finding, the Court, in the exercise of a sound discretion, may make the *remittitur* of the excess the condition of refusing to grant a new trial.

Judgment affirmed.

AGENCY—EXCEPTIONS.

The Nimrod Furnace Company *vs.* The Cleveland and Mahoning Railroad Company. Error to the Court of Common Pleas of Cuyahoga County. Reserved in the District Court.

MCILVAIN, J.—*Held:*

1. Where an agent has been authorized by an instrument, to enter into a contract on the part of his principal with a third person therein named, and all the terms and conditions of the proposed contract are contained in the instrument, and the same is signed by the principal, or by some other person thereunto authorized, the agent may, in the execution of the power, deliver such instrument to the person named as and for the proposal of his principal; and when such person assents to and accepts the proposal thus made, the contract is complete; and the agreement thus entered into is "in writing and signed" by the proponent within the meaning of the fifth section of the statute of Frauds and Perjuries.

2. A railroad company agreed with K. and his associates, in consideration that they would build an iron furnace on the line of its road, to transport ore and metal to and from such furnace, at a given rate, for the term of ten years, "when by them required so to do." And K. and his associates, in consideration of the promise and agreement of the railroad company, erected a furnace according to the stipulations of the agreement. *Held*—That the promise of the company to carry freight at the rates agreed upon is not void, for want of sufficient consideration, nor for want of mutuality of obligation between the parties; and, held further, that the right thus secured under the contract by K. and his associates was transferable by assignment to a subsequent purchaser of the furnace property.

3. When an exception is taken to the ruling of a Court in rejecting testimony offered by the party taking the exception, it is not necessary that the testimony so offered and rejected should be set out in the bill of exceptions; it is sufficient if the bill state the facts which such testimony tended to prove.

Judgment reversed and cause remanded.

WHITE, J., dissented as to the first proposition in the syllabus, on the

ground that the writing in question was not binding under the statute of frauds.

MANDAMUS.

The President, Trustees, and Faculty of the Cincinnati College *vs.* George S. Larue, Auditor, &c. Error to the District Court of Hamilton County.

WHITE, J.—*Held:*

1. In a proceeding by *mandamus* to compel an officer to do an act which it is claimed the law enjoins on him as a duty, the existence of all the facts necessary to put him in default must be shown.

2. Before the Auditor of a county can be required to transfer real property from the name in which it stands charged on the duplicate, to the name of a party to whom it has been assigned or conveyed, evidence of the title of the party to whom the transfer is to be made must be presented to the Auditor; and where the transfer is to be of only a part of such property, satisfactory proof must also be made to the Auditor of the value of such part as compared with the valuation of the whole as charged on the duplicate.

3. The presentation by the party seeking the transfer, of a statement of the facts concerning the title, with the request to the Auditor to have the property valued and transferred, is not a compliance with the statute. The evidence on which the Auditor is to act is prescribed by the statute, and he can be required to act on no other.

4. Where specified apartments in a building on a city lot are held by perpetual lease, by which it is provided that, in the event of the destruction of the building by fire, it is to be rebuilt, to which the parties are to contribute, and that the lessee shall, in such case, have the same rights in the new building as in the old, *it seems* that the property held by the lessee may be listed on the duplicate for taxation in his name, if such appears, by the terms of the lease, to have been the intention of the parties.

Judgment affirmed.

PERJURY.

Jehiel W. Stewart *vs.* The State of Ohio. Error to the Common Pleas of Ashtabula County.

WELCH, C J.—*Held:*

1. An essential element in the crime of subornation of perjury is the knowledge or belief on the part of the accused, not only that the witness will swear to what is untrue, but also that he will do so corruptly and knowingly.

2. An indictment for subornation of perjury, setting forth in due form of law the crime of willful and corrupt perjury by the suborned witness, and then averring that the defendant feloniously, willfully, and

corruptly did persuade, procure, and suborn the witness to commit "said perjury in manner and form aforesaid," sufficiently charges the defendant with knowledge that the witness would corruptly and knowingly swear to that which was false.

3. By the laws of Indiana the Court of Common Pleas has jurisdiction of divorce cases, and, by the decision of her Courts, decrees in divorce are conclusive and binding between the parties, irrespective of their residence at the date of the divorce, or of the petition therefor. To entitle a party to a divorce, however, he is required to state in his petition, and prove to the satisfaction of the Court, that he is a resident of the county, and that he has resided in the State one year. Provision is also made by law for bringing in the absent defendant by publication of notice. In a case where such petition had been filed in said Court by a non-resident, falsely alleged that he was such resident, and in which notice to the absent defendant had been duly published, the deposition of a witness was taken before a proper officer in Ohio, proving the fact of residence, and the causes of divorce specified in the petition.

Held—That the oath and deposition of the witness were not extra-judicial or unauthorized by law, and that perjury may be assigned upon them.

4. In a criminal case it is error to instruct the jury that evidence of the defendant's good character is not to be considered by the jury, or made available to the defendant, except in doubtful cases; the true and proper rule being to leave the weight and bearing of such evidence to the jury. [Harrington *vs.* Shale, 19 O. S., 264, approved.]

Judgment reversed and cause remanded for a new trial and further proceedings.

ANNUITY.

John Douglass *vs.* D. C. Parsons, *et al.* Error reserved to the District Court of Licking County.

By the Court:

An agreement to pay an annuity to a husband and wife "during their natural lives" binds the party to pay the annuity during the joint lives of the husband and wife, and during the life of the survivor.

Judgment reversed and cause remanded.

NATIONAL BANKS—USURY.

The First National Bank of Columbus *vs.* George Garlinghouse, *et al.*, Error to the Court of Common Pleas of Delaware County. Reserved in the District Court.

White, C. J.—*Held:*

1. The discounting of a note in this State by a National Bank at a usurious rate of interest, does not avoid the note *in toto*, but only to the extent of the interest.

2. The statute of this State, of March 19, 1850, entitled "an act to restrain banks from taking usury," was intended to operate on banking institutions in this State whose authority to discount and purchase notes, &c., is subject to control by the legislation of this State, and has no application to banking institutions existing and exercising their powers under the authority of Congress.

3. The discounting of a note for the principal maker, at a usurious rate of interest, will not discharge the sureties, where there is no intention to practice a fraud on them, and in the absence of any express agreement, or understanding, that the note was to be used only at a given rate of discount. In such case the sureties must be held to have trusted the principal as to the terms on which the note might be discounted.

Judgment reversed and cause remanded.

NATIONAL BANKS—PRACTICE.

John G. Shinkle and wife *vs.* the First National Bank of Ripley. Error from the District Court of Brown County.

WELCH, J.—*Held:*

1. Under the code of civil procedure, it is competent for the defendants in error to file a cross-petition, asking the reversal of the judgment for errors prejudicial to him, and not assigned in the plaintiff's petition; and it is not error in the Court to hear the case upon both petitions at the same time, and to reverse the judgment for such errors.

2. Where judgment is rendered upon a special finding of the facts, and a motion for a new trial, predicated on the ground that the finding is contrary to law and the evidence, is made and overruled, but no bill of exceptions setting forth the evidence is taken, and the judgment is subsequently reversed on error, the finding of the Court, although it sets forth in detail all the facts proven upon the trial, can not be regarded as such bill of exceptions in the case; and it is therefore not error in the revising court to render final judgment upon the finding, instead of remanding the cause for re-trial.

3. The words "by discounting and negotiating promissory notes, drafts, bills of exchange," &c., contained in the eighth section of the National Currency Act of 1864, are not to be read as limiting the mode of exercising the "incidental powers" necessary to carry on the business of banking, but as descriptive of the kind of "banking" which is authorized; and the true reading of the petition is, that the company may carry on banking "by discounting and negotiating promissory notes, drafts, bills of exchange," &c., and may exercise "all such incidental powers as shall be necessary" for that purpose.

4. Four persons being jointly indebted to one bank in two several sums, and to another bank in one sum, by mutual agreement between all parties, the notes which the banks respectively held for the debts were given up, and the debtors, each, executed his individual note and mortgage for such part of the aggregate sum as it was agreed among the debtors he should secure and pay; and in pursuance of said agreement the new notes and mortgages were drawn and made payable to a third person, and by him indorsed to one of the two banks. In an action against one of the debtors, upon his note and mortgage, by the bank to which it had been so assigned—*Held:* That the transaction was a payment, and not a mere renewal of the old notes; that there was a sufficient consideration to support the new notes and mortgages; and that the bank had authority, by the provisions of the National Currency Act, to make the arrangement, and take the new notes and mortgages in that form and manner.

5. In such action interest is recoverable upon the new note, although the old notes bore usurious interest, which was thus paid in full; and no offset or deduction can be allowed to the defendant on account of such usurious interest, in an action brought against him after the expiration of two years from the date of such payment, the period limited by the National Currency Act, for recovering back double the amount of usurious interest paid.

Motion overruled.

NATIONAL CURRENCY ACT.

William Shunk, *et al.*, *vs.* The First National Bank of Galion. Error to the District Court of Cuyahoga County.

McIlvaine, J.—*Held:*

1. Under the thirteenth section of the act of Congress of June 3, 1864, commonly called the National Currency Act, National Banks, located in a State where by the laws thereof a certain rate of interest is limited for banks of issue, organized under State laws, are allowed to take, receive, reserve, and charge interest at the rate so limited, and no more, although a greater rate is allowed by the laws of such State to parties other than such State banks.

2. The provisions of the act of the General Assembly of this State, passed May 4, 1869 (66 O. L. 91), viz., "that the parties to any bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest on the amount of such bond, bill, note, or other such instrument of writing, at any rate not exceeding eight per centum per annum, payable monthly," were not intended to embrace banks of issue organized under State laws, whose powers in relation to taking and charging interest on loans and discounts were conferred and limited by prior and special enactments.

3. The thirteenth section of the National Currency Act provides that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon."

Held—That, under this provision, such taking or charging a rate of interest greater than six per centum per annum in advance, by a National Bank, located in this State, forfeits all interest accruing on such note, bill, or other evidence of debt, after maturity and before judgment thereon, as well as interest accruing before the maturity thereof.

The judgment of the District Court affirming the judgment of the Common Pleas Court is reversed, and unless the defendant in error, within thirty days, remit from the judgment of the Court of Common Pleas all interest included therein, the judgment of said Court will also be reversed.

WELCH, J., dissented from the second proposition of the syllabus.

JURORS—MISCONDUCT.

Valentine Weis *vs.* the State of Ohio. Error to the Court of Common Pleas of Ross County.

DAY, J.—*Held:*

The separation of a juror from his fellows, in the trial of a criminal case, after it has been finally submitted to them, and before they have agreed upon a verdict, for the purpose of obtaining and drinking intoxicating liquors, when not explained or shown to be excusable, is such misconduct of the juror as will entitle the prisoner to a new trial.

SUPERIOR COURT OF CINCINNATI.

ACTION UNDER ADAIR LIQUOR LAW.

Sarah A. Mason *vs.* Thomas Shay.

This suit was brought to recover $10,000 damages for alleged injury to the plaintiff, in her "means of support," occasioned by alleged sales of intoxicating liquors, by defendant to the plaintiff's husband, Thomas H. Mason, who was a habitual drunkard, and known by defendant to be such; said Mason having died of *delirium tremens*, caused by the use of the liquors sold to him by defendant. He left plaintiff, his widow, and he also left minor children, who did not unite in the action.

Superior Court of Cincinnati.

Yaple, J., announced the following rules of law in his charge to the jury.

1. That the seventh section of the act of 1870 (67 O. L. 102), amendatory of the seventh section of the act of 1854 (52 O. L. 153), by omitting the words "by selling intoxicating liquors contrary to this act," does not render any person who has legally sold such liquor liable to a civil action for any injury to any one resulting from the intoxication of the purchaser caused thereby; for if such words had not been in the law of 1854, such legal sellers would not have been liable.

2. The right of action in all such cases against the seller depends upon his having sold *criminally*, in violation of the provisions of that statute, and to recover against him a plaintiff must prove all the material facts of his case, beyond a reasonable doubt. (Schaffner *vs.* State, 8 O. S. R. 643; Strader, *vs.* Mullane, *et. al.* 17 O. S. R. 626; Fuller *vs.* State 12 O. S. R. 433.)

3. If death be caused by intoxication resulting from illegal sales in such cases, no recovery can be had for the wrongful causing of such death; a wife, child, &c., being only entitled to the labor of a husband or parent as a means of support *while he lives*, death (under the common law, which this statute has not changed), being considered as the act and visitation of God. The act providing for recovery of damages in cases of wrongfully causing death is a special act, independent of the Liquor Law, and governed by rules peculiar to itself. Under it no recovery can be had unless the deceased, had he survived, could have maintained an action, and the damages are merely for pecuniary loss, and are limited in amount by statute; while, under the Liquor Law, damages are not limited and may be exemplary, and the intoxicated person can maintain no action; he violates the law himself by becoming intoxicated, and directly contributes to his injury.

4. Whenever the Legislature can constitutionally make the commission of an act criminal, it can authorize any person who has been injured by its commission to maintain a civil action to recover damages for such injury; and where a person has sold intoxicating liquors to a person in the habit of getting intoxicated, the seller, having knowledge of such habit, and the buyer's wife "is injured in her means of support," in consequence of the intoxication of her husband, resulting from such liquors, she can maintain an action, if brought within four years, against such seller for injury to her "means of support," even after the death of her husband; she has an interest in her husband's capacity to perform labor as a "means of support," and she may recover damages, though she does not show that she has been at any time, in whole or in part, without present means of support. It is enough that the means of future support have been cut off

or diminished, and the injury to the "means of support" is not confined to cases of injury resulting from drunkenness immediately, and during its continuance, but extends as well to cases where the injury results from insanity, sickness, or inability induced by intoxication. Nor, where she sues one seller only, is she barred from recovering against him on account of any substantial injury he may have occasioned to her "means of support," if others have by selling during the same period, also injured her in this respect; and where the husband dies in consequence of such intoxication, she will be entitled to recover for all injuries to her means of support on account of the loss of his labor during his sickness, and while he lived, and the expenses of such sickness and funeral expenses; she can recover, where she alone sues, only for injury to her own means of support, not for the support of the deceased's and her minor children, as they may sue for themselves. Nor can she recover for the loss to the amount of her husband's estate, but the diminution, if any, thereby resulting to her means of present and future support. Nor can she recover for injuries to her property occasioned by such intoxication without alleging such property in her petition and proving injury to the same on the trial. (Duroy *vs.* Blinn & Letcher, 11 O. S. R. 331; Schneider *vs.* Hosier, 21 O. S. R. 98; Mulford *vs.* Clewell, *id.* 191.)

5. As the foundation of such action is the criminal violation of the statute by the defendant, exemplary damages may be awarded by the jury, though no actual malice or other circumstances of aggravation be proven. The award of exemplary damages is authorized when the plaintiff is found to be entitled to actual legal damages, and may include a reasonable allowance for the time, trouble, expense (including reasonable counsel fees) of prosecuting and maintaining the action. The jury may even go further and allow damages by way of "smart money," exercising this power wisely, and without passion or prejudice, in the exercise of a sound discretion, in view of all the facts and circumstances in the case, remembering that in few cases should a defendant pay more than a plaintiff ought, in justice between themselves, to receive from him.

6. The statute, being in derogation of the common law, must be strictly construed by Courts; but, in finding the facts, juries are to be governed by the same fairness and candor in an honest and diligent effort to ascertain the truth, that they should observe in any other case, which is governed by the rules of criminal evidence.

The jury returned a verdict for the defendant.

Reuben Tyler for plaintiff; C. H. Blackburn and Judge Okey for defendant.

KENTUCKY COURT OF APPEALS.

CONSTRUCTION OF A WILL—AUTHENTICITY OF RECORDS OF COURTS—LIMITATION—BONDS—PARTIES.

Day, &c., *vs.* Grady, &c. Todd. Lindsay, Judge.

Pendleton died in 1858, devising his estate to his grandchildren then living, and if any should die in infancy unmarried, his or her portion should go to his or her brothers and sisters. The fifth clause of the will is: "I desire that the part of my estate that may pass to the children of my daughter, Nancy Grady, shall be paid over to my son-in-law, James T. Grady, and by him managed to the best advantage for the benefit of the children of my daughter, Nancy Grady, and pay over to them their interest or share as they arrive at age or marry; I also desire that that portion of my estate that shall fall to the children of my daughter, Rebecca Manion, shall be paid over to my son-in-law, Reuben T. Manion, and by him managed for the benefit of her children, and pay over to them their interests as they become of age or marry. It is further my desire that that portion of my estate that shall fall to the share of the children of my deceased son, H. B. Pendleton, and my deceased daughter, Sarah Ann Halsell, shall remain in the hands of my executor, and by him managed to the best advantage for the benefit of said children, and pay over to them their part or shares as they arrive at age or marry. My executor is requested to expend, however, a sufficient part of their shares to decently clothe, educate, and board them.

Lawson was appointed executor, and qualified with appellants as sureties in his bond. A settlement in 1868 showed a large balance in his hands due the legatees, and this suit was brought by them to recover it.

Held—1. The record book of the County Court contains what purports to be orders qualifying Lawson as executor, and accepting his bond as such. It is not alleged that the minutes of the proceedings of the Court, on the day these orders purport to have been made, have not the name of the Judge or presiding Justice signed to them, but that, as a matter of fact, they were not signed by such officer. In attacking a record or impeaching the contents of a book recognized to be the order book of a Court (if such a practice be allowable under any circumstances,) the charges should be direct, explicit, and unmistakable. In an absence of a direct charge to the contrary, we must presume that the order book of the Court not only contains what purports to

be an order showing that Lawson was qualified as executor and executed the bond sued on, but that the proceedings purport to have been signed by the Judge or presiding Justice.

2. Limitation did not begin to run until the legatees respectively arrived at twenty-one years of age. The will gave the legacies directly to the grandchildren, and they are not only the beneficiaries, but they took the legal title to their respective shares. The legal title to the legacies of the children of Grady and of Manion not being vested in the fathers by the will, they could not have maintained an action against the executor.

3. That Lawson was appointed guardian of two of Mrs. Halsell's children is no bar to their action against the sureties on his bond as executor. The will directed that their shares should remain in the executor's hands, and that he should pay it to them as they arrived at age or married, and his sureties undertook that he would perform the trust.

4. The shares of the two deceased infant legatees passed to their brothers and sisters, not by descent, but under the will, and it was not necessary to make their personal representatives parties.

SALARY OF TREASURER OF CITY OF COVINGTON.

City of Covington *vs.* Mayberry. Kenton. Lindsay, Judge.

Under the city charter of Covington, the Treasurer is required to keep a correct account of all receipts and expenditures of the treasury as the Council may direct, report at stated periods the amount of money on hand, and "perform all such other duties appertaining to his office as the Council may ordain; and for his services shall receive such compensation or salary as may be provided by ordinance." The charter also requires him, on receiving the tax-book from the City Clerk, to give notice that unless taxes are paid by the 15th of June, fifteen per cent. will be added, and within five days after that date he was required to indorse the tax bills remaining unpaid as delinquent and return them. On the 15th of June, 1868, the Council passed a resolution remitting the penalty of fifteen per cent. to all who would pay their taxes by July 1. Under this the Treasurer was directed to and did receive taxes until the 1st of July. He was then receiving an annual salary of $1,200, and nothing was said as to any increase on account of the additional labor. This was a suit by him for additional compensation.

Held—The receiving from the tax-payers of the taxes assessed against them was a duty pertaining to the office of Treasurer, and the increase of such duties by no means implies that the city thereby places itself under legal obligations to increase the Treasurer's salary. That he

continued to receive taxes after the extension of time without demanding an increased salary, was a recognition of the right of the Council to require the service at his hands.

STATUTE OF LIMITATIONS—SUIT ON A NEW PROMISE MADE AFTER THE DEBT IS BARRED.

Truesdell's administrator *vs.* Anderson. Campbell. Pryor, Judge.

This was a suit on account against Anderson for borrowed money, to which he plead the statute of limitation. An amended petition was then filed alleging a promise by him to pay the debt, made within five years prior to the institution of the suit. The evidence shows that Anderson, when asked by one Morin, "What about that debt of three hundred dollars to Mathias Truesdell?" answered, "You need not give yourself any uneasiness about it, I will pay the money." It does not appear that Morin was the agent of the appellant or his intestate, or was authorized to collect the debt.

Held—Where the right to recover on the original contract is barred by limitation, and a new promise given sufficient to avoid this statutory bar, it constitutes a different cause of action, and the suit must be based upon it. The proof shows no promise made by Anderson to intestate or his administrator to pay the debt, nor did he acknowledge to either of these parties that the debt was due and that he intended to pay it. Any contract between Morin and Anderson in regard to the debt would not have been obligatory on appellant or his intestate. As payment to Morin would not have discharged the debt, no contract with him could have created a new obligation or promise on the part of Anderson to appellant or his intestate to pay the debt. In order to take a case like this out of the statute, there must be an express promise to pay, or an unqualified acknowledgment that the debt is a subsisting debt which the party is willing to pay, and this promise or acknowledgment must be made to the party to whom the debt is owing, or his agent authorized to collect or control it.

LIMITATION AND CONTRIBUTION BY CO-SURETY NOT SUED.

Shelton, &c., *vs.* Farmer. Ballard. Lindsay, Judge.

In October, 1858, a cause of action, for money collected and not paid over on demand, accrued against George as constable, and Farmer and Young the sureties on his official bond. Suit, however, was delayed until June, 1865, when it was instituted against George and Farmer alone, and in 1866, judgment was recovered against them. George being insolvent, Farmer paid the judgment, and brough this suit against the heirs of Young for contribution as co-surety.

Held—At the time judgment was rendered against Farmer, the statute of limitation would have barred an action against Young. He was

no longer bound to the plaintiffs, and therefore the payment of the judgment relieved him of no burden, and placed him in no better attitude than that he occupied before. If it raised an implied *assumpsit* on his part to repay Farmer one-half the amount so paid, it imposed on him a liability which did not before exist, and was a positive injury. The creditor had the right to sue all or either of the parties to the constable's bond, but Farmer also had the right, under the statute (Sec. 10, chap. 97, Rev. Stat.), to compel him to sue his co-surety, or release him from liability, except for his proper share of the debt. Failing to do this, he has no cause of action against the heirs of Young. This is a controversy between co-sureties, while that of Bowman *vs.* Wright, was between a principal and his surety.

SALES OF REAL ESTATE IN WHICH THERE IS A CONTINGENT INTEREST—COUNTY COURTS CAN NOT APPOINT TRUSTEES.

Lowry *vs.* Morgan, &c. Fayette. Pryor, Judge.

Higgins's will contains the following clause: "The portions of my estate given to my daughters, Caroline Waters and America Morgan, are hereby vested in my sons, Joel and Richard Higgins, as trustees, and the right and title to the same are to remain in my sons and their heirs as trustees, the interest thereon to be paid to my daughters, respectively, during their lives, and at their deaths, or that of either of them, their portion or portions to be transferred and delivered to her heirs forever." The portion of Mrs. Morgan was invested in ninety-five acres of land, which were conveyed to the trustees, in trust on the above conditions. The trustees having died, Mrs. Morgan had her son appointed in their stead by the Fayette Court, and desiring to sell the land to Lowry, she, and her son, as trustee and as guardian for his children, filed their petition for a sale, under the act of August 23, 1862, authorizing a sale of real estate in which there is a contingent interest. At the sale Lowry became the purchaser, but now insists that the proceedings were defective.

Held—The appointment of the son as trustee was invalid, as the County Court had no jurisdiction to make it. The jurisdiction of County Courts is derived from statutory enactment, and the extent of their powers clearly defined. Unless there is some express authority given to substitute trustees for those who die, are removed, or fail to act, or the power may be implied as necessary to perfect a jurisdiction granted over trustees, acts of substitution are mere nullities. (13 B. M. 337.) No such power has been vested by statute in the County Courts, and Courts of equity, therefore are the only tribunals having jurisdiction in such cases. The Chancellor, however, should have recognized the son as trustee and required him to execute bond as such,

as he had been selected by his mother, and is the only person entitled to the estate in the event of his surviving his mother.

The object of the act of August 23, 1862, was to authorize sales of contingent interests in real estate, and it is immaterial whether that contingency depends on the happening or non-happening of an event, or the uncertainty in whom the title to the remainder will finally vest. The act contemplates no uncertainty in regard to the duration or the termination of the particular or limited estate, but has reference to events which may or may not happen during its existence, making it uncertain as to those who are to take the remainder.

In this case the happening of the events on which the parties are to take is certain, but it is uncertain who will be entitled to the estate when the event does happen. The Chancellor was authorized to sell even though this one contingency existed, the remainder men being made secure by the reinvestment of the proceeds.

BREACH OF CONTRACT AND THE MEASURE OF DAMAGES.

Keith's Executors, &c., *vs.* Hinkston. From Harrison. Lindsay, Judge.

This was a suit by Hinkston on a contract alleged to have been made by appellants, owners of the Kentucky Central Railroad, in writing, to the effect that they in consideration of the use of a parcel of ground, the property of Hinkston, would put a switch thereon for his use, and furnish cars to transport his stock and produce to market; that they had removed the switch and refused to furnish transportation for his stock and produce, laying his damages at $2,000. He recovered $800.

Held—It is evident that the damages sustained, if any, result not from the removal of the switch, but the failure to replace it at the proper times to accommodate Hinkston in the shipment to market of his stock and produce. The failure of appellants to keep this agreement to the time of the trial of the case does not entitle Hinkston to recover for like failures for all time to come. Appellants may, as they will have the right to do in case the alleged contract is sustained, replace the switch and afford Hinkston the accommodations to which he claims to be entitled. Besides, it is impossible to ascertain now what will be the extent of the damage in future.

The diversity of statements by Hinkston's witnesses as to whether the contract was in writing, as alleged, or merely oral, was a matter to be considered by the jury, and this Court will not by reason of such fact, reverse the judgment on the idea that he has wholly failed to make out his case, and that a peremptory instruction might have been given to find against him.

Kentucky Court of Appeals.

DECRETAL SALES CAN NOT BE SET ASIDE MERELY ON THE OFFER OF TEN PER CENT. ADVANCE ON THE FORMER BID.

Stump *vs.* Martin, &c. Louisville Chancery. Pryor, Judge.

On the petition of the appellees, owners of the Louisville Hotel and other property in Louisville, alleging that it is indivisible and that a sale would advance the interests of all parties interested, the Chancery Court adjudged a sale thereof. Under this decree the Marshal of the Court made the sale, and Stump, being the highest and best bidder, became the purchaser of the hotel property at $190,100, and Murrell, the purchaser of a house and lot at $29,000. A few days after the sale an advance of ten per cent. on Stump's bid was offered by the attorney for the appellees, and a bond tendered by him signed by four of them as his sureties, conditioned that he would comply with his offer, and a motion was then made to open the bidding, which Stump resisted. The sale on this offer was set aside.

Held:

It is a fixed and recognized rule in reference to decretal sales in this State, that a party purchasing at such a sale becomes only an accepted bidder, and the completion of this purchase depends upon the judicial discretion of the Chancellor when called upon to confirm. The bidder, it is true, has the right to infer that if he is the highest and best bidder, and complies with the terms of sale, that the property purchased is his, but still he is required to know that the Chancellor can exercise this judicial power over his offer and may approve or reject it, and to deny him this right would be to leave the rights of litigants unprotected in all such sales.

The practice in the English Courts of Chancery is to open the biddings and order a release whenever an advance of ten per cent. is offered, with an indemnity to the purchaser by paying him his costs incurred by reason of his biddings. In this State this rule has never been adopted, and has certainly never been sanctioned by this Court, but, on the contrary, such sales are not disturbed by mere inadequacy of price alone, unless there has been such a sacrifice of property as to import fraud. There must be either fraud or misconduct in some one connected with the sale, some surprise or misapprehension on the part of those interested or of the officer who makes the sale, or some irregularity in the proceedings or other circumstances attending it conducing to show unfairness, before the Chancellor will refuse to confirm this act of his Commissioner. It is the duty of the Chancellor to look to the rights of parties litigant, where property is placed under the control and custody of his Commissioner by the judgment, and where there has been fraud, surprise, accident, &c., to disregard the act of his

agent by ordering a resale; but where there is an entire absence of all unfair dealing, and the sale conducted in pursuance to the judgment, good faith requires that the rights of the purchaser should be protected, as well as the parties to the original proceedings.

It would be trifling with the stability of judicial sales, as well as the right of purchasers to permit those who were present at the sale, or who ought to have been present, to interfere after the sale is made, and open the biddings for no other reason than that since the sale an advanced price has been offered for the property, and hence this Court has always been unwilling to go so far in any case as to say that the Chancellor has the power to set aside a sale made by his Commissioner, merely because he could get a better bargain. In Foreman, &c., *vs.* Hunt, 3 Dana, 621; Pusey *vs.* Hardin, 2 B. Mon, 411; Dale *vs.* Sling, 5 B. Mon, and Edgard *vs.* Cheany, 1 Bush, though the inadequacy of price constituted the principal objection to confirming the sale, this Court was careful to look to other facts, in order to relieve the debtors by setting aside the sale, and mere inadequacy of price was held insufficient for that purpose. This has been the rule in New York. [Lefore *vs.* Laraway, 22 Barb; Tripp *vs.* Cook, 21 Wend; Williamson *vs.* Dale, 3 John's Chy R., 290.] The practice of many of the Courts of the State of following the English rule, has never been sanctioned by this Court, and the rule well established and always recognized will not now be varied. In the cases referred to the property sold was that of a debtor to pay his debts, where the Courts are inclined to aid him in obtaining the highest price for his property, but here the owners were not forced to sell voluntarily and sought the authority of the Court to make the sale. That the debtor may derive a benefit merely from the opening of a sale has never been held a sufficient reason for that purpose, even where the rights of infants and married women were involved, and though Courts of Equity will exercise jurisdiction in such cases to relieve those laboring under disabilities when the same relief would be denied adults, still where there is no reservation in the judgment, and the price paid, or offered, is a fair price for the property, the Chancellor will not and ought not to disturb the sale.

Murrell seeks to avoid the sale of the other lot to him, because of certain alleged defects in the proceedings. The act of March 2, 1863, is a virtual repeal of Chapter 86 of the Revised Statutes so far as it applies to married women in cases where the property sought to be sold (in which they have an interest) is indivisible. Nor is the act of March 2, 1863, affected by the provisions of the act of February 15, 1866. This last named act is intended to apply to cases where the land is susceptible of division, but yet authorizes a sale on the allegation and proof that a division would materially impair its value, retaining, however, the right of any one interested to appear and have his interest parti-

tioned. The act of 1863 is intended to apply alone to cases where no division can be made, and in such cases neither the failure of the husband to give bond nor the married woman to be privily examined can affect the validity of the sale.

SUPREME COURT OF PENNSYLVANIA.

TO APPEAR IN 19 P. F. SMITH, PA. REP.

BINDLEY'S APPEAL.

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

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

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

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

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

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

McCLURKAN *v.* THOMPSON, *et al.*

1. C. being much in debt, gave to B. a mortgage, to be sold, and his creditors paid at fifty per cent. The mortgage could not be sold, and

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

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

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

BENTZ, GARBE, *v.* ROCNISHKEY.

Before Thompson, C. J., Agnew, Sharswood, and Williams, JJ. Error to the Court of Common Pleas of York County: of May Term, 1871.

1. When there is no question of bankruptcy, the transfer of property by an insolvent debtor, to a creditor for a debt, accompanied by delivery of possession, is not fraudulent and void, if there be no intent to hinder, &c., creditors, though this may be the tendency.

2. Without legal fraud, it is the intent with which the transfer is made, not its effect, that characterizes the transaction as honest or fraudulent.

3. An insolvent selling property in payment of his debts, can not reserve any of it for his own benefit: a stipulation for such reservation renders the transaction void.

4. Roller, a tanner, who was insolvent, transferred all his property to Bentz, in payment of a debt, and received a note for a balance. At the time of the transfer, there was an understanding that Roller should get back part of the property for working out the tannery stock, and that the money was to be made out of the stock before the note should be paid. *Held*, that the transfer was void.

At the time of the transfer, Roller rented the tannery. Bentz rented the tannery from Roller's landlord, and gave him a note for rent for the remainder of the year. Roller and the property remained on the premises as before, working out the stock, which was sold; Bentz received the money. *Held*, there was not such a change of possession as would render the sale valid against creditors.

NEEL, *et al.*, *v.* McELHENNY, *et al.*

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

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

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

VANARSDALE, *et al.*, *v.* LAVERTY.

Before Agnew, Sharswood, and Williams, JJ. Error to the Court of Common Pleas of Cumberland County: of May Term, 1871.

1. The right of petition is not so sacred, that the private purposes and motives of the petitioners may not be inquired into.

2. A groundless petition, instigated only by malice, is not the *right* of any citizen, if it results in harm to its object.

3. Citizens remonstrated to the school directors against appointing the plaintiff teacher, stating no reasons for their objection. They had a right to remonstrate, but the right could not be made means for gratifying malice and enmity.

4. The plaintiff was rejected by the board after the presentation of the remonstrance; he at the time had no certificate from the county superintendent; this did not prevent his recovery, if the remonstrance was malicious and did him damage.

5. After his rejection, the plaintiff obtained another school at a higher salary. This would be in mitigation, but did not bar his recovery. The wrong was complete when he lost his place by the malice of the defendants.

MARSH'S APPEAL.

1. Partners can not charge each other or the firm for their services

without an express agreement, or one implied from the course of dealing between them.

2. Each partner must work to the extent of his ability for the whole, without regard to the services of his fellows or comparison of value.

3. Partners by writing entered "into partnership upon an equal footing," the capital to be furnished by two, at six per cent. interest: there was no stipulation as to their respective duties. By *verbal* agreement one was to attend to the finances. He withdrew his services. *Held*, that on a settlement of the firm accounts, he was chargeable with the value of his services.

NAREHOOD *vs.* WILHELM, *et. al.*

1. By a clause in a deed, the grantor "reserved the timber except what (the grantee) has reserved for his own use, such as building houses, fencings," &c. The grantor entered the premises to cut and remove timber, alleging that he had not exhausted his reservation. In ejectment by the grantee, the jury found that the grantor had cut timber reserved to the grantee, but did not find that the grantor had exhausted his own right. *Held*, that ejectment could not be maintained.

2. Ejectment would not lie until the right to enter to take timber had been determined.

3. One exceeding his authority after an entry under authority of law, is a trespasser; *aliter* for abuse of authority after entry under contract.

4. A right to standing timber gives a right to the soil, so far as to protect the right and preserve the timber, and trespass lies against the owner of the soil or other person who cuts timber unlawfully.

5. Boults *vs.* Mitchell, 3 Harris 371, recognized.

LEFEVRE'S APPEAL.

1. As to strangers, mortgagees, purchasers, and creditors, the agreement of partners to make real estate part of the common stock, must be in writing and ought to be on record.

2. If, with the acquiescence of the members of a firm, partnership funds are applied to the purchase of real estate in the name of one member, there is no resulting trust.

3. Partners may agree that any members may withdraw any part of the common stock; such part will then become his own.

4. It is because each partner has an equity to insist upon the application of partnership debts, that joint creditors have priority over separate creditors..

5. It is not competent to show by parol that estate conveyed to two as tenants in common, is partnership property.

6. McDermat *vs.* Lawrence, 7 S. & R. 433, recognized.

7. Erwin's Appeal, 3 Wright 535; Hale *vs.* Henry, 2 Watts 143; McCormick's Appeal, 7 P. F. Smith 54, considered.

SUPREME COURT OF OREGON.

VOLUME 3, OREGON REP.

ALTERATION.

1. If the plaintiff took a joint note knowing that it was altered without the consent of one of the makers, he can not recover against the maker not consenting.—*Wills* v. *Wilson*, 308.

2. If it is so altered, and the plaintiff, before receiving the altered note, was put upon inquiry, he can not recover against the party who did not consent to the alteration.—*Id.*

3. If the plaintiff was without fault and was deceived, and received the note believing that the note was altered by both the makers, when in fact one of the makers did not authorize the alteration, the plaintiff is entitled to recover against the latter upon the original note, to the same extent as if no alteration had been made.—*Id.*

BILL OF REVIEW.

1. A suit in the nature of a bill of review to set aside or modify a judgment or decree, is entertained by virtue of the original and not the appellate jurisdiction of the court.—*Kennard, et al.*, v. *Sax*, 263.

2. To warrant a review of a decree by an original suit, except for error appearing on the record, a reason must be shown why the facts now presented were not presented and determined on the former trial.—*Harper* v. *Harding, et al.*, 301.

COIN.

1. Where the plaintiff sues for gold coin loaned to the amount of $80, he will not be entitled to recover a judgment for $114, on the ground that the coin was worth that sum in currency.—*Davis* v. *Mason*, 154.

2. In such case, evidence of the relative value of coin and legal tender notes is not admissible.—*Id.*

3. Nor is evidence of the custom of a particular bank to pay coin on checks that do not name the kind of currency, or of the customs of other banks in the place in this respect.—*Id.*

4. Where the parties have agreed orally that the wages shall be at a fixed rate in gold coin, but have failed to reduce the agreement to writing, it is held not to amount to a special agreement, and evidence of the reasonble value is admissible, under proper pleadings.—*Id.*

CONVEYANCE.

Where one in possession, without title, conveyed two adjacent blocks of land in trust, "for the purpose of erecting an academy *thereon* and *therewith*," with covenants for further assurance, and having afterward acquired the legal title, executed a deed purporting to be confirmatory of the former deed, and purporting to recite its substance, but which describes the former deed as a deed conveying the "land for establishing *thereon* a seminary of learning *to be divided into a male and female academy*;" and which in terms grants the land in trust, "for the uses and purposes aforesaid:" *Held*, that the change in language does not denote an agreement on the part of the *cestuis que trust* to change the nature of the trust.—*Chapman* v. *Wilbur*, 326.

COVENANT.

1. *Construction.*—A covenant in a deed was in these words: "The said party of the first part, for them and their heirs, the said premises, in the quiet and peaceful possession of the said party of the second part, their heirs and assigns, against the said party of the first part and their heirs, lawfully claiming, or to claim the same, shall and will warrant, and by these presents forever defend:" *Held*, not to be a covenant for quiet enjoyment, and that it does not warrant against assigns of the grantor.—*Moffit, et al.*, v. *Coffin*, 426.

2. An express covenant can not be construed so as to extend its obligations by implication.—*Id.*

DECREE—JUNIOR MORTGAGEE.

A junior mortgagee is not so far bound by a decree rendered without notice to him, as to be compelled to apply by bill for leave to redeem. But he may resort to the ordinary mode of foreclosure as if no sale had been made.—*Besser v. Hawthorne*, 129.

DEMURRER.

The objection "that the complaint does not state facts sufficient to

constitute a cause of action," is not waived by failure to demur.—*Bowen, et al.*, v. *Emmerson*, 452.

EJECTMENT.

1. *Title.*—In an action for the recovery of the posession of real property, it is not necessary for the plaintiff to set out his muniments of title.—*Pease* v. *Hannah*, 301.

2. Where a defendant set up a title in himself to an undivided interest, he was required to specify what interest or share he owns.—*Id.*

CINCINNATI BAR ASSOCIATION.

A meeting of the Cincinnati Bar Association was held Feb. 4, 1873, at the CollegeBuilding. President Stanberry presided.

The minutes having been read and approved, Mr. T. D. Lincoln, from the Committee on the Judiciary, presented the following reports, which were adopted:

PROPOSED AMENDMENT TO THE NATIONAL BANKING ACT.

"The Committee on Judiciary and Legal Reform, to whom was submitted at your last meeting the resolution of Judge Yaple, relative to the amendment of Section 57, of what is known as the National Banking Act, respectfully report by a proposed bill as follows:

'A Bill entitled an act to amend Section 57 of the act entitled "An act to provide a national currency, secured by a pledge of the United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864.

'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, as follows:

"SEC. 57. That suits, actions, and proceedings by and against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: and such banks may bring suit in any other circuit, district, or territorial court of the United States, or in any other State court; and in any suit now pending, or hereafter brought against any person, corporation, or party residing

or existing in one district in any State, any person, corporation, or party residing or existing in any other district of the said State, may be made party, and proper process may be issued against such party to the Marshal of the district in which such party may reside or exist, to be served upon such party; and persons, corporations, or parties residing or existing in any other State than that in which suit is brought, who may have an interest in property affected by such suit, may be made parties by publication, or motion, as the court may, by general rule or special order, direct; provided, however, that all proceedings to enjoin the Comptroller, under this act, shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located; provided, further, that in all cases in which any suit, action, or proceeding shall or may be properly brought in any such State or municipal court, by or against persons or parties other than such association; and such association shall be a permissible, proper, or necessary party to a complete or final adjudication and determination of such suit, action, or proceeding, by and before such court; every such association may be made a party thereto, the same as natural persons might be. And this section shall also include process of garnishment, or trustee process, issued from any such court in aid of any party or parties in any cause, matter, or proceeding pending before it, the same as if such association were a natural person. Said original Section 57 is hereby repealed, this act to take effect from the date of its approval. T. D. LINCOLN, Chairman."

"The Committee on Judiciary and Legal Reform, to whom was referred the resolution of Mr. Logan, requesting this committee to inquire and report concerning the propriety of so amending the act, known as the National Banking Act, as to authorize stockholders therein to pledge or sell their stock to *bona fide* purchasers or pledgees, though indebted to such banks, beg leave to report that they have found stockholders have now such power. The act of 1863, which forbid the same, was superseded by the act of June 3, 1864, which authorizes sales and pledges in such cases. This has been expressly decided by the Supreme Court of the United States in 11 Wal. Rep., Bank *vs.* Lanier.

"Such purchasers or pledgees acquire equity in such stock paramount to that of such bank. We think this right is now ample, for as between the bank and the general creditors of its stockholders, the bank should have the preference as to the avails of the stock as a security for its creditors, depositors, &c.

"This report is respectfully submitted, and we ask to be discharged from the further consideration of the subject.

T. D. LINCOLN, Chairman."

SECOND TRIALS.

"The Committee on Judiciary and Legal Reform have had before them the recommendation referred to them in relation to a second trial, together with the remarks of Judge Force before the Association upon the subject, do report in favor of a recommendation by the Association of the passage of a bill substantially as set forth by Judge Force, and for the reason assigned by him, as follows; to-wit:

"AN ACT, &c.

"Be it enacted, &c. That Sections 1 and 3 of an act, &c., passed twelfth April, 1858, and Section 2 of same act, as amended thirty-first of March, 1859; also, an act, &c., passed thirty-first of March, 1859; also, an act, &c., passed thirteenth May, 1861; also, an act, &c., passed May 1, 1862—all of which acts relate to a second trial, be and the same are hereby repealed.

"II. This act is to take effect on the first day of May next, provided, however, that all actions in which a demand for second trial shall be duly entered before the first day of May next, shall be carried on in all respects in accordance with the provisions of the acts hereby repealed.

"By order of the committee.

"T. D. LINCOLN, Chairman."

INDICTMENTS AGAINST CORPORATIONS.

"The Committee of Judiciary and Legal Reform have considered the recommendation Judge Force referred to them in reference to insuring the appearance of an indicted corporation, and do report that the Association recommend the passage of an act as follows—being the same drawn up by Judge Force, and for the reasons assigned by him as follows; to-wit:

"AN ACT, &c.

"Be it enacted, &c., That when an indictment shall be reported against a corporation, a summons shall issue upon the precipe of the Prosecuting Attorney, which summons shall be served in the manner provided, or that may be provided, for service upon a corporation in civil actions, and shall be returnable on the seventh day after the day on which it shall be issued.

"If the summons be returned duly served, then, or before the fourth day after the return day, or, if the third day be Sunday, then on or before the fourth return day after the return day, such corporation shall appear, by one of its officers or by counsel, and answer to the in-

dictment by motion, demurrer, or plea; and, in case of its failure to make such appearance being made or plea entered, such corporation shall thenceforth be considered as continually present in court, until the case be finally disposed of.

"T. D. LINCOLN, Chairman."

Judge Yaple offered the following:

"*Resolved*, That under the proposed new constitution all judges shall be elected by the people at special elections, when no other officers shall be chosen, and that the people be recommended to eschew all party tests at every such election.

"*Resolved*, That this resolution be considered by the Association at its next regular meeting."

Referred to the Committee on Judiciary.

Judge Collins presented the following:

"*Resolved*, That in organizing a new judiciary system there should be provided a distinct and independent court intermediate between the *nisi prius* court and the court of last resort, in which no member of the *nisi prius* courts should sit, thus insuring a review on error by a tribunal that has not formed and expressed an opinion on the case.

"Also that the courts of last resort should consist of five judges, and be exempt from all circuit duties."

Referred to the Committee on the Judiciary.

Mr. Sage, from the Committee on Rules and Regulations for the Committee of Investigation and the Committee of Grievances, submitted a printed report which, with a few amendments, was adopted, as follows:

"1. Any member of the Association may prefer to the Committee of Investigation, through the chairman, charges of unprofessional conduct against any member of the bar, practicing in Cincinnati, or make complaint against any person connected with the administration of justice, upon any subject proper for investigation by this Association.

"2. Every charge or complaint shall be in writing and in ordinary and concise language, with such specifications as may be necessary to set forth clearly the nature of the offense, and there shall be furnished with such charge or complaint the names of witnesses and a memorandum of facts to which the member making the charge or complaint believes each will testify.

"3. Every charge or complaint shall be deemed confidential, until the Committee of Investigation shall report thereon; and in no

case shall the name of the complainant or person preferring the charge be disclosed by the Committee of Investigation, or the Committee on Grievances, or any member of either, except with the written consent of such person. Provided, that if either committee shall be satisfied that any charge or complaint is false and malicious, it shall report the author and the facts to the Association for its action.

"4. It shall be the duty of the chairman to call a meeting of the Committee of Investigation whenever any charge is preferred or complaint made as aforesaid, and the committee shall proceed to investigate the same without unnecessary delay, by examining all witnesses and inquiring into all facts which may be brought to its knowledge.

"5. It shall be the duty of every member of this Association, upon the call of the Committee of Investigation, or the Committee on Grievances, to state any facts within his knowledge, or allow an inspection and copy of any papers in his possession or control, relative to any charge or complaint made as above, subject to the laws of the State in regard to testimony.

"6. All testimony taken by the Committee of Investigation, or of the Committee on Grievances, shall be reduced to writing.

"7. Any member of the Association may appeal from the decision of the Committee of Investigation, in any case in which the committee shall refuse to report charges or complaints to the Committee on Grievances; and upon such appeal the Committee of Investigation shall deliver to the Committee on Grievances the original charge or complaint, and all papers, records, or memoranda of evidence, documents, and copies relating thereto; and the Committee on Grievances shall thereupon consider the same, and if satisfied that there is reasonable ground for the charge or complaint, shall retain the same for hearing as upon cases reported by the Committee of Investigation.

"8. The Committee on Grievances shall give to every member of the Association, against whom a charge or complaint shall be pending, a copy thereof, and at least twenty-four hours' notice of the time and place for the hearing thereof, and such member, upon filing a written answer or defense to the complaint, shall have the right to be present at the examination of each witness, and to introduce witnesses on his own behalf.

"9. The Committee on Grievances, a majority of whom must be present at its sessions, shall hear and decide the allegations and proofs thus submitted to them; and if they shall find the complaint, or any material part of it, to be true, they shall so report to the Association, with their recommendation as to the appropriate action to be taken.

"10. If, upon any report by the Committee on Grievances, the Association shall be of the opinion that the person complained of ough

to be prosecuted in the courts, it shall be the duty of the Committee on Grievances to prepare and present the same by and with the authority of the Association.

"11. Either committee, while a complaint or charge is pending before it, may allow the same to be amended on such terms and conditions, and in such manner, as to the committee shall seem proper, subject to the limitations or conditions of Section 8.

"12. All reports upon charges or complaints shall be accompanied by the record of testimony, and all papers relating to the case.

"13. The Committee of Investigation may, upon the motion of any of its members, and without any charge or complaint having been preferred, proceed to investigate as upon charges or complaints any facts touching the professional conduct of any member of the bar, or of any person connected with the administration of justice, and proceed in regard to the same in all respects as if a charge or complaint had been made as hereinbefore provided."

LEGAL ITEMS.

The Governor of Florida favors the abolishment of the system of trial by jury.

The National Prison Association have memorialized Congress for aid in procuring complete statistics of crime and its causes throughout the United States. The next annual meeting of the Association will be held at St. Louis.

A memorial, signed by nearly all the leading lawyers of Salt Lake City, asking for such legislation as will enable the courts instituted by organic acts in Utah, to perform their duties, has been forwarded to the President.

The Milwaukee *Sentinel* says, that in the private political circles of Washington the name of Hon. Matt. H. Carpenter is mentioned in connection with the office of Attorney-General of the United States, but it does not believe he would accept the place if offered to him.

Indiana has enacted a new divorce law which reduces the number of causes for divorce to seven: adultery, impotency, three years' abandonment, cruel and inhuman treatment, failure of the husband for two years to provide for the support of his wife, three years' habitual drunkenness, and conviction of any infamous crime.

Legal Items.

A bill before the Michigan Senate provides that no opinion formed or expression uttered by a juror, upon other than personal knowledge of the facts, shall be a sufficient ground of challenge, if the juror will declare on oath that he believes he can render an impartial verdict according to the evidence submitted on the trial. The number of peremptory challenges is increased to twenty on each side.

Mr. Archibald, British consul-general at New York City, was formerly Chief-Justice of Newfoundland.

Hon. Herschel V. Johnson has been made a Georgia judge.

Judge Caron, of Toronto, has accepted the lieutenant-governorship of Quebec, on condition that on the expiration of his term of office he shall receive his pension as judge.

Lerdo de Tejoda, the new President of Mexico, is a lawyer forty-five years of age, possesses great energy and courage, and is also notably eloquent as an orator.

About seventy of the most distinguished members of the bar of the Supreme Court of the United States have addressed a letter to ex-associate Judge Nelson, expressive of their deep regret that they are compelled to part with him, paying high compliment to his learning, sagacity, impartiality, and integrity as a justice.

Soon after Mr. Curran had been called to the bar, on some statement of Judge Robinson's, the young counsel observed, that "he had never met the law, as laid down by his lordship, in any book in his library." "That may be, sir," said the judge; "but I suspect that your library is very small." Mr. Curran replied, "I find it more instructive my lord, to study good works than to compose bad ones.* My books may be few; but the title-pages give me the writer's names, and myself is not disgraced by any such rank absurdities that their very authors are ashamed to own them."

"Sir," said the judge, "you are forgetting the respect which you owe to the dignity of the judicial character." "Dignity!" exclaimed Mr. Curran; "My lord, upon that point I shall cite you a case from a book of some authority, with which you are perhaps not acquainted."

He then briefly recited the story of Strap, in RODERICK RANDOM, who, having stripped off his coat to fight, intrusted it to a by-stander. When the battle was over, and he was well beaten, he turned to

* Judge Robinson was the author of many stupid, slavish, and scurrilous pamphlets, and by his demerits, raised to the eminence which he thus disgraced.—*Lord Brougham.*

resume it, but the man had carried it off. Mr. Curran thus applied the tale: "So, my lord, when the person intrusted with the dignity of the judgment-seat lays it aside for a moment to enter into a disgraceful personal contest, it is in vain when he has been worsted in the encounter that he seeks to resume it—it is in vain that he tries to shelter himself behind an authority which he has abandoned." "If you say another word I'll commit you," replied the angry judge; to which Mr. Curren retorted, "If your lordship shall do so, we shall both of us have the consolation of reflecting, that I am not the worst thing your lordship has committed."

When Mr. John Clerk (afterward Lord Eldin) was admitted to the bar, he was remarkable for the *sang-froid* with which he treated the judges. On one occasion a junior counsel, on hearing their lordships give judgment against his client, exclaimed that he was "surprised at such a decision." This was construed into a contempt of court, and he was ordered to attend at the bar next morning. Fearful of the consequences, he consulted his friend, John Clerk, who told him to be perfectly at ease, for he would apologize for him in a way that would avert any unpleasant result. Accordingly, when the name of the delinquent was called, John Clerk arose, and coolly addressed the assembled tribunal: "I am very sorry, my lords, that my young friend has so far forgotten himself as to treat your honorable bench with disrespect. He is extremely penitent, and you will kindly ascribe his unintentional insult to his ignorance; you must see at once that it did originate in that. He said that he was surprised at the decision of your lordships. Now if he had not been very ignorant of what takes place in this court every day—had he known you but half so long as I have done—he would not be surprised at any thing you did."

We have received Dr. Ray's "Contributions to Mental Pathology," and will notice the work in our next number.

THE

AMERICAN LAW RECORD.

VOL. 1. APRIL, 1873. No. 10.

THE AUTHORITY OF THE DECISIONS OF THE COURTS IN THE UNITED STATES. *

ONE of the greatest preservatives of the liberty of the subjects of a State is the absolute independence of the judicial officers of the State, and this has been long recognized in this country. Our Judges, once appointed, hold their offices during good behavior, and are removable only on the address of both Houses of Parliament. Such independence enables the Judges to give their decisions uninfluenced by fear of removal or by desire of gaining the favor of political parties. They give no respect to individuals, because from individuals they have nothing to expect, nothing to dread. It is this that gives weight to their opinions, and causes them to be looked upon as the true exponents of the law. Can it be said that all the courts in the United States are entitled to the same respect?

Although it is becoming a much more common practice in our courts to cite American decisions than it was a few years back, still it frequently happens that our Judges in the Superior Courts are not very willing to accept the decisions of American courts as authorities on questions of law argued before them, with one notable exception, namely, the decisions of the Supreme Court of the United States. The reason for this hesitation is apparent. In England there is a very prevalent notion that almost all the Judges in the United States, except those of the Supreme Court, are elected by the people for a term of years only. This, in the opinion of the English Judges and lawyers, is calculated to diminish the authority of their decisions on the ground that a Judge, the tenure of whose office depends upon the will of an electoral body, can not be free from extraneous influences; political pressure can be brought to bear upon him

* From the *London Law Times.*

and, it is to be feared, pressure of even a more demoralizing nature. This is not only the opinion of Englishmen but of many Americans of the highest intellect. ALEXANDER HAMILTON, whose name is well known throughout the United States, writing in the *Federalist*, says: "The standard of good behavior, for continuance in office of the judicial magistracy, is certainly one of the most valuable improvements in the practice of Government. . . Nothing can contribute so much to its firmness and independence as permanency in office. . . . And next to permanency in office, nothing can contribute more to the independence of the Judges than a fixed provision for their support." In Story's Commentaries (No. 1626) this independence is pointed out with special commendation. From these considerations it is evident that wherever Judges are appointed by an executive to hold their offices during good behavior, their decisions are entitled to be treated with respect and as of authority, so long as there are no other circumstances, such as an undeveloped system of jurisprudence or lack of means of acquiring knowledge of the law, to detract from the value of those decisions. In a country like the United States public opinion is likely to secure the appointment of Judges from among those men best qualified for their posts, wherever their tenure of office is permanent. In considering, therefore, what decisions in courts of the United States are to be treated as of authority in this country, without question and without the necessity of examining minutely the reasons given for such decisions, it may be taken as a rule that those courts whose Judges are appointed during good behavior are entitled to the most weight in this country. We have no wish to say, however, that there may not be Judges in the United States, who are elected periodically to their offices, whose opinions are not most valuable, but, considering the enormous number of State Courts with elected Judges, and the unfortunate instances of the behavior of Judges of those courts in the administration of the law, it is impossible for lawyers in this country not to draw a distinction between the two classes of Judges. Another very prevalent idea in this country is that the Federal Courts have power to deal only with constitutional questions or points of law connected in some way with treaties or statutes. Unfortunately but little is known in this country of the constitution of the various courts in the United States, and it is proposed to give a short notice of those courts which are, according to the rule stated, entitled to be treated with the utmost respect in this country. It would be a difficult task to deal minutely with their jurisdiction; but still, with a view of showing that almost every question that can come before our Superior

Courts is also within the jurisdiction of such courts as we have mentioned, it may be useful to point out in a general way the nature of these powers.

The courts in the United States are composed of two separate and distinct branches, frequently exercising the same jurisdiction over the same area. The first are the Federal or national courts, which derive their authority from the Constitution of the United States, and have jurisdiction in certain matters over the whole of the States forming the United States; the second are the State Courts, having a separate existence in each several State, and depending upon the constitution of each State. The Judges of the Federal Courts are all appointed during good behavior by the President, with the consent of Congress. The Judges of the State Courts are, as a rule, elected either by the people or the assemblies for various terms. In New Hampshire, Massachusetts, Delaware, and Florida, they are appointed during good behavior; in Rhode Island, when appointed, they are removable on a vote of the majority of both Houses of Assembly; in Georgia they are appointed by the Governor, but are removable on the address of both Houses of Assembly, or on impeachment and conviction; in the District of Columbia, the seat of government of the United States, they are appointed by the President of the United States during good behavior; the courts of this last District are rather Federal than State Courts. The State Courts have jurisdiction in suits of every nature, except where their jurisdiction is taken away by express enactment of the United States Legislature. The jurisdiction of the Federal Courts is defined by various enactments of the United States Legislature, and as it is rather with these latter courts that the present notice is concerned, from the nature of their constitution, an attempt will be made to show over what questions their power extends.

By the Constitution of the United States (Art. III., Sec. 1) the judicial power of the United States, that is, of the Federal Courts, "shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. The Judges both of the Supreme and inferior courts shall hold their offices during good behavior." By Sect. 2, "The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different

States, between citizens of the same State claiming lands under grants from different States, and between a State or the citizens thereof, and foreign States, citizens, or subjects. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court sha'l have *original jurisdiction*. In all other cases before mentioned, the Supreme Court shall have *appellate jurisdiction*, both as to law and fact with such exceptions and under such regulations as Congress shall make." By Art. XI., amending the Constitution, "the judicial power of the United States shall not be considered to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Under the powers thus given by the Constitution, Congress constituted three courts—the Supreme Court named in the Constitution, and certain inferior courts, the Circuit Courts, and District Courts. The Supreme Court has had a varying number of Judges, but by an Act passed on April 10, 1869 (41st Congress, sess. 1, c. 22), s. 1, it now consists of a Chief Justice and eight associate justices, any six to form a quorum. The Circuit Courts for the different districts, formerly under the Judiciary Act 1789 (c. 22, s. 1), and Acts passed in 1793 (c. 22, s. 1), and in 1802 (c. 31, s. 4), consisted of a Justice of the Supreme Court, and the District Judge of the district, the judgment of the court being in accordance with that of the Justice of the Supreme Court; considerable doubt existed at one time as to whether Congress had power to make the Justices of the Supreme Court act as Circuit Judges, and as to whether they ought not to appoint Circuit Judges (See *Stuart* v. *Laird*, 1 Cranch Rep. 299; 1 Cond. 316). Now, however, by the abovementioned Act of 10th April, 1869, s. 2, a Circuit Judge has been appointed for each of the nine judicial circuits, with the powers of the Justice of the Supreme Court within his circuit; and circuit courts are to be held by the Justice of the Supreme Court, or by the circuit Judge, or by the District Judge sitting alone; or by the Justice of the Supreme Court and the circuit Judge sitting together, the Justice of the Supreme Court presiding; or in the event of the absence of either of them, the other (who shall preside) and the district Judge; and (sect. 4) it is the duty of the Justice of Supreme Court to attend at least one term of the circuit Court in each district of his circuit during every period of two years. The circuit of each Justice of the Supreme Court, and each circuit Judge extends over several districts. The District Courts are held by one district Judge for each district, who is compellen to reside in the district for which he is appointed. (Judiciary Act 1789, c. 20, sect. 3.)

These districts consist either of the whole of a State, or of parts of a State divided into Northern, Southern, Eastern, and Western districts, as the case may be, and there are District Courts having jurisdiction over every State of the Union. Here, then, there is a complete system of courts whose Judges are appointed by the highest authority of the United States, and hold their offices apart from popular will. It only remains to show that these courts have jurisdiction in all matters which come before our courts in order to prove that, being competent to deal and dealing with all questions arising in a commercial country bearing an intimate resemblance to ours in its laws and customs, their decisions are entitled to respect at our hands.

It will, perhaps, be more convenient to deal with the lowest court first, and, in so doing, we shall only deal with the civil jurisdiction, omitting the criminal as apart from our subject. The District Courts "have *exclusive original* cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and shall also have *exclusive original* cognizance of all seizures on land, or other waters than as aforesaid made, and of all suits for penalties incurred under the laws of the United States. And shall also have cognizance *concurrent with the courts of the several States, or the Circuit Courts*, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations, or a treaty of the United States. And shall also have cognizance, *concurrent* as last mentioned, if all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum of $100. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls:" (Judiciary Act 1789, c. 20, s. 9). They have also an inherent jurisdiction in all matters of prize and capture at sea: (*Glass* v. *Sloop Betsey*, 3 Dallas, 6; *Bingham* v. *Cabot*, 3 Dallas, 19; *The Amiable Nancy*, 3 Wheaton, 546; *The Emulous*, 1 Gallison, 563, 575,) as well as by statute (Act of 1812, c. 107, s. 6); both on the high seas and inland waters (Act of 1818, c. 88, s. 7); and in cases of *quasi* admiralty jurisdiction arising in the inland lakes of the United States they may exercise the ordinary admiralty jurisdiction (Act of 1845, c. 20). The Circuit Courts have *original* cognizance *concurrent* with the courts of the several States, of all suits of a civil nature at common law or in equi-

ty, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between the citizen of the State where the suit is brought and the citizen of another State;" and "if a suit be commenced in any State Court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court," the defendant may by petition to the State Court have the cause removed into the District Court (Judiciary Act 1789, s. 12), and this removal is of right (*Gordon* v. *Longest*, 16 Peters, 97, 104); similarly, any cause where citizens of the same State claim land under grants from different States may be removed into the Circuit Court. (Judiciary Act 1789, s. 12.) The Circuit Courts have also cognizance in cases of patents and copyright: (Act of 1819, c. 19; Act of 1836, c. 357, s. 17, Act of 1842, c. 263, s. 5). The Circuit Courts have also appellate jurisdiction from the District Courts. Final decrees and judgments in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed or affirmed in a Circuit Court held in the same district upon a writ of error, but there can be no reversal on a writ of error for error for ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such a plea to a petition or bill in equity, as it is the nature of a demurrer, or for an error in fact: (Judiciary Act 1789, c. 20, s. 22.) From final decrees of a District Court in cases of admiralty and maritime jurisdiction, when the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, there is an appeal to the next Circuit Court held in such district (Judiciary Act 1789, c. 20, s. 21), and also an appeal from all final judgments and decrees in any of the District courts where the matter in dispute exceeds the sum or value of fifty dollars to the next Circuit Court held in the district) Act of 1803, c. 40). The original jurisdiction of the Supreme Court has already been stated. It has, moreover, exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States, or aliens, in which latter case it has original but not exclusive jurisdiction; and has exclusive jurisdiction of such suits or proceedings *against* ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other

public ministers, or to which a consulor vice-consul shall be a party: (Judiciary Act 1789, c. 20, s. 13). The Supreme Court moreover, has power to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty and maritime jurisdiction: (See *United States* v. *Peters*. 3 Dallas, 121, 1 Cond. 60; *Bonis* v. *Schooner, James and Catherine*, Baldwin, 544, 563); and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States: (Judiciary Act 1789, c. 20. s. 13). The appellate jurisdiction has already been pointed in Article 3 of the Constitution before set out, and the way in which it is exercised is prescribed by Act of Congress. It has appellate jurisdiction from the Circuit Courts and from the courts of the several States in certain cases: (Judiciary Act 1789, c. 20, s. 13). Final judgments and decrees in civil actions and suits in equity, in a Circuit Court, brought there by original process or removed there from courts of the several States, or removed there by appeal from a District Court, where the sum in dispute exceeds two thousand dollars, may, upon a writ of error, be re-examined and reversed or affirmed in the Supreme Court, subject to the same limitations as writs of error in the Circuit Courts (Judiciary Act 1789, chap. 20, sec. 22), and writs of error also lie to the Supreme Court from all judgments of a Circuit Court in cases brought there by writs of error from the District Courts with the same limitations. (Act of 1840, chap. 43, sect. 3.) From all final judgments and decrees rendered, or to be rendered in any Circuit Court or in any District court acting as a Circuit Court in any cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, an appeal is allowed to the Supreme Court (Act of 1803, chap. 40, sect. 2). An appeal or writ of error lies to the Supreme Court from the Circuit Courts in copyright and patent cases (Act of 1819, c. 19; Act of 1836, c 357, sect. 17); an appeal lies in case of *habeas corpus* (Act of 1842, c. 257). From the final decree or judgment in any suit in the highest court of law or equity in a State in which the decision in the suit could be had, where is drawn in question the validity of a treaty, a statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties and laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, of a treaty, or statute of, or com-

mission held under, the United States, and the decision is against the title, right, privilege or exemption, specially set up by either party, a writ of error lies to the Supreme Court (Judiciary Act 1789, c. 20, s. 25).

We have now set out the jurisdiction of the several Federal Courts so far as is necessary for our present purpose, and in doing so have endeavored, for the sake of greater accuracy, to follow the words of the various Acts conferring that jurisdiction. The jurisdiction of the State Courts in all civil matters, save such as are expressly excepted, is concurrent and co-extensive with that of the Federal Courts. A perusal of the above statement will be sufficient, we think, to show that there exist in the United States a number of courts which possess jurisdiction over every matter—bankruptcy, divorce, and probate only excepted—that can come before our own courts, and which possess those qualifications which confer upon the judgments of our courts the authority universally yielded to them. When it is remembered that the Federal Court have jurisdiction in all cases arising between citizens of different States, it will be seen at once that almost every question of law may arise, and be decided by the Federal Courts. The opinions, then, of the Judges of these courts may be accepted in this country, not as binding, it is true, but as of the highest authority, and the same may be said also of the Judges of those few States we have before enumerated, making allowance for the fact that the better lawyers would naturally be chosen for the Federal Courts. It is not in any way our intention to depreciate the decisions of the State Courts; but our object has rather been to point out, as far as our limited space would allow, the value of, and wide field covered by, the decisions of the Federal Courts, about which there is little accurate knowledge in this country.

PARTNERSHIPS AND TRUSTS.

In the course of the last session there came before the House of Lords a case on appeal from a decision in the Court of Chancery, which raised a most important and very perplexing question. Of all questions those are the most perplexing which start, or appear to start, from an acknowledged rule, one, in short, which is looked on as a kind of legal truism, and yet is all at once disputed and denied. In legal discussions, as in other matters, the effect of a startling surprise is great. The mind has long reposed on something which appeared to be substantial, and finds itself suddenly aroused by a sudden warning that the supposed

substance is but a dreamy unreality. The discovery is neither flattering to the intellect nor the feelings.

This perplexing and important question arose in the case of *Knox* v. *Gye*, the circumstances of which, and the points that appeared properly to present themselves in it for consideration, were as little interesting, "though not to the parties themselves, at least to the by-standers," as any could be. Mr. Knox filed a bill (which was afterward amended) in which he said that he had been a partner with Mr. Gye in the adventure of the Royal Italian Opera, and relied on the terms of one letter to show the creation of the partnership, and on many others to evidence the continuance of its existence, and by his bill he asked for partnership accounts. Mr. Gye denied the partnership, and the law lords did not think that its existence was, as a matter of fact, established. But connected with this, which had been the main question in dispute between the parties, was another, which gave rise to the great legal difficulty that divided the opinions of their lordships at the time, and which remains unsettled. It occurred in this way. A Mr. Thistlethwayte had advanced to Mr. Gye a sum of money in a form and under circumstances which undoubtedly made him a partner in the concerns (as they may for distinction sake be called) of the Old Royal Italian Opera at Covent Garden. By will he divided all he was entitled to in respect of this advance between Mr. Knox and Mr. Gye. He was an officer in the army, was ordered out to the Crimea, died there, and finally probate of his will was taken out by Mr. Knox. Having thus become executor of the deceased partner, Mr. Knox demanded accounts of the partnership. The first point to be considered was whether the Statute of Limitations could be made available in resisting a demand for an account in respect of this matter. This point depended, under the particular circumstances of this case, on the question whether, on a partnership dissolved by the death of one partner, the survivor became a trustee for his deceased partner's share of the property and profits of the concern, so as to be liable in equity to be called on to render an account to the representatives of the deceased partner. If so, the statute would not apply. Mr. Thistlethwayte died in December, 1854, the first bill was filed in April, 1861; it was amended in 1864, when the demand on account of the Thistlethwayte advance became the prominent matter of the suit. The question as to the Statute of Limitations was complicated with this peculiarity that even if the statute did apply as to the subject-matter of the amended bill, there was one circumstance which might prevent its application. Mr. Gye, out of the money advanced by Mr. Thistlethwayte, had paid a sum of 5,000*l.* to a Mr. Hughes, in respect of an agreement relating to Her Majesty's Theatre. This agreement had never been performed. After many delays, Mr. Gye brought an action to re-

cover back the 5,000*l.*, obtained a verdict and judgment for the full amount, but finally consented to accept 2,500*l.* as a compromise. The sum of 2,500*l.* was received some time after Mr. Thislethwayte's death, but not long before the filing of the amended bill. This was clearly a receipt of money arising out of what had been a partnership transaction. It was insisted that the receipt of this money took the case out of the Statute of Limitations, but it appeared to be thought by the lords that it did not, for that if an account was demandable, and if such account had been rendered, and compromised in it an item which was made the subject of settlement between the two accounting parties, the mere receipt of the money afterward, a receipt wholly unexpected, would not have the effect of opening up the whole account.

It is needless here to go into the arguments of counsel; they will no doubt duly appear in the authorized reports, and they were summed up, and the essence of them given, by Lord Westbury and the Lord Chancellor, Lord Hatherley, when the opinions of those two noble and learned lords came into direct conflict on the main question in the case.

As to the bar to a remedy presented by the Statute of Limitations, there seemed to be little doubt among the lords that equity acting in analogy to law would imply the bar in cases where, if the proceeding had been at common law, the statute would authoritatively impose and enforce it. But there is in equity the doctrine of Trusts, and if the surviving partner was subject to a trust for the benefit of the estate of the deceased partner, then the bar would not exist.

Here the great divergence of opinion between the two noble and learned lords began. Lord Westbury denied the existence of a trust as between a surviving and a deceased partner, on arguments of which the following may be taken as a summary. The representative of a deceased partner has no specific interest in, or claim upon, any particular portion of the partnership estate. The whole belongs to the surviving partner. The right of the deceased partner's representative is limited to having an account of the property, and receiving his clear portion of the balance. But this right is a legal right, and not one arising out of an equitable trust. For the surviving partner is not a trustee either expressly or by implication. He is subject to legal obligations, which are capable of being enforced, but there is no trust. As an illustration of the loose manner in which the word trustee was used, the case of an agreement for the sale of a house was referred to, and the judges of a court of a common law were quietly indicated as having been for a time misled by the representation that the vendor was a trustee for the purchaser, which was quite wrong, since he could only be called a trustee by a metaphor, not being, as he ought to be, "a complete trustee by declaration." In fact, his only "trust" was that he was bound to per-

form the agreement between himself and the purchaser. It was exactly the same between the surviving partner and the representatives of the dead partner; the liability was limited to the discharge of the obligations of the partnership. That liability might be barred by the lapse of time, though as between a declared trustee and his *cestui que trust* time would not run. The result was that his lordship declared that there was nothing for discovery by account between the surviving partner and the representative of the deceased partner; there were legal rights and duties, and no more.

Such was the reasoning of Lord Westbury, one of the clearest headed of lawyers, and one whose favorite habit it is, not merely to apply past decisions to passing cases, but to seek for and to declare the principles on which they are, or are not, applicable. At first sight, the reasoning seems unanswerable. Whether it is so or not remains to be considered. But before going into any argument upon its conclusiveness, it will be proper to see what was the answer presented to it by Lord Chancellor Hatherley, who "protested" against it as erroneous.

The Lord Chancellor first declared that he had always thought it to be an "elementary principle" that the right and the power of partnership which survive, at law, to the surviving partner, carry to him the whole interest of the assets, and vest the whole property of the partnership in him; that this involved in it the doctrine of a trust, so that, having the sole control of what had been the joint property, he was to be treated as a trustee in exercising that control. His lordship illustrated this position by referring to the different means which courts of equity would employ; such, for instance, as a sale of every portion of the partnership property to enforce honest dealing between a surviving partner and the estate of a deceased partner, and to enable a court of equity to apply the property according to the equitable rights between the partners.

The reasoning on each side is strong, and therefore, to an impartial mind, perplexing. It is impossible not to feel that the two arguments show the want of some one cardinal rule which shall determine on which side absolute correctness is to be found. With two such powerful and experienced champions in argument, holding exactly opposite opinions, it becomes any one to be cautious in pretending to pronounce judgment. But it may be permitted to any one to suggest difficulties to one side or the other, or to fancy means by which any difficulties may be removed. After a careful consideration of the whole case, it seems impossible to get out of this new complication of principle and practice except by actual legislation. "Judge-made law," as Bentham happily termed it, will not alone suffice—to say nothing of the fact, that if judge-made law is to decide the question, there must be several unhappy victims of this doubtfulness as to the law, before a final and conclusive decision can be pronounced.

And the legislation appears the more necessary from a consideration of practical difficulties in the way of any ingeniously contrived remedies. The fact that a sum of money, undoubtedly bearing the character of partnership assets, had been received by Mr. Gye within six years of the filing of the bill, has already been mentioned. What was its effect, or want of effect, in this case, has also been mentioned. Could it have any effect, under any circumstances, where an account had already been settled between the parties? There appeared to be, in the judgment of Lord Chelmsford, a slight suggestion, that whether or not it could be made the subject of a proceeding in equity for an account, a share of this money might have been recovered by an action at law; and perhaps this is true. The money was received in virtue of a legal right. That right was inseparably connected with, and sprang out of, the character of Mr. Gye as a partner with Mr. Thislethwayte; and an action of assumpsit (essentially in its origin an equitable action) might thereby become maintainable in the well-known form of money had and received. In many circumstances a man, by performing an act, takes upon himself a duty, and must take it on himself all the more strongly if the act could only properly be performed by him in a particular character, which character would fix liability on him. Money had and received would, therefore, seem to be the proper remedy, and the fitting one, to recover a share of such money for the benefit of the deceased partner's estate. If so, that portion of the partnership assets could have been recovered by law; and to that extent the representatives of a deceased partner could not be entirely unprotected. But even then the receipt of the money by the surviving partner, and the recovery of it in this way by the representatives of the deceased partner, would not have opened the whole past account. At law, it would have been a particular act, bringing with it a particular liability, to a particular remedy, nothing more. And as to that the question would arise whether such a particular remedy could be allowed, since it would operate practically as a partial repeal of the statute. For if an action could be brought in respect of the receipt of one sum of money, twenty might be brought in respect of the receipt of twenty sums of money, all received at different times, and every one of them operating to extend the time of limitation, and therefore operating so far to defeat the statute. On the other hand, if it could be treated in equity as one individual act in the discharge of a general trust, it might have a different and more permanent operation.

Assuming that in the particular case assumpsit might have been maintained, the representatives of the deceased partner would, of course, not have been entirely without remedy, but the remedy would only have been partial, since the character of a trust would not

have been attached to it. But now, turning from law to equity, and assuming that there is no fiduciary relation between the representatives of partners, what is the result? Dismissing entirely the case of *Knox* v. *Gye* from consideration, and taking an imaginary case to test the matter, let the principle of the relative rights and liabilities of a surviving partner, and the representatives of a deceased partner, be considered. It seems hardly possible to doubt, that if there is no fiduciary relation between these parties, a good deal of injustice may, and with perfect impunity, be committed. If money should be actually received by the surviving partner, it may, for the purpose of argument, be assumed that the proper share of it could be recovered from him in the form of money had and received. But suppose that to be so, the remedy would be incomplete. Should the surviving partner wilfully refuse to enforce payment from a debtor to the partnership (and many cases may be imagined in which he would have an actual interest in refusing to enforce it), what then? A surviving partner can alone collect the assets. If he will not collect them, is there any form of process at law by which he can be compelled to perform the duty? If there is not, what becomes of the interests and of the needs of the representatives of the deceased partner? These unfortunate persons might stand in the posture of fixed entreaty, but in vain; without the power to enforce their rights, they might proclaim those rights and entreat their enforcement as they pleased, but the sound of their claims would be unheeded, and their entreaties set at naught. Would it be just that it should be so? No one will answer that question in the affirmative.

If the law is, as there is much reason to suspect it is, thus defective at present, its defectiveness should at once be remedied. If a surviving partner is, as he is, the only person whom the law recognizes as the person entitled to collect the partnership assets, there should be means for compelling him to collect, and, after collecting, fairly and honestly to distribute them. The law confers on him an exclusive right; it should bind him by a corresponding liability. In this great commercial country there must be cases, of daily occurrence, in which the existing questionable state of the law on this subject must be of the highest interest to thousands. There should be no delay in setting the matter right. Party feeling has nothing to do with it; personal opinion as to its existing deficiencies ought to have as little. The fact of the difference of opinion set forth shows that the law is in a state of unsuspected uncertainty—of uncertainty on a most important point, and one likely to be of daily recurrence. That uncertainty should at once be remedied; and it would be a graceful thing on the part of these two noble and learned lords who differ as to what the law really is, if they would join their efforts to pass a measure to make it what it should be.

A very short Bill, not at all difficult to frame, would correct the existing evil; and there would be no trouble in passing it.

CONTEMPT OF COURT.

By W. F. Finlason.

The recent proceedings in the Court of Queen's Bench involved two questions of constitutional law of very great interest, and no slight importance. Unhappily, however, these questions were not *raised*, and hence, as a legal contemporary very justly observes, there is the more occasion that they should be discussed in legal journals. The questions were these: Whether a court of law can summarily fine and imprison for a constructive contempt? And whether privilege of Parliament is a protection against commitment for such a contempt? We propose briefly to discuss both of these questions. And first, as to constructive contempts, by which we mean such acts as are not direct and actual contempts to the court itself, but only indirectly or inferentially so by way of construction. Constructive contempts, like constructive treason, are rather an extension of the true and ancient doctrine of the law. Contempts originally meant actual insults to the court itself, or disobedience to its orders, or obstructing its process. The silly story of Chief Justice Gascoigne, for which there is not any historical authority, related to a contempt of this kind. Such contempts were very frequent in ancient times, and usually involved the exercise of force. They were, therefore, commonly indictable offenses, and if so, were always made the subject of indictment, and tried by a jury,* and even if not indictable, the contempt was the subject of a distinct proceeding by way of a prosecution for contempt, on which there could be such a trial,† unless from the nature of the case this was not necessary, or where there was a confession on record, or it was an act of a suitor, or officer, in a suit before the court.‡ Our ancestors had no idea of an arbitrary power of punishment without trial by jury, unless where the contempt occurred in the presence of the court, or where there was an assault on a suitor or juror in court, or an assault or insult to a judge; and even in these cases, it is to be observed, that if there was an assault, as it would support an indictment, the course was always to *indict* the party. So it was, for instance, in the case reported of the prisoner who threw a brickbat at a judge, and against whom, it is stated, that Nory-at-Arms drew an indictment. It was only in cases of contempt not indictable,

* Liber Ass. 39, 1. † *Ibid.* 41, 30. ‡ *Ibid.* 43, 29.

as of mere obedience to orders of court, or disrespect to its process, that the court interfered summarily by attachment, as the ordinary case of the sheriff delaying, or a suitor obstructing, the process of the court, or against witnesses or jurors refusing to be sworn.* It would be difficult to put a case of a summary punishment of a contempt in a court of law where it was *regularly* punishable, except in case of a necessity arising from an outrage on the court, or an actual obstruction or abuse of its process. In the Star Chamber no doubt numerous instances can be found of contempts arbitrarily punished on information without the intervention of juries; but these were all unconstitutional, for, on the ground of necessity, of course, no summary proceedings could be justified, except in the court itself, to which the contempt was offered. On the abolition of the Star Chamber a large and undefined portion of its criminal jurisdiction, so far as it was legal and constitutional, passed to the King's Bench, and especially the jurisdiction by information.

This, however, as Lord Coke declared, was utterly illegal without a trial by jury, and was of very doubtful legality even with such a trial, for it dispensed with a grand jury. Hence, Lord Hale emphatically declared that if ever the legality of criminal informations should be inquired into, they would be found to rest on no sure foundation, and their legality has more than once been questioned both in the courts of law and in Parliament. They were, however, indirectly sanctioned after the Revolution by the Act which provided that they should *not* be granted except on motion in court, and they became the proper and constitutional means of punishing such contempts as did not require to be *instantly* dealt with. They were far more speedy than indictments. The information could be granted and the party tried all in the same term, and there was therefore now less reason than ever for *summary* punishment of contempt in cases where it was not absolutely necessary. It *was* necessary in most cases of *actual* contempts in courts of law, as obstruction of its progress, for otherwise the proceedings would be interrupted, and the act might not be legally punishable. And the necessity was all the greater in the Courts of Chancery, in which suits went on while the courts of law were not sitting, and which had no regular criminal procedure. Thus it was Lord Hardwicke interfered summarily when, while evidence was being taken in a suit, an attempt was made to deter persons from giving evidence in favor of one of the parties by publications calculated to excite prejudice against him.† In such a case it is obvious that whether or not the language used was action-

* Year-book, 36 Kers. 6; 27 Cary's Reports, 148-161; 4 Coke, 33; 1 Stra 511.

† *Roach* v. *Garvan*, 2 Atkin's Reports.

able or indictable, it would have been idle to allow it to have its effect upon the suit, and there was an evident necessity for prompt and summary action. No case can be cited at law or equity in which a summary course has been taken where there was not the same reason of *necessity*. On the other hand, there is abundant authority in support of the contrary view, that the scope of *summary* procedure is strictly limited by necessity. Ever since the Revolution criminal information has been considered the proper course for a contempt, unless there was such a *necessity* for immediate summary procedure. And even *that* was considered an extraordinary remedy, and not to be allowed without some reason. Thus, if a party made a false return to a *mandamus*, the course was information.* So if a party published papers calculated to prejudice a trial of a cause.† But even the remedy of criminal information would be granted where the matter was not of importance for public example in an extraordinary manner.‡ Except on special grounds the court would not even allow a criminal information, but that was deemed the proper remedy for a contempt where it did not require *instant* action.

In 1765, indeed, under the influence of strong political excitement, which extended itself to the courts of law, an attempt was made to extend the summary power of the court so as to enable it to punish in an arbitrary manner, by fine and imprisonment, at its pleasure. But the attempt was abortive, and only served to establish the opposite doctrine. An attack had been published on Lord Mansfield, for his conduct in the course of a proceeding in his court. The printer, Almon, was summarily called upon to answer for a contempt, and there was no doubt it was a contempt, and one of a very serious character; but Lord Mansfield did not care to go before a jury, as his conduct was not quite clear in the matter. Accordingly, he desired to punish the printer summarily, and had him brought before the court for the purpose. Sir Eardley Wilmot prepared an elaborate judgment to vindicate this course; but it is remarkable for an entire absence of authority. It rested mainly on the assumption that on the trial of an information for libel the court would decide that it was a libel, and that therefore the accused sustained no prejudice by being deprived of a trial by jury. This, however, was bad law, and ten years later was declared by Parliament to be so. It would seem that the judges of the King's Bench, upon consultation, were satisfied that the proceeding was illegal, for, notwithstanding this elaborate judgment, the proceeding was abandoned; judgment was not adopted or delivered, and it does not even appear that Sir E. Wilmot remained of the same opinion after consultation with his colleagues, for it is stated that his opinion was printed after

* 1 Valkeld, 374. † Lofft. 465. ‡ Lofft. 397.

his death, *without his sanction.** At all events, the proceeding for contempt was abandoned, although the printer was afterward prosecuted for libel,† and Lord Mansfield gratified his revenge by obtaining a verdict against him by an unworthy artifice.‡ On the whole, therefore, this remarkable case established and illustrated the true legal doctrine on the subject. And since that time no instance can be found of a summary procedure for contempt except in case of absolute necessity for instant action. Yet numerous cases occurred of contempt, but they were all punished by criminal information. Thus, in 1795, a gentleman committed a contempt by publishing papers to prejudice the jury in a suit in which he was interested (just as Mr. G. Onslow was accused of doing); but as the *trial had been postponed* (just as in the Tichborne case), and there was, therefore, no need for instant action, the course taken was by information.§ Twenty years after a similar case occurred, and the same course was taken.¶ Some years later, indeed, another case occurred, that of the editor of the *Observer*, who published the evidence in a case, contrary to the direct order of the court, while the trial was going on. This, of course, called for an instant action, and he was fined by the judge for a contempt.**

Several similar cases have occurred at law and equity, but all clear cases of *necessity*. Thus, in the case of Mr. Wellesley, he took away a ward of court with force and violence. He was a member of Parliament; but a committee of the House of Commons reported that it was a case which called for *prompt* and efficacious action,†† and on that ground his committal for contempt was amply justified. So the case of Mr. Lechmere Charlton, who wrote a threatening letter to one of the Masters while the proceedings were actually going on before him. This again was obviously a case which required instant action, for the letter was provocative of a duel, and the Master would have to meet the writer daily.‡‡ Lord Cottenham in that case laid down the true principle, when he said: "The power of summary committal for contempt is given to the courts to secure the due administration of justice."§§ That great judge was far too good a lawyer to imagine that every contempt justified an arbitrary and summary exercise of power. He did not content himself with showing a *contempt:* he also showed from the *nature* of the contempt *a necessity for instant action.* And his course again was approved on that ground by a committee of the House of Commons.

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* Sir Eardley Wilmot's Opinions.

† *Rex* v. *Almon*, 5 Burrows, 26, 86.

‡ *See* Debates on the Libel Bill.

§ *Rex* v. *Joliffe*, 4 Term Reports.

¶ *Rex* v. *Fleet*, 1 B. & Ald.

** *Rex* v. *Clements*, 4 B. & Ald.

†† *In re Long Wellesley*, 2 Russell & Mylne.

‡‡ Charlton's case, 2 Mylne & Craig.

§§ *Ibid.*

It need hardly be pointed out how utterly unlike any of these cases was that of Mr. Onslow and Mr. Whalley, who were punished summarily for observations on the evidence in a case *already heard*, and on the very ground that it was substantially the same as that which was to be heard; so that there could not be any *prejudice*, the evil evidence having all been published to the world already, and the future trial being three months distant, so that there was ample time for criminal information; yet they were fined and threatened with imprisonment.

This brings us to the *second* head of the subject: the privilege of members of Parliament. This was laid down by a solemn judgment of the Court of Common Pleas, in the time of Lord Camden, in the case of Wilkes.* The privilege, declared the court, is to free from arrest "except in case of treason, felony, or actual breach of the peace," which is explained by Hawkins to mean riot and assault, but which might include other cases, as a rescue, or a forcible abduction of a ward. However, the court discharged Wilkes on a *habeas corpus*, as he was shown to be a member of Parliament, although the warrant was good enough on the face of it, as against any one *not* a member; because it did not show a good cause for detaining a person who *was* a member. No doubt both Houses resolved that privilege of Parliament did not extend to a *seditious* libel;† but in the first place that was a party vote, protested against by Lord Chatham and the most eminent constitutional statesmen of the time; in the next place, it did not in the least affect the legal force the judgment; and lastly, it does not at all affect the present question, for no contempt is likely to be a *seditious* libel. No doubt in another case arising out of Wilkes's, the case of Crosby, the court held that on a committal of a *member* for contempt, they could not examine into the cause of it,‡ but that was the *converse* of the other case, for, as a member, he was necessarily subject to the authority of the House, and liable to a committal for contempt of the House. And so in Burdett's case.§

It is to be observed, however, that the warrant in that case recited not merely a contempt, but the cause and character of the contempt (signing a warrant of commitment of a messenger for executing a warrant of the Speaker). But as it did not appear that it was *not* a contempt of which the House could take cognizance, and there was neither a *plea* to the return, as perhaps might have been, nor affidavits showing that the act adjudged a contempt was legal, the court could not but declare the custody legal. Neither in that, nor in any other case, how-

* *Rex* v. *Wilkes*, 2 Wilson's Reports, 151.

† Adolphus's "History of England," Vol. 1.

‡ The case of Crosby, 3 Wilson's Reports, 188.

§ 1 Dow's Reports, 168.

ever, has the authority of Wilkes's case been shaken; and, on the contrary, it has been repeatedly confirmed. Thus, in Wellesley's case, although, as already showed, there was an actual breach of the peace, yet the House of Commons appointed a committee, and *asserted* their privilege; though they did not think fit to *enforce* it in that case, as they deemed it a case which called for "prompt and efficacious action."* So in Charlton's case, the House equally *asserted* their privilege, though they declined to *enforce* it, because they took the same view as Lord Cottenham of the case; that it *required* the instant and summary exercise of the power of the court.* On the whole, therefore, it may be safely laid down that the *House* would not interpose to *enforce* the privilege in any case in which the summary power of committal had been *necessarily* exercised; and, as already shown, such is the only kind of case in which it could *legally*, or at least constitutionally, be exercised. The privilege may, however, be asserted by the member on a writ of *habeas corpus*, as in Wilkes's case; and that case shows that a warrant, to be good as a *member*, must show a good cause for detaining a *member*; and that is not sufficient that it is good on the face of it as against any other than a member. Now, Lord Brougham admitted, in Wellesley's case, that it is not *every* contempt which will justify the imprisonment of a member. And Wilkes's case and Crosby's both show that the warrant ought to show the *nature* of the contempt, in order to show whether it were such as will justify the committal of a member. In the case of the Sheriffs of Middlesex Lord Denman reprobated the idea of keeping out of the warrant anything that might entitle the party to liberation.† It has been held, moreover, by the Court of Queen's Bench, that upon return to a *habeas corpus* the truth may be shown by affidavit, or plea,‡ so that the nature of the contempt could be shown, even if the warrant would not be bad for not disclosing it. No doubt one court will not examine into the cause of a contempt to another; but this only shows that it will assume a contempt for which that court might ordinarily convict, not that it is a contempt for which it could commit a party privileged from committal, except for contempt of a certain kind. It is to be observed that a proceeding for contempt is not necessarily of a criminal character;‖ but may be purely civil; and Lord Brougham admitted that members are not liable to be committed for merely civil contempts. It appears to follow that a warrant of commitment against a member would be bad which did not disclose a criminal contempt, and one accompanied by force and violence, and amounting to a breach of the peace.¶ It is to be added, the Lord Chief Justice, in some observations he made on

* 2 Russell & Mylne.
† 11 Ad. & Ellis.
‡ *In re Watson*, 9 A. & E. 731.
‖ *Cobbett* v. *Slowman*, 4 Exch. Rep. 547.
¶ 2 Mylne & Craig.

the case, admitted the privilege, though he relied on the *House* not enforcing it. But if the privilege exists, it is the privilege of the member, and as it is a privilege against arrest, except for certain causes, such causes must be shown, and a mere allegation of contempt would *not* show it.—*London Law Times.*

SUPREME COURT OF NEW HAMPSHIRE.

TO APPEAR IN VOL. 51, N. H. REP.

COCHECO MANUFACTURING CO. *v.* STRAFFORD.

On a petition to abate taxes assessed by the selectmen of a town, there is no right to a trial by jury, but the court in such case may, in its discretion, send an issue to the jury.

When the valuation of a water power is in question, it would ordinarily be a proper exercise of discretion to send the case to commissioners.

The owner of the land at the outlet of a lake or pond is the owner of the water power furnished by that stream, as an incident to the land, but he is not in consequence the owner of the bed of such lake or pond, or of the land on its borders, merely because he has flowed it for twenty years; and he is not liable to be taxed for either the bed of the lake, or the land so flowed on its borders.

Where the value of the water power furnished by such lake is greatly enhanced by a dam and excavations at the outlet, converting it into a reservoir for mills twenty miles below, the water power, with the land to which it is attached, is still real estate in the town where the outlet is situate, and is taxable there at its fair value, in its improved state, for any purpose for which it is or may be applied, even although such improvements were made by the owners of those mills, and for use there.

In the valuation of those mills for the purpose of taxation in another town, the increased value by reason of such reservoir should be considered,—diminished, however, by the cost of maintaining it, including the taxes assessed in the town where it is situate.

Real estate of corporations, as of individuals, is taxable only in the towns where it is situated.

The petition to abate a tax is an equitable proceeding, appealing to the discretion of the court, and the whole tax will not be abated because there was included in the assessment a small amount of property not liable to be assessed.

Section 4 of chapter 51 of the General Statutes, providing that every person liable to be taxed in any town shall exhibit to the selectmen an account of his polls and estate for which he is taxable there, does not apply to non-residents; and, therefore, an exhibition of such account is not necessary to entitle such non-resident to maintain a petition to abate his taxes.

PETITION, by Cocheco Manufacturing Company, against the town of Strafford, to abate taxes, alleging that the petitioners own certain cotton mills and printery on the Cochecho River, in Dover; that the Bow Pond is the source of one of the tributaries

of that river, and is some twenty miles above their said mills; that the natural area of this pond is about 740 acres; that since 1825 the petitioners have used said pond as a reservoir for their mills at Dover; that by excavations at the outlet they can draw the water of this pond some eight feet below its natural low-water mark, and by a dam there can raise it some twelve feet above the low-water mark; that they have purchased and own lands bordering upon said pond, and which are all, or nearly all, flowed by said dam when full, the lands amounting to 130 acres and 44 rods, which is all they own in said Strafford; that the full cash value, at the relative value of other lands in Strafford, does not exceed $1,000; that they have also bought the right to flow other lands in Strafford by their said dam, to the amount of about 205 acres; that the selectmen of Strafford, in 1870, estimated the company's lands at 1,000 acres in Strafford, and appraised the same at $40,000; and assessed that year against the company taxes to the amount of $936; and the plaintiffs aver that they are liable to be taxed in that town only for 130 acres and 44 rods of land, at a valuation not exceeding $1,000; that by written petition they have applied to the selectmen of said Strafford to abate said tax, which they have neglected and refused to do; and that they have complied with all the other requirements of the law,—and they ask that the taxes so assessed may be abated.

The answer alleges that the natural area of the pond is much more than 740 acres. It admits that since 1825 the plaintiffs have used this pond as a reservoir for their mills in Dover, and says that they have drawn water from this pond to supply their said mills one-third part of the time each and every year.

The answer admits the excavations and raising of the dam, as stated in the petition, the purchase by the plaintiffs of certain lands bordering on said pond, and that some portion of the same, but not nearly all, are flowed during some portions of the year, but not all the year, and that such lands amount to much more than 136 44-160 acres, to-wit, 500 acres; that the lands are not all the lands the plaintiffs own in Strafford, but that they own all the lands flowed by said pond at its natural height, in all, with the lands so purchased, more than 1,000 acres, together with the right to flow other lands as alleged in the petition; —and the defendants say that the plaintiffs own the fee in the 205 acres, that they own the stone dam there, worth $30,000; that in 1870 the selectmen estimated the plaintiffs' lands in Strafford at 1,000 acres about, but did not appraise them at $40,000, or assess a tax upon them of $936, but that they did estimate the real estate of the company, to-wit, the land, dam, and pond, known as Bow Pond reservoir, at $40,000, and upon the

whole assessed said tax,—alleging that the plaintiffs are liable to be taxed for all the land covered by said pond at any stage of the water, and for said pond, or reservoir and dam, as well as for said lands purchased by them, amounting in all to 136 44-160 acres, and the actual value of said land, dam, and pond is fully $100,000.

The answer admits the plaintiffs' application to the selectmen to abate the tax, but denies that they have complied with all or any other requirements of the law; that although the selectmen appointed the house of Robert B. Peavey, in said Strafford, and the 12th day of April, 1870, from ten o'clock A. M. to four o'clock P. M., as the place and time when they would receive an account of the polls and taxable property in Strafford, and gave due notice thereof by posting advertisements at the town-house and at the stores of George C. Peavey and Davis Foss & Son, on March 29, 1870, yet the plaintiffs did not then, or at any time, render any such account of their taxable property: and the answer alleges that the tax is legal and just.

The petitioners moved for the appointment of commissioners to report the facts, and the defendants moved for trial by jury.

Wheeler (and *Goodrich* of Massachusetts) for the petitioners, *Peavey* and *Small* for the defendants.

BELLOWS, C. J.* The first question is, whether the parties have a right of trial by jury. By article twenty of our bill of rights, it is provided that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore otherwise been practiced, the parties have a right to trial by jury. As to the first part of the provision, we have no doubt that under our decisions this proceeding must be regarded as a controversy concerning property within the meaning of this constitutional provision. *Petition of the Mount Washington Road Company*, 35 N. H. 142.

The inquiry then is, whether matters of this sort, at the adoption of the constitution, were determined without a trial by jury; and to answer that question, it is necessary to consider our early legislation on the subject, as well as the nature of the power conferred upon the courts. The earliest authority for the abatement of taxes that we find was in 1719. Province Laws 1771, p. 138. By sec. 6 of that act, selectmen were authorized to assess taxes in their respective towns for such sums of money as may be voted therein, for the support of the ministry, schools, and the poor, and for other necessary town charges, and

*Smith, J., did not sit.

to issue their warrants to the constables, who may make distress, etc., and for want of goods, etc., to seize and imprison the person of the delinquent tax-payer; "and if any person shall think himself overrated. and make it appear to the selectmen, he shall be eased; and if they refuse, such person aggrieved may make his application to the quarter sessions, who are hereby empowered to rectify the same." The court of sessions had been previously constituted. See Province Laws 1771, p. 5, sec. 2. By that law the court of sessions was to be held quarterly at Portsmouth by justices of the peace, or so many as should be limited by their commission to make a quorum, and it was to have cognizance of all matters and things proper to the jurisdiction of said court relating to the conservation of the peace, and the punishment of offenders according to the law and statutes in force within this province. By the same act jurisdiction was conferred upon justices of the peace to the amount of forty shillings. A court of common pleas was also established with a jurisdiction extending to twenty pounds, and a superior court with general jurisdiction in matters exceeding twenty pounds.

By the act of March 19, 1771, same Province Laws, p. 207, these courts are re-established with the same jurisdiction in general, and giving to the court of sessions the power to require money to be raised by taxation for sundry country purposes; to audit and allow accounts against the county, and generally to have charge of the county buildings and other property. By law of February 8, 1791, N. H. Laws, ed. 1805, p. 215, selectmen were authorized to abate taxes assessed by themselves or by their predecessors, if sufficient reason is shown; and if they refuse, the court of sessions, on application, may make such order as justice may require, but limiting it to cases of over-valuation. The law of July 7, 1827, ed. Laws of 1830, p. 559, sec. 14, is substantially like that of February, 1791, except that the court of common pleas takes the place of the court of sessions, and it has the power to abate taxes assessed by way of doomage, for not giving an invoice when the person was unable to give it. By chapter 44 of the Revised Statutes, section 1, selectmen may, for good cause shown, abate any tax assessed by them or their predecessors; and by section 2, if selectmen refuse, the court of common pleas, on application, may make such order as justice may require. The General Statutes, ch. 53, secs. 10 and 11, are the same.

From this view of our legislation, it will be observed that no provision is anywhere made for a trial by jury; and this affords an inference that no such trial was contemplated, especially when it is considered that for a great many years there was on

constitutional provision from which it could be urged that such a trial was a matter of right.

Upon the absence of any provision for a trial by jury in the assessment of damages for lands taken for highways, much stress was laid by the courts in *Backus* v. *Lebanon*, 11 N. H. 19, and in the *Petition of Mount Washington Road Co.*, 35 N. H. 134, and especially in the latter case.

In all these provisions the selectmen have power to abate taxes assessed by themselves or their predecessors for any good cause, and, among others, for inability to pay them—*Briggs's Petition*, 29 N. H. 547; and, of course, no trial by jury before this could have been contemplated. So, too, there is nothing in the character of the jurisdiction originally given to the court of sessions that would encourage the belief that a trial by jury before that court was contemplated. It was to have cognizance of all matters and things proper to the jurisdiction of that court relating to the conservation of the peace and the punishment of offenses; and such seems to have been the jurisdiction of that court in England. 5 Burns's Justice, 194. It seems, indeed, that indictments were then found by a grand jury, and trials had by a traverse jury, even in cases of felony, but it does not appear that it had jurisdiction of civil causes according to the course of the common law. So it appears to have been in the early history of our province, at the time the power to abate taxes was conferred upon it. Looking, then, at the nature of the power to be exercised, involving necessarily much exercise of discretion, and the tribunals to which it was entrusted, we should not be prepared to expect that the questions would be submitted to a jury. Nor are we able to learn of any instance of a trial by jury in such cases. Applications to the courts have not been numerous, and the reported cases are very few—only about half a dozen: in none of these, however, was there a trial by jury,—the facts having been determined by the court.

As the law now stands, the court has substantially the same power as the selectmen, and may abate taxes in whole or in part for inability in the tax-payer,—as in *Briggs's Petition*, 29 N. H. 547,—or on account of insanity. In some cases the court may make an equitable abatement, as in *Perry's Petition*, 16 N. H. 44; and generally the court may exercise the same discretion as the selectmen. Altogether, a large discretion is now lodged in the court, and so large as to be inconsistent with the idea of submitting the entire subject to a jury. Cases may however arise where it would be a proper exercise of discretion to send an issue to the jury, and we think the court would have power to do it,—as was held in *Baker* v. *Holderness*, 26 N. H. 110, in respect to a petition for an increase of damages to land,

assessed by selectmen in laying out a highway. There is nothing in the law that prohibits the submitting of questions arising in such cases to a jury; and, under the general power incident to courts of justice, we think they might do it when the nature of the case made it expedient.

In the case before us, the great question of fact is the value of the property taxed, consisting mainly of a water power; and, under the peculiar circumstances of the case, we think it would not be a sound exercise of discretion to send the question to a jury. In determining the value of the property, there will be necessarily mingled with the matters of fact many questions of law, and it will be convenient to have the report of a competent board of commissioners, placing the whole subject before the court in a way to promote a speedy decision of the cause. Besides, the case is one that peculiarly calls for the selection of persons having knowledge of the value of such kind of property; and, upon the whole, we think it expedient to send the case to a board of commissioners, consisting of three persons, whose acquaintance with such subjects would enable them to form a reliable judgment.

The next question is, Upon what principles shall the value of the property for the purpose of taxation in Strafford be determined, and how far shall the value be affected by the circumstances that the water is used in connection with the mills of the petitioners in Dover? On this point the first inquiry is, What did the petitioners own in the town of Strafford that was subject to be taxed there? It seems that they owned a dam at the outlet of Bow Pond, and a right to maintain it, and to raise the water above its natural height, and also to draw it down below the natural level, in dry times, by deepening the channel of the outlet. It appears that they owned certain lands around the margin of this pond, and the right to flow other lands there.

It seems that the property owned by them is valuable chiefly as a water power, and that the lands owned by them, together with the right of flowing other lands, are valuable chiefly as constituting part of the water power,—an essential part of the reservoir. If the plaintiffs own lands about the pond which are not flowed, or are useful or valuable for purposes other than constituting part of the reservoir, they should, of course, be appraised at their fair value; but so far as they constitute part of the water power merely, they will naturally be included in the general appraisal, and should not be separately appraised. It is true that it is possible that the water power may at some time be abandoned, and the pond drawn down so as to uncover the plaintiffs' lands and make them valuable for other purposes; but so long as the water power is the principal thing, the appraisal

of that will include everything that goes to constitute part of it, and is valuable for nothing else.

With these views, it would seem to be unnecessary to consider whether the plaintiffs have title to the general bed of the pond, or whether they can be rightfully taxed for the right of flowing the lands of others, because we understand that the value of the plaintiffs' property is mainly, if not altogether, in the water power, and that it is likely to remain so.

In respect to the land owned by the company in fee, it would seem that it might be the subject of a separate valuation and assessment, although it was used only for the purpose of flowing. *The Boston Water Power Company* v. *City of Boston*, 9 Met. 119. But in such case the valuation should be made so as to avoid a double assessment; otherwise the excessive tax would be abated on a proper application. This would not, however, apply to the general bed of the pond, or land which the plaintiffs had acquired the right to flow by twenty years' user. By purchasing the land at the outlet of the pond, the plaintiffs acquired the right, as incident to the land, to the use of the water flowing from the pond in its natural state. By the erection of a dam and raising the water above its natural level, and so maintaining it for twenty years adversely, a right would be acquired of flowing the lands on the margin of the pond to the height of such dam. It would be, however, a mere easement in those lands, and the fee would remain in the former owners.

Nothing beyond this would be acquired in respect to the original bed of the pond, whether it belonged to the State or individuals. The use is merely for the purpose of flowing the land; and it is too well settled to need the citations of authorities, that such use is not inconsistent with the retention of the fee by the owner. In grants of mills and the appurtenances, the head of water, and the right of flowing the lands covered by it, will pass, but not the fee in the land so flowed, even if owned by the grantor. Washb. on Easements, 33—35, and cases cited.

So far as respects the bed of the natural pond, the plaintiffs acquired the right to have it flowed by becoming the owners of the land at the outlet, and no one could interpose any objection to such use. This right, then, did not depend upon prescription, but was an incident of the land. For aught we can see, it stands upon the same ground as in the case of a running stream; and in neither case can we perceive any foundation for holding that, by the erection of a dam and the use of the natural flow of a stream, the absolute title to its bed would be acquired by any length of use. As to most of our large bodies of water, like Winnipiseogee Lake, Squam Lake, Newfound Lake, Sunapee Lake, and Massabesic Lake, such dams have been erected at their out-

lets, and used for many years, but without supposing that a title in fee was thus acquired to the entire beds of those lakes; and we are well satisfied that no such position could be maintained.

The great question in the case is, how far the water power furnished by this pond, in its present condition, is to be considered in the valuation of the land owned by the company.

The right to maintain the dam and use the water flowing from the pond is an incident of the land at the outlet, and if used there it should unquestionably be included in the appraised value of the real estate; and it would make no difference whether the power was gained partly by artificial means, or was wholly the natural force of the stream. It does not appear from the case that the water is used at all at the outlet, but rather that the pond is used as a reservoir for the benefit of the plaintiffs' mills at Dover,—the water being drawn from the dam, and finding its way into the Cochecho River, on which those mills are situate. If, beyond the use of the pond as such reservoir, there is a surplus which might be used profitably at the outlet, it clearly ought to be included in the valuation of the plaintiffs' real estate in Strafford, even if it be not actually used there, for it would add materially to the value of the land; and we can see no reason for holding it not subject to taxation that would not apply equally to all real estate that is not brought into a productive state. If it really enhances the value of the land to which it belongs, it ought to be taxed like other real estate at its fair value.

Such is the doctrine of *Lowell* v. *Middlesex Co.*, 6 Allen 131. In that case, the Middlesex Company were the proprietors of locks and canals from which they supplied the various manufacturing companies in Lowell with water to propel their machinery; and it appeared that these companies used all the water which these works of the Middlesex Company could supply throughout the entire year,—but that for nine months in the year there was a considerable surplus of water capable of a profitable use, but not yet appplied to manufacturing purposes. The water power used by the several companies was not taxed to them separately, but was included in the valuation of the mills.

The Middlesex Company was assessed in Lowell for the locks and canals and water power; and the court, on full consideration, held that the company was legally taxable for the locks and canals, and the surplus water power remaining after supplying the several mills, but not for the power furnished to those mills, and for which they were taxed. Upon the same principle, the surplus water power not absorbed by its use as a

reservoir would at least be taxable in Strafford.

It is a graver and more difficult question, whether the entire water power furnished by this pond shall be taxed as part of the real estate of the plaintiffs of Strafford.

By Gen. Stats., ch. 50, s. c. 11, real estate shall be taxed in the town in which it is situate. That this water power is an incident of the land and is part of the real estate, there can be no controversy; but the question is, whether it is situate in the town of Strafford, within the meaning of the law for the purpose of taxation. Had the mills been built in Strafford at this outlet, and the water used there, there could have been no question; but the difficulty arises from the fact that the reservoir, so far as it is artificial, was created for the use of the mills at Dover, and is used for their benefit; and it would seem to be probable that by far the greatest part of the value of the present water power arises from its increase by what may well be considered as artificial means, by which the water may be raised twelve feet above and drawn eight feet below its natural level, especially when it is quite probable that its value as a reservoir to be drawn from in dry times for the large mills at Dover may be much more than for any use that could be made of it at the outlet. At all events, this additional water power was created for use at Dover, is used there, and, by enhancing the value of the Dover mills, may in some sense be said to be taxed there. This raises the question, whether, by applying a water power to the use of mills in another town, it became so far annexed to those mills and a part of them as to be subject to taxation there to the exclusion of the town in which the water power was originally situate.

In *Boston Manf'g Co.* v. *Newton*, 22 Pick. 22, the case was this: the plaintiffs owned two mill-dams across the Charles River, which divided the towns of Newton and Waltham, and the water power thus created was exclusively applied to drive mills on the Waltham side of the river; and the plaintiffs were taxed in Waltham for their mills. The town of Newton also taxed the plaintiffs for one-half the dams and for the land in Newton, and for one-half the water power. The court held that the water power not used is not a distinct subject of taxation; that it is a capacity of land for a certain mode of improvement, which can not be taxed independently of the land—and more especially because the water power had been annexed to the mills and went to enhance their value, and could be taxed only with the mills as contributing to increase their value; and therefore, as the mills were situated in Waltham, no part of the water power could be taxed in Newton. There the water power originally belonged to the riparian owners in each town as

tenants in common, and there was no obstacle to its being used on the Newton side of the river; but as the plaintiffs, owning both sides of the river, built their mills wholly on the Waltham side and used all the water there, the water power was regarded as annexed to those mills and made part of them, and was taxable in Waltham alone.

In this way a water power, originally attached to the land on both sides equally, was transferred wholly to one side.

The same principle might apply to a case where mills were erected below a reservoir like this, but over the line and in another town, and all the water furnished by the reservoir taken by a flume for the use of those mills.

This, indeed, would be changing the locality of this kind of property; but it is nevertheless one of the incidents of ownership, as is often seen in the removal of buildings from one town or ward of a city to another. In respect to rivers, it is very clear that the right to the use of the whole water power at a particular mill site may be acquired, by grant or prescription, by the riparian owner upon one side. This was assumed to be the law in *Burnham* v. *Kempton*, 44 N. H. 78.

In such a case, where the river was the boundary between two towns, it would seem to be reasonable that the water power should be taxable only in the town where there was a right to use it. It certainly could not be taxed to the riparian owner who had no right to its use; nor could the water power be taxed separately or independently of the land to which it was incident.

Whether the doctrine of the *Boston Manufacturing Company* v. *Newton* is sound, or whether it is applicable to the present case, remains to be seen,—and we give no opinion as to its soundness.

The dam and excavations at the outlet of this pond were made for the benefit of the mills at Dover; but still, as the water is not conducted in a flume to those mills, but is suffered to run in its natural channel, it may be that it can be profitably used to propel machinery at the outlet; and it may be, also, that all the water power that has been gained by these artificial means can be profitably used there without affecting its usefulness at the Dover mills. This would depend much upon the quantity of water naturally flowing from the pond, and the fall at the outlet. If the water can be so used at its outlet, it clearly ought to be included at its fair value in the valuation of the plaintiffs' property in Strafford. As before stated, the water that runs over the dam, or that is drawn from it for use at the Dover mills, passes down its accustomed channel, understood to be the Isinglass River, and runs into the Cochecho Riv-

er, and then to the Dover mills, a distance in all of twenty miles. During the whole of its course, before and after it unites with the Cocheco River it forms a part of both rivers, and, for aught we can see, is subject to the ordinary use by the riparian owners for manufacturing or other purposes, and is, in fact, so used. It is not, then, applied to the exclusive use of the Dover mills, as it would be if conducted to them all the way by a flume, in which case it might, perhaps, be deemed to come within the principle adopted in the *Boston Manufacturing Company* v. *Newton*, 22 Pick. 22, before cited,

And the question is, whether this water, running in an open and natural channel, and subject to use in the ordinary way by the riparian owners throughout its whole course, can be regarded as so far annexed to the Dover mills as to be taxable there only, as in case it was exclusively applied to the use of those mills by a flume the whole distance. Very little light is shed upon this question by the adjudged cases. Some aid may be obtained from the case of the *Talargoch Lead-Mining Company* v. *St. Asaph Union*, 3 Queen's Bench 478, decided in 1868. There, the company having obtained a lease of a corn Mill at £100 per year, diverted the stream which supplied it into an artificial and new water-course of about a mile and a half in length, through which they drew so much of the water of the stream as was required for working a pumping engine and for other purposes of the mine, after providing sufficiently for the inhabitants along the stream. The water-course was partly open and partly tunnelled, and for about three hundred and fifty yards next the mine the water was taken through iron pipes. The whole water-course and the corn mill were in the parish of Dyserth. The company used some of the land in which the water-course was made, and paid an annual rent for the rest.

It was rated in this parish as land, water-course, land covered with water, way leases, land for laying water-pipes on, and it was rated at £100, although the agricultural value of the land was only £2. The company contended that as this water-course was accessory to the mine, and as that was not ratable, the water-course itself was not liable to be taxed. It appeared, in fact, that the mine itself was not ratable, and that the water was used to work it; but the court held that the land over which the water flowed was ratable, and for its increased value arising from its capabilities of carrying water to the mine. COCKBURN, C. J., says: "We are dealing with a water-course passing over a considerable extent of land, and the works are only thus connected with the mine;" and he looks at it as a case where the value of the land is increased by the existence of the water-course.

BLACKBURN, J., says that it can never for a moment be said that this water-course is part of the mine. Its value is, no doubt, that it affords facilities to the occupation of the mine and the works attached to it, but the water course is part of the soil, with its value enhanced if you can carry water.

It appeared that the company paid £100 per annum to the owner of the corn mill for the right to take the water to their mine; but the court held that it would be wrong to rate the water-course in respect to the amount so paid.

The substance of this decision, so far as it has relation to the present case, is, that this land and water-course, although used for working the mine, were not a part of it, but liable to be rated separately. In making this decision, the court distinguished it from *Rex* v. *Bilston*, 5 B. & C. 851, where it was held that an engine used in working a mine, for raising water and other purposes, was not ratable. In this case of the *Talargoch Mining Co.* v. *St. Asaph Union*, the water-course which had been used to carry a corn mill was diverted wholly by the mining company, and, by means of a canal and pipes one mile and a half long, the water was applied wholly to working a pumping engine and for other purposes of the mine; yet the court held that, for the purpose of taxation, the water-course was no part of the mine. Upon this principle, the reservoir in the case before us would not, for the purposes of taxation, be regarded as part of the Dover mills; neither would a canal carrying water from the reservoir to those mills. That, indeed, would be like the case of *Talargoch Mining Co*, v. *St. Asaph Union*, which is strongly in point.

It is urged on the part of the plaintiffs that the water power furnished by this pond is appurtenant to the Dover mills, on the ground that a conveyance of the mills with the appurtenances would carry the water power. Granting that it would include the right to use the water as it was then being used, it would not convey the land to which the water power is still an incident, and not being disannexed, the whole is liable to be taxed in Strafford; and the case of *Talargoch Mining Co*, v. *St. Asaph Union*, before cited, is in point. The creation of this reservoir has probably greatly increased the hydraulic power of both the Isinglass and Cochecho rivers, and thereby enhanced the value of all the mills on those streams, and for such increased value each of those mills is properly taxable; and in this way the water power so gained may be taxed several times, and this because it is used several times over. The effect is substantially to enlarge the water power of these streams; and the owners of all the mill sites on them have the same right to use them in their improved state, as they would have had to use the natural

streams,—although they would not, probably, after this long use by the Cochecho Manufacturing Company, have a right to interfere with the customary mode of drawing the water from the reservoir. But for purposes of use by the riparian owners, and for taxation, the water power of these streams, in their improved state, must, for aught we can see, stand relatively as it did before such improvement.

Upon a full and careful consideration of the case, we think that this reservoir can not be regarded as annexed to the mills at Dover and taxable there only. Whatever might be our views in respect to a case like that of the *Boston Manufacturing Co.* v. *Newton*, we think the principle there announced can not apply here, where the water power created is not appropriated exclusively by the Dover mills, but consists in increasing the hydraulic power of the two rivers for the space of twenty miles, in the advantages of which all the riparian owners have a right to participate. The land at the outlet, with the water power incident to it, was taxable, and was taxed as non-resident real estate in Strafford; and in assessing it, the assessors were not called upon to inquire into the state of the title, or by whom the right to regulate the flow of the water was possessed. The property was before them, and it was their duty to appraise it at its fair value, considering the various uses to which it might be applied, whether the improvement was made by a resident or a non-resident. In this respect it stood like any other real property upon which improvements were made.

To effect a change in the place of taxing this water-power, there must be something more than a mere change of ownership, or in the use for which the improvement was made; there must be such a physical change as shall annex it to land in another town. Whether that can be done at all, and if so, how, we need not decide; but we are satisfied that such a state of things does not exist in this case.

It has been suggested that upon these views the water-power furnished by this pond will be subject to double taxation, and even to be taxed many times over; and, undoubtedly, this is the most embarrassing aspect of the question before us, enhanced, as the embarrassment is, by the fact that the improvement of this water power was made by the Dover mills, and for use at those mills. So far as regards the other mills upon this water-course, there can be no difficulty. If the hydraulic power of these streams is increased by the improvements, then other mills have the same right to use it as they had to use the streams in their original state, but have no right to control the use of the reservoir as such. It is proper, then, that they should be taxed for the enhanced value of their mills, arising incidentally

from this improvement, which has cost them nothing.

As to the Dover mills, they have acquired the right by artificial means, to enlarge the capacity of this pond as a reservoir. In its original state it was valuable on account of that very capacity of improvement, and chiefly on that account; and what has been done in the erection of the dam and the excavations has simply enlarged its capacity as a reservoir, and enhanced its value. That value is found chiefly in the fact that it can be used to great advantage as a reservoir, and the right to control it and regulate the flow of the water is a great element of that value.

In taxing the intermediate mill owners, then, for the enhanced value of their mills, it is obvious that a great element of value in the reservoir is not reached at all; and, in respect to the Dover mills, they have merely enlarged, by artificial means, the capacity of this pond as a reservoir, but they have not changed its character, or removed it from the town of Strafford. Before the improvement it was real estate in that town, and of a value much increased by the fact that it possessed this capacity of improvement; and the fact that it has been so improved, and its value enhanced, does not change its nature or locality. In these respects it is the same, whether the improvement be made by a Strafford or a Dover corporation. In respect to the Dover mills, it is not material whether the property be taxed in Strafford or in Dover, if it is only taxed reasonably; and when it is understood that in appraising the Dover mills for taxation the cost of maintaining the advantages of the reservoir, including the taxes paid in Strafford, should be considered, no injustice to the Dover mills is likely to be done.

Before the improvements were made, the question would be, What was the fair salable value of this property in Strafford, considering the various uses to which it might be put?—and the question would be the same since the improvements.

In regard to the taxation in Dover, it may be suggested, that in determining the valuation of the Dover mills for the purpose of taxation there, while this enhanced value caused by this reservoir should be considered, there should at the same time be considered the annual cost of maintaining and managing the reservoir, including the repairs of the dam, bulk-head, and water-gates, the taxes on the reservoir property in Strafford, and all other expenses incident to the care and management thereof. In this way the objection arising from the taxation of the mills at Dover would be greatly diminished, if not in fact wholly removed, inasmuch as the enhanced valuation caused by the reservoir would be diminished in proportion to the taxation in Strafford. Our conclusion then is, that this water power, furn-

ished by this pond in its improved state, must, with the land to which it is incident, be regarded as real estate situate in Strafford, and subject to be there taxed, without being affected by the circumstance that the mills of the plaintiffs, with the water power attached, may be taxed in Dover.

In an additional brief, it is urged in behalf of the petitioners, that all the ratable estate of the corporation is to be taxed in Dover, wherever it may be situated, and it is contended that this is a fair implication from the provisions of the General Statutes; and especially from section 8 of chapter 51, which requires the cashier, or other proper officers of every corporation, on application by any selectman, to furnish at the principal place of business of said corporation an account in writing, on oath if required, of all the ratable estate of such corporation, and a like account of all shares and deposits therein owned by any person, resident, or corporation established out of the State, within four days after such application.

We think, however, that no such inference can be made from this provision. In the law of July 1, 1825, the duty is imposed upon the clerk, agent, or directors of every manufacturing corporation, to exhibit to the selectmen of the town in which such establishment is situated a just and true account of all its ratable estate; and yet it is expressly provided in the same act, that all the ratable estate of such manufacturing corporation shall be taxed to the corporation "in the town or place wherein said ratable estate is situated."

In *Smith* v. *Burley*, 9 N. H. 428, the history of this law was given; and it was held that under it the property of manufacturing corporations is taxable to the corporations in the town where the property is situated. The provisions of this law of 1825 are substantially re-enacted in the act of July 7, 1827, Laws, ed, 1830, page 555, sec. 6. By the Revised Statutes, chapter 4, sec. 7, the cashier, treasurer, agent, or other principal officer of every bank, savings institution, insurance company, or other corporation, shall, on application by *any* selectman, furnish an account of all the ratable estate of the corporation, &c. At the same time, in chapter 40, section 7, it is provided that all real and personal property shall be taxed to the person claiming the same; but such real estate shall be taxed in the town in which it is situate. And in section 5 of the same chapter, it is provided that "taxable property of manufacturing corporations in this State, and property taxable to any other corporation, shall be taxed to such corporation by its corporate name, in the town or place in which it is situate, except in cases where other provision is made."

These same provisions are substantially re-enacted in the General Statutes. Under the laws of 1825 and 1827, the clerk

or agent was required to give such account to the selectmen of the town in which the manufacturing establishment was situate, and only to those selectmen; and yet, by the express terms of the same act, such property was to be taxed in the towns where the property was situate—excluding, of course, any such inference as the petitioners now urge.

By the Revised Statutes and the Genera' Statutes, these corporations are required to furnish an account to *any* selectman, instead of the selectmen of the town where their business is located,—by which may fairly be understood, *any* selectman of *any* town having occasion to know about the property of the corporation for the purpose of taxation; and this tends to rebut any inference that the property was to be taxed only in the town in which the corporation had its principal place of business. Besides, in both the Revised and General Statutes it is provided that all "real estate shall be taxed in the town in which it is situate."

And we think that the provision of the Revised Statutes, chapter 40, section 5, and General Statutes, chapter 50, section 8, that taxable property of corporations and property taxable to corporations shall be taxed to the corporation by its corporate name in the town in which it is located, except where other provision is made, is substantially a revision of the laws of 1825 and 1827, although extending it to other corporations.

To regard it as providing for the taxation of all property of a corporation in the town where the corporation is established, would be contrary to the long and well established policy of our tax laws, especially as respects real estate. This is shown by the well considered case of the *Nashua Savings Bank* v. *The City of Nashua*, 46 N. H. 389, where it was held, under the Revised Statutes, that real estate of a savings bank is taxable in the town where it is situated.

We are clearly of the opinion, then, that the real estate of the petitioners is taxable only in the town where it is located.

It is urged, also, that this corporation is not liable to be assessed for its property until an application has been made for an account at its principal place of business. But we see nothing in the law that requires the selectmen to make such application. They may do it if the aid of the corporation is deemed necessary; and if the account is not furnished, the corporation may be doomed, as in the case of individuals. Nor is there anything in the law that requires notice to the tax-payer that the selectmen are about to appraise his property. Practically, no such thing is done, and we do not think it necessary.

It is also urged that the valuation and assessment upon "land, dam, and pond, known as the Bow Pond reservoir, ranges 6 and

7, 1,000 acres, value $40,000," are void upon the ground, among other things, that three distinct classes or items of property are taxed together at an entire gross sum.

We can not, however, so regard it. The dam and water power are incidents of the land, and really part of it; and the mention of the dam and pond must be regarded as merely descriptive, much the same as if the terms had been the land, ranges 6 and 7, including the dam and pond known as the Bow Pond reservoir. It is like a description of land, as Black Acre and the buildings thereon, which could never be understood as two distinct classes of property. So it is much like the case before cited of the *Talargoch Lead-Mining Co.* v. *St. Asaph Union*, where the property was rated as land, water-course, land covered with water, way leases, land for laying water-pipes on, all rated at £100.

It is also urged that the entire assessment was illegal and void, because land was included in the appraisal and assessment that did not belong to the petitioners.

From the answer, it would seem quite probable that the selectmen did include in their estimate of value the land forming the original bed of the pond, and perhaps land which the company had merely the right to flow. So far as this is the case the tax would seem to be illegal, and in some other proceedings might affect the validity of the entire tax: of that, however, we give no opinion.

But it is held in this State that this is an equitable proceeding, and that, although the assessment may be illegal on account of imposing a four-fold tax when the facts did not justify it, the court would abate only the excess, and allow what was just to remain. Such is the doctrine of *Perry's Petition*, 16 N. H. 44, and we see no reason to dissent from it. It is very clear that this is largely an appeal to the discretion of the court, the same as to the selectmen, as in the case of poverty or insanity of the tax-payer, and so in the case of over-valuation of the property assessed; and there the court should ascertain the true valuation of the property, and adjust the tax accordingly. The jurisdiction was conferred originally upon the court upon this ground, and to be so exercised; and the case of over-valuation, by including by mistake some property not subject to be assessed, stands much upon the same ground. The case made by the petition is substantially an over-estimate of the quantity of the land and the value of the property.

The remaining question is, whether an exhibition by the company to the selectmen of Strafford of their taxable estate was necessary to enable them to maintain this petition.

The General Statutes, ch. 53, sec. 11, provide that a tax-payer, having complied with the requirements of sec. 4 of chapter 52, may apply to the supreme judicial court to abate his tax when the selectmen refuse. The reference to chapter 52 is undoubtedly a mistake; it should be chapter 51, section 4. Section 4 of chapter 52 makes no requirement of the tax-payer at all. Section 4 of chapter 51 requires that every person liable to be taxed in such town shall exhibit to the selectmen, at the time and place appointed them, or upon such personal application, a true account of the polls and estate for which he is there taxable, and on oath if required. This is, with some merely verbal alterations, the same as section 4 of chapter 41 of the Revised Statutes; and in chapter 44, section 2 of the Revised Statutes, which is retained in the General Statutes, chapter 53, section 11, without substantial change, the reference is to this section 4 of chapter 41,—leaving no room to doubt that the reference in the General Statutes should have been to chapter 51 instead of 52; and so we shall proceed to consider it. In the first place, a non-resident owner of land is entitled to this remedy—*Dewey* v. *Stratford*, 40 N. H. 203; but the question is, whether an exhibition of an account of the taxable estate was an essential prerequisite. The provision of section 4 of chapter 51 is, that "every person liable to be taxed in such town shall exhibit an account to the selectmen." &c. In the Revised Statutes the terms were, "all persons liable to be taxed in such town," &c. By the law of July 7, 1827, N. H. Laws, 1830, p. 553, the provision was, that the *inhabitants* of the several towns in this State shall annually exhibit to the selectmen a just and true account; and the selectmen were required to give notice to the *inhabitants*, of the time and place in their towns when and where they will receive such account, by warning in a public meeting, by posting notices, or in some other way; and an invoice shall be taken of what the respective inhabitants had on the first day of April. The law of February 8, 1791, ed. 1805, p. 214, was the same. It is clear, then, that by these laws of 1791 and 1827 none but inhabitants of the several towns were required to exhibit an account; and the question is, whether, by the Revised Statutes, the legislature intended to change the law so as to require of non-residents an account. By the Revised Statutes, as we have seen, all persons liable to be taxed in such town shall exhibit, &c. Strictly speaking, this language does not apply to a person who is not an inhabitant, for a non-resident is not liable to be taxed personally in the town for the lands he may own there. In *Dewey* v. *Stratford*, 42 N. H. 286, decided in 1860, it was held to be the intention of the legislature that taxes assessed upon the lands of non-residents should be a charge upon the lands

taxed, only, and not a personal charge against the owner, and to be enforced only by a sale of the land. The same doctrine is held in Massachusetts. *Rising* v. *Granger*, 1 Mass. 47. So the general provision for taxing is, that every person shall be taxed in the town in which he is an inhabitant or resident, &c. General Statutes, ch. 50, sec. 1. And this is, as we think, in accordance with the universal practice in this State—the tax being assessed against the land, giving the name of the owner, if known; otherwise, the name of the original proprietor, if known; if not, by the number of the lot and range, and other description. So the provisions for the collection of such taxes exclude all idea of any personal liabilities on the part of the owner.

Clearly, then, such owner "is not liable to be taxed" for such lands, in the ordinary sense of those terms; and unless there is something in the nature of the case that points to a more enlarged construction of those terms, so as to include persons whose lands are liable to be taxed in the town, non-residents are not required to render an account. From 1791 to the passage of the Revised Statutes, they were clearly required not to exhibit an account; and, upon a careful examination of the legislation on that subject, we think there was no intention to change the old law.

Had there been such an intention, we should naturally have expected a more explicit expression of that intention; but the terms used in the later laws may fairly be construed to mean the same as the former statutes. The Revised Statutes and the General Statutes are but revisions of the former laws; and it is an established rule of construction, that unless there is found in the revision such a change of the language as to indicate a clear intention to change the law, the previous construction will be adopted—*Jewell* v. *Holderness*, 41 N. H. 163, and cases cited; and the construction will not be changed by alterations which are designed to render the provisions more concise. *Ibid*, and *Burnham* v. *Stevens*, 33 N. H. 256. In this case we perceive no such change in the language as to evince a purpose to change the law on this point.

In one respect there is some change by the Revised and General Statutes. By the old laws, the selectmen were required to make an invoice of what the respective inhabitants had on the first day of April, while in the Revised and General Statutes they were to take an invoice of all the polls and estate liable to be taxed: and yet, in the old law, the provisions for taxing non-resident lands necessarily imply the taking of an invoice, so that the change here is but in the form and not in the sub-

stance, and can not affect the question before us. There are good reasons for not including non-residents in the obligation of inhabitants to exhibit an account. In the first place, the notice provided is not likely to reach them; and then there is ordinarily no necessity for such an account, the land only being liable to be assessed, and no difficulty in ascertaining what and where it is.

It would not be unreasonable, therefore, to suppose that the legislature did not intend to require an account of non-residents. We think, then, that there has been no failure to comply with the provisions of section 4, chapter 51, of the General Statutes, because no account was required of non-residents. It may also be suggested, that the provisions for application for an account at the place of business of such corporations sustain the views we have announced.

Case Discharged.

LADD, J., did not concur in all the views of the court as expressed in the foregoing opinion by the chief justice, but delivered no opinion.

DOE, J. 1. Is Strafford real estate taxable in Strafford? "Real estate shall be taxed in the town in which it is situate," Gen. Stats., ch. 50, sec. 11. "The words 'land,' 'lands,' or 'real estate' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein." Gen. Stats., ch. 1, sec. 20. The plaintiffs' real estate, situate in Strafford, is taxable there, and that real estate includes their land and dam, their rights of flowage and drainage, and all their rights to and interests in real estate in the town.

Topographically considered, the water power of this estate is the difference of level in the land over which the water runs; and that difference of level exists (so far as it can be said to have a local existence) in Strafford where the land is, and not in Dover. The value of the basin of Bow Pond, composed of land and dam (the dam being regarded by the law as land), consists partly in its height of outlet, which gives it a power of pouring out water from an elevation; partly in its form and size, which give it a capacity for holding water; partly in its situation, which enables it to receive a constant supply of water to be held and poured out. These capacities of the basin give it a value, as the capacities of the adjoining land for the growth of grass or wood give it a value. Whether a basin be real or personal estate, its value depends upon its capabilities. In such legal formalities as the annual invoice and the record of

assessment, capacity is not a subject of taxation; but it is evidence of the substantial value of taxable property. The present value of the basin of Bow Pond is not in the water which it now holds. The water, like the air above the water, passes away, and is not owned by the plaintiffs. It is the right to a reasonable use of those circulating elements which the basin may enable its owner to enjoy, and not the elements themselves to which the plaintiffs have a legal title. In point of law, the capacity of the basin for receiving, holding, and pouring out a constant supply of water, is a quality of the land; and the land is situate in Strafford. In point of fact, the right of the plaintiffs to use the basin for receiving, holding, and pouring out water, is exercised by them in Strafford. They choose to exercise the right of pouring out the water, in the particulars of time and quantity, in a manner the most advantageous for their Dover mills. But their favorite method of exercising this part of their right in those particulars does not change either the locality of the Strafford land to which the right is incident, or the town in which the right is, and of necessity must be, exercised.

The legislature might have enacted that real estate shall be taxed in the town in which its owner lives or carries on business; or that such real estate as would pass by deed as appurtenant to other real estate shall be taxed in the town in which the latter is situate; or that real estate used as a reservoir or basin shall be taxed in the town or towns in which the owner, on the first day of April in each year, intends to apply to manufacturing purposes, during any portion of that year, any of the water which he intends to draw from the basin if his needs shall require him to draw any, and that, if the owner has no such intention, the basin shall be taxed in the town or towns in which it is situate. But the legislature have done nothing of the kind. Instead of prescribing an inconvenient and unsettled rule upon any such shifting and dubious circumstances, they have established a purely geographical test by declaring that "real estate shall be taxed in the town in which it is situate." Strafford real estate is taxable in Strafford; Dover real estate is taxable in Dover.

If a riparian owner of a water-course running through the towns A, B, and C, builds a dam across it in the town of C, and thereby flows his lands in A and B, he does not thereby repeal the act of the legislature which fixed the boundaries of the towns, nor does he thereby exercise the legislative power of enacting that any part of his real estate shall not be taxed in the town in which it is situate. His real estate in A would be taxable there, because the legislature have said, "Real estate shall be taxed in the town in which it is situate." They might have

said, "Flowed land and the easement of flowage shall be taxed in the town in which the dam that causes the flowage is situate;" but they have not said so. So, if the riparian owner builds a dam in the town of A, and by a flume, natural or artificial, conducts the water to his wheel in B, he does not thereby alter the boundaries of the towns, nor change the locality of his land and easements situate in A, nor repeal the statute which fixes the place of their taxation in the town in which they are situate. Nor would the geographical lines of taxation be changed if the wheel in the town of B were used solely to operate machinery in the town of C. The legislature might have said that all dams, flowed lands, and reservoirs, or that certain aquatic rights, shall be taxed in the towns in which certain wheels are situate, or in the towns in which other machinery is situate, on the first day of April; but they have not said so.

If these plaintiffs should sell all their Strafford real estate to the Newmarket Manufacturing Company, and that company, first acquiring the right to do so, should divert the water of Bow Pond into the stream that turns their wheels, the Strafford real estate would remain taxable in the town of Strafford and county of Strafford, and would not be taxable in the town of Newmarket and county of Rockingham, for the simple reason that it would remain in the town of Strafford and would not be moved into Newmarket. But if the Newmarket company should carry the materials of the Strafford dam to Newmarket and annex them to their Newmarket land, those materials would be taxable in Newmarket, for the simple reason that they would be real estate situate in that town. The locality of the dam would be changed by its actual transportation, but not by the delivery of a deed or the diversion of water. If a Lowell manufacturing company should purchase all the plaintiffs' Strafford real estate, and, being duly authorized, should turn the outlet of Bow Pond into the Suncook branch of the Merrimack River, and use the pond as a reservoir for the benefit of their Lowell mill, the taxation of the Strafford real estate would not be transferred to Massachusetts. But if the Lowell company should carry any part of the Strafford property to Lowell and annex it to their Lowell land, there would be the same difficulty in holding real estate situate in Lowell to be situate in Strafford, that there is in holding the materials of wood, stone, and clay, severed from New Hampshire land, transported to Lawrence, and used in building that city, to be still situate in New Hampshire.

If Strafford real estate can be disannexed from Strafford and annexed to Dover, for the purposes of taxation, by the order of the owner and a canal, without transportation, it can also be disannexed from Dover and annexed to Barrington, and then

re-annexed to Strafford, by other orders and the same canal. On this theory, property absolutely stationary in its geographical nature, might, while actually remaining in Strafford, acquire an ideal, itinerant character, and be found temporarily absent from that town and transiently located in such other town as the owner should from time to time designate, and sometimes scattered in undivided fractional parts, in several surrounding towns, at the ends of various canals running from Bow Pond. Such a visionary migration of real estate is not a principle of the common law, and is as little in harmony with the terms and spirit of the statute and the convenience of taxation, as with the order of nature.

If there were no statute authorizing the taxation of manufacturing establishments, the question might be whether this Strafford estate is a part of the plaintiffs' manufacturing establishment—as, in *Talargoch Lead-Mining Co.* v. *St. Asaph Union*, Law Rep., 3 Q. B. 478, the question was, whether a water-course, used for working a mine that was not taxable, was a part of the mine. But the decision of a question of that kind has no bearing on this case. Here the question is, whether this real estate is situate in Strafford, not whether it is a part, incident, accessory, adjunct, or appurtenance of the plaintiffs' manufacturing establishment. If land could be appurtenant to land, as an incorporeal hereditament may be, and if the plaintiffs' Strafford estate, corporeal and incorporeal, were a mere Strafford appurtenance of the Dover mills, it would nevertheless be situate in Strafford. Concerning the place of taxation, in this case, there is no question of law—nothing but a question of geography, and on this question the parties are agreed.

II. At what sum ought the selectmen of Strafford to have appraised the property? "The selectmen shall appraise all taxable property at its full and true value in money." Gen. Stats., ch. 52, sec. 1.* The selectmen ought to have appraised this and all other property taxable in the town at its value; and the question of value is as pure a question of fact as the geographical question of locality. When a question of the value of real or personal property is tried by jury in a civil or criminal case according to the strict rules of law, the judge does not instruct the jury what the value is as a matter of law. The judge rules upon the admissibility of the evidence offered, and the jury find the value proved by the evidence admitted by the judge.

The selectmen, in determining the value of this property, were

* In July, 1872, the language of the General Statutes was amended by the addition of "as they would appraise the same in payment of a just debt from a solvent debtor." Laws 1872, ch. 31. REPORTER.

not bound by the strict legal rules of evidence. They might receive and weigh such evidence as they thought proper; and ordinarily they would be as likely to arrive at a just appraisal by that course as by attempting to apply the technical rules of law to the admission of evidence. And on a trial of the question of value before the commissioners now appointed by the court, the commissioners will have as much liberty as the selectmen. The court would not refuse to act upon their appraisal merely because they did not attempt to apply the rules of the common law in the admission of evidence, or merely because, in attempting to apply them, they admitted what the court would have excluded, or excluded what the court would have admitted. Their appraisal would not be rejected, like a verdict at common law, on a mere technicality, nor unless it were shown that there was some serious error practically and materially affecting the result arrived at. They are not an independent tribunal, established by law for the final and conclusive appraisal of taxed property; the law puts upon the court alone the duty of doing justice in cases of this kind, and the court can not transfer their responsibility to commissioners: the commissioners are employed by order of the court to ascertain a fact under the direction of the court, because this mode of ascertaining the fact is convenient for the parties: if the court think it probable, for any reason, that the fact is not correctly reported by the commissioners, they will act upon the fact, and not upon an inaccurate report of it; but if the court see no reason to doubt the substantial correctness of the report, they will accept it as satisfactory proof of the fact without regard to technical niceties. The commissioners should not report any of the evidence received or rejected by them, or any objections made by the parties to evidence, unless specially directed by the court so to do. Their appraisal, like that of the selectmen, might be founded entirely upon their own personal observation and knowledge, although they would of course hear any important evidence offered by the parties, unless they were sufficiently conversant with the value of such property in general or of this property in particular to appraise it correctly without the aid of the evidence offered. This petition for the abatement of a tax is not a common law proceeding, and is subject, in the matter of evidence, not to the technical rules of the common law, but only to those rules of equity and good sense which are necessary to substantial justice. The question of value being a question of fact, and the judgment of the commissioners being relied upon for the reception and rejection of evidence on that question, there is no question of law concerning the full and true value of the property which we are now called upon to decide.

III. But suppose the court had seen fit to hamper the commissioners in this case with an order for a rigid application of the technical rules of evidence laid down in the books for the trial of questions of fact at common law, so that a trifling mistake in the application of those rules might annul the appraisal and indefinitely prolong this litigation; or suppose, for any reason, it were advisable for the court now to anticipate what evidence may be offered, and to pass upon its technical competency,—what evidence would be admissible, under strict legal rules, upon the question of the full and true value in money of the plaintiffs' real estate situate in Strafford?

Evidence tending to show the quantity of land of which the plaintiffs have the entire title, and the extent of their interest in other land, including their rights of flowage and drainage, would be competent. If there is a part of the natural pond which can not be drained and converted to other uses at a reasonable expense, and if the plaintiffs have the right to the absolute control of it, it is probably immaterial whether they own the soil or not. If the soil is valuable only as a basin for holding water, and if they have an unlimited right to use it for that purpose, it is probably not necessary, on this petition, to investigate the theoretical technicalities of the title. If the plaintiffs have a right to use it as a basin, and if it is useless for any other purpose, their right is practically absolute, and that right, and all their other rights in Strafford real estate, however acquired, should be appraised together in one sum at their value.

It would be proper for the commissioners to take a personal view of the premises, and of any other property and any other localities, so far as a view would throw any light on the value of the property in question, or help them to understand the other evidence, or aid them in any way in making a correct estimate.

The opinions of witnesses, qualified to judge of the value of the whole or any part of the property, would be competent evidence. Gen. Stats., ch. 209, sec. 24; *State* v. *Pike*, 49 N. H. 422. Whether a witness is qualified to judge of the value, is a question of fact to be determined by the commissioners. *Jones* v. *Tucker*, 41 N. H. 546; *Dole* v. *Johnson*, 50 N. H. 452; *Taylor* v. *R. W. Ins. Co.*, 51 N. H. 50.

Evidence tending to show what the property cost the plaintiffs, or any other former owner, would be competent.

Evidence of the price at which other property has been sold would be competent, if such other property can be so compared with any part of this as to have any tendency to show its value. Whether any such comparison can be made is a question of fact for the commissioners to determine.

If any part of the land owned by the plaintiffs can, with or without being drained, be used for raising wood or any annual crop, evidence tending to show its productive or salable value for such purposes would be admissible. If the plaintiffs' right in any land is merely of flowage, evidence tending to show the agricultural value of such land would be admissible, because the price for which the plaintiffs can sell their easement might depend somewhat upon the sum which an agricultural owner of the soil would pay for the removal of the water.

If the plaintiffs can sell their Strafford estate to be used for the benefit of a Strafford mill situate at any point on the stream from the dam down to the line of Barrington, evidence tending to show the price it would bring for such use would be admissible. If they can sell it to be used for the benefit of a Barrington mill situate farther down the stream, evidence tending to show the price it would bring for such use would be admissible. If they can sell it with their Dover mills, to be used for the benefit of those mills situate still farther down the stream, evidence tending to show the joint price for which they can sell their Strafford and Dover estates together, and the part of that price fairly assignable to the Strafford estate, would be admissible.

If the plaintiffs had not the title or control of the Strafford reservoir, they would be entitled to the use of all the water that would naturally come to their Dover mills, subject to the reasonable use of other riparian owners above them. If the reservoir did not exist, if the natural basin had not been created and no artificial alterations had been made, and the water were allowed to go to Dover without obstruction, the plaintiffs would have a right to the use of the natural stream at Dover, and to receive there as much water as they receive now,—and probably more, for the reservoir causes some loss by evaporation from its extended surface. That right can not be taxed in Strafford, because it is an incident of land situate in Dover. But the advantage of the reservoir to the plaintiffs seems to be in its holding some of the water which they do not want in the wet season until they do want it in the dry season, not increasing the natural supply, but decreasing its irregularity. And, whether the reservoir is worth more or less for the production of uniformity at its Strafford outlet, and consequently at Dover, than for the production of water power for sawing trees or grinding corn at Strafford below the dam, or for the production of trees or corn above the dam, and whether there is or is not such an incompatibility in its various productive capacities that they can not all be profitably exercised at one time, its capacity for producing crops, power, or uniformity, at any time and any place, is admissible evidence on the question of its value.

IV. Were the court to depart from its usual practice, and attempt to instruct the commissioners what weight they should give to the various kinds of evidence that may be offered and received, the instructions would involve no question of law, and would necessarily be very general and indefinite.

The first fact to be ascertained is, the full and true value in money, that is, the fair market value, of the plaintiff's real estate in Strafford on the first day of April, 1870. Evidence of what it cost the plaintiffs or any other owner before that time may be entitled to very little weight. It may have cost more or less than it was worth. In 1870 it might have been worth so much more or so much less than it had previously cost, that its previous cost would have very little, if any, tendency to show its value in 1870. Its previous and subsequent values, and all the rest of the facts proved, are material, so far as they tend to show the fair market value on the first day of April, 1870. It is not unlikely that much of the evidence, admissible under the technical rules of law, would be too remote and trivial to occupy much of the time of a competent board of commissioners in hearing or weighing it.

It may not be easy to ascertain the fair market value of the property as a Strafford mill privilege. Mill privileges may not be sold often enough to give them a market value as easily ascertained as the market value of a barrel of flour or an ordinary farm. The price of mill privileges, like the price of other property, depends upon the relation of demand and supply; and that relation may not be tested, in the case of mill privileges, frequently enough to establish such a uniform rate of prices as is attached to some other kinds of property. The evidence available on this point may not be very direct or satisfactory, but the law can not supply a natural defect in the evidence.

If the value of the plaintiffs' Strafford estate depends, in a measure, on its being controlled for the benefit of their Dover estate, and if the value of the latter depends, in a measure, upon the control of the former, this mutual partial dependence of values is a circumstance to be considered in the appraisal of each of the estates, and to be carefully considered, so that no part of the fair market value of either shall be sacrificed for the undue advantage of the other. Such a mutual partial dependence of the values of the estates may create a difficulty, great or small, in the valuation of each; but such a difficulty, if it exists, is one of fact for which the law is not responsible, and which is to be solved, like other difficulties in questions of fact, upon diligent investigations, by candid, deliberate, and sound judgment. In making the investigation in this case, some general views of the subject may perhaps be usefully borne in mind, although they may not of themselves lead to a precise arithmetical result.

A piece of real estate in two towns, A and B, might be so situated that the entire substantial value of each part would depend on its being jointly used with the other. If the selectmen of A should appraise the part situate in A at the value of both parts, because the other part would be worthless for separate use, and if the selectmen of B should appraise the other part at the value of both parts, because the part in A would be worthless for separate use, the error of disregarding their reciprocal relation would be obvious. There would be equal reason for the selectmen of A to appraise the part in A by the test of its being worthless without the other part, and for the selectmen of B to appraise the latter by the test of its being worthless without the former, thus appraising the whole at nothing.

If a Strafford farmer owned a tract of land containing one hundred equally productive acres, worth much more for pasturing cattle than for any other use; and a corner of it, containing one acre, were in Barnstead, and the rest in Strafford; and a brook on the Barnstead corner furnished the only supply of water for the cattle, and had no value for any other use,—the owner would be taxed in Barnstead for the one acre, and in Strafford for the rest; and the selectmen of each town, in appraising his property, would find a mutual partial dependence of values. If the selectmen of Barnstead should argue that the Barnstead acre was worth what the owner would give rather than lose it—that the ninety-nine acres would be nearly worthless, and could not be sold for a pasture without the brook, and that therefore nearly the whole value of the pasture was in the Barnstead acre; and if the Strafford selectmen should argue that the ninety-nine acres were worth what the owner would give rather than lose them—that the Barnstead acre would be nearly worthless and could not be sold separately for a pasture, and that therefore nearly the whole value of the pasture was in the ninety-nine acres,—the owner would probably find his pasture appraised and taxed far beyond its value. Whether he were or were not able to point out the logical flaw in the arguments of the selectmen, he would have a realizing sense of the unfairness of their conclusions; and his tax in each town would be abated by the court on another appraisal that would make the values of the parts no greater than the value of the whole. The value of the ninety-nine acres would certainly be greater if the cattle pasturing there could get water at the brook, than if they could not; and the value of the one acre would certainly be greater if there were ninety-nine adjoining acres in need of the water, than if there were not. But if a separate appraisal of either were founded upon the dependence of the other, and the mutuality of the dependence and the joint value were disregarded, the re-

sult would be as unsound as the calculation that if A owns a farm and owes B $500, and B owns a farm and owes A $10, each of them is worth the value of his farm and what the other owes him, without regard to the mutual debts.

The Dover mills do not depend on Bow Pond for water or for power. They would have as much water and as much power without the reservoir as with it. But if the reservoir can be useful as an instrument for lessening the natural irregularity of the water, its capacity for being used as a gauge or regulator is evidence entitled to some weight on the question of its value, for the same reason that, on the question of the value of the instrument called in mechanics a governor, its capacity for regulating and equalizing the speed of the machine to which it can be attached would be entitled to consideration. But if, for the purpose of taxation, such a regulator were appraised at a value increased by adding to it the value which the machine would lose by being deprived of a regulator; and if the machine were appraised at a value increased by adding to it the value which the regulator would lose by being deprived of a machine to be regulated,—the regulator and the machine would be worth much more for the purpose of taxation than for any other purpose—a result too irrational to require any comment.

Nothing can be more fallacious than the idea that the amount which the owner of a piece of property would give rather than be deprived of it, is an absolute and conclusive test of its fair market value. What would the owner of a new house give rather than be deprived of the few feet of ground on which his chimney stands? And who would think of making such an inquiry for the purpose of ascertaining the fair market value of that piece of ground? Appraise every foot of a house-lot or farm on that principle, and the parts would be made of far greater value than the whole. The defect in the principle is, that it sacrifices a portion of the value of each part to increase the value of each. What is added to each in turn, is first taken from the others; and when the counteracting process of diminution and magnification is completed, the fictitious loss and the fictitious gain are equal, and the real value of the whole is no greater and no less than before. It might be argued that the house-owner might sell his land under his chimney at auction for a price enhanced by the fact that many persons, to whom the use of it would be valueless, would bid for it, knowing that the buyer could give the house-owner the choice of buying it back at an exorbitant price, or sacrificing a considerable part of the value of his house to the necessity of removal. In the practical business of life men would not stop long to consider such an argument, or to hear debate upon the question whether

such a market price would be a fair market price. A board of selectmen, who should once appraise the property of a majority of their townsmen at the speculative value of property supposed to be taken from its owner and sold at auction as a means of extorting from him an unconscionable ransom for not injuring the value of his other property, would probably not be employed to exhibit that system of taxation a second time.

When it is said, as it sometimes is, that the value of property is what it is worth to the owner, this test of the value is not to be understood to be the cost of restoring the property if it were so changed as to be, figuratively speaking, destroyed; but the test is to be understood to be the fair market value, that is, what the owner could have sold the property for at a fair sale, at the time it was destroyed. *Jones* v. *Gooday*, 8 M. & W. 146. The owner may sometimes be entitled to greater damages for the destruction or conversion of property than its market value; he may be entitled to damages for the consequential injury to other property, or to his feelings, for interruption of business, or loss of comfort or health. But in this case of taxation the property is to be appraised at its fair market value.

While the law does not and can not prescribe the weight to be given to the evidence bearing on a question of fact, it does not tolerate wild, erratic, fanciful, or distorted views. It can lay down no absolute rule for ascertaining what property is worth, because that is a question of fact; but it requires that question to be decided by a fair exercise of the common sense of an honest and intelligent man.

When we want to know what any piece of property is worth, for the purpose of taxation, or setting off a homestead, or dividing an estate among heirs, or making partition among tenants in common, or not attaching personal property exempt from attachment, or levying an execution on real estate, or imposing the penalty of larceny, the nature of the inquiry is not altered by an accumulation or omission of definitive adjectives and explanatory terms descriptive of the value to be ascertained. The constitution formerly required that a member of the house of representatives should have an estate "of the value of one hundred pounds;" that a senator should have a freehold estate "of the value of two hundred pounds;" that a governor should have an estate "of the value of five hundred pounds." Articles 14, 29, 42. The act of February 8, 1791, provided that, for the purposes of taxation, certain real estate should "be estimated at the rate of half of one per cent. of the real value thereof." "The selectmen shall appraise all taxable property at its full and true value in money." Gen. Stats., ch. 52, sec. 1. The homestead right "shall not exceed in value five hundred dollars." *Id.*, ch. 124,

sec. 1. In levying an execution, the appraisers appointed to set off the homestead "shall set off such homestead by metes and bounds, of the value of five hundred dollars and no more." *Id.*, sec. 7. When the homestead can not be set off by division of the property without injury, the appraisers "shall appraise the whole." *Id.*, sec. 10. If real estate can not be divided among heirs or devisees without great prejudice, the committee "shall appraise the same at its just value." *Id.*, ch. 185, sec. 5. The reversion of the widow's dower, and of the family homestead, may be set off "at its just value, to be estimated by the committee." *Id.*, sec. 10. Among the articles exempted from attachment are the debtor's "household furniture to the value of twenty dollars," "tools of his occupation to the value of fifty dollars," "provisions and fuel to the value of twenty dollars." *Id.*, ch. 205, sec. 2. "All real estate, except the homestead right, may be taken on execution, and shall be appraised and set off to the creditor at its just value." *Id.*, ch. 218, sec. 1. When partition can not be made of real estate without great prejudice or inconvenience, it may be assigned to one of the owners, he paying to the others "such sum of money as the committee shall award." *Id.*, ch. 228, sec. 25. If any person steals property "of the value of twenty dollars," or "of the value of ten dollars and less than twenty dollars," or "of a less amount or value than ten dollars," he is liable to a proportional penalty. *Id.*, ch. 260, secs. 3, 4, 5.

These instances are sufficient to show that when property is to be appraised at what it is worth, the use of terms descriptive of value is unnecessary. The value need not be required to be the real, full, true, just, fair, salable, market value in money, no more and no less. No one would suppose that the value is to be an unreal, partial, false, unjust, unfair, unsalable, or unmarketable value, or in any thing else than money, or more or less than the property is worth, unless a departure from the usual course of business and the ordinary meaning of value were marked out by the law in an unmistakable manner.

"The selectmen shall appraise all taxable property at its full and true value in money." The words "full and true" "in money," give the statute no meaning which it would not have without them. As words of description, they are superfluous. They are mere words of emphasis, and not of necessary definition. And if the words "at its full and true value in money" had been omitted, the statute would have meant precisely what it means now. An appraisal of property signifies a valuation of it, or an estimation of its value, unless some other sense is plainly indicated. The common practice of undervaluing real estate for the purposes of taxation may have led the legislature to em-

ploy an unusual number of synonymous words, not to convey their meaning, but to impress it upon selectmen. Whatever the object of the tautology, it does not modify the legal or the natural interpretation of the word "appraise." If the legislature had said,—"The selectmen shall appraise all taxable property," and stopped there, it would be the duty of the selectmen to appraise all taxable property at what it is worth; and that duty is emphasized, not changed, by the other words of the statute.

V. The statute provides that when a tax-payer properly applies by petition for an abatement of a tax, the court "shall make such order thereon as justice requires." Gen. Stats., ch. 53, sec. 11. Justice requires an equal rate of taxation of Strafford real estate. If the Strafford real estate of others was appraised, in 1870, at a less rate than its full value, the real estate of the plaintiffs should be appraised by the commissioners at the same rate, so that the plaintiffs shall pay their proportion of tax and no more. The usual rate in farming towns is well understood; and the practice of under-valuation is so universal as to raise a presumption of fact that it prevails in Strafford. When the commissioners have ascertained the fact of the full value of the plaintiffs' Strafford real estate, on the first day of April, 1870, they should proceed further, and appraise it at its value as compared with the value at which other Strafford real estate was appraised by the selectmen in 1870. This comparative value is the only question which the commissioners are appointed to decide, and is a pure question of fact.

SUPREME COURT OF OHIO.

TO APPEAR IN VOL. 22 O. S. REP.

APPEAL BOND.

Samuel Robinson *et al.* vs. Mary E. Chadwick. Error to the District Court of Cuyahoga County.

STONE, J. 1. Where in case of appeal the record certified to the Appellate Court showed that the appeal bond was filed within the time limited by law, and was approved by the Clerk, whether on motion to dismiss the appeal on the ground, it is competent to show, *aliunde*, that the bond, although received by the Clerk, and by him filed within the time limited, not, in fact, approved by him until after that time had elapsed.—*Quere?*

But, *Held:* That in such case the appeal is not on that ground to be defeated, without clear proof, not only that the bond was not approved, but that the appellant had knowledge of that fact.

2. In an action by a married woman to establish as against a third party, her title to property which she claimed in her own right, the plaintiff, under the 314th section of the Code, as amended by the act of February 16, 1866 (S. & S. St., 588), is a competent witness on her own behalf, but is not competent to testify concerning communications between herself and her husband, made during coverture.

Judgment reversed, and cause remanded.

MANDAMUS.

The State of Ohio, on relation of Henry Adgate and Hart Adgate *vs.* Luther M. Meiley, Probate Judge of Allen County. Application for writ of mandamus.

WELCH, J. *Held:* Where money is paid into the Probate Court, in a proceeding to condemn private property under the statute, and wrongfully retained by the Probate Judge from the party entitled thereto, such a party has a plain and adequate remedy therefor, by action on the official bond of the Probate Judge, or by an ordinary action against him for the money, and, therefore, until such ordinary remedy has been resorted to, and proved ineffectual, mandamus will not be allowed to compel payment of the money. Peremptory writ refused.

PROMISSORY NOTE.

Clark A. Sackett *vs.* Jacob Keller. Error to the District Court of Summit County.

MCILVAINE, J. 1. The purchase of a promissory note without indorsement or other guaranty of payment, but with notice that it was given for a patent-right, is not thereby, as matter of law, charged with notice that it was obtained by fraud or without consideration.

2. The holder of negotiable promissory notes, purchased before maturity, and for value, but with notice that they had been obtained from the maker by fraud, and without consideration, can not, by way of estoppel, prevent the maker from setting up such defenses as against him, by showing that the maker, before the purchase, had informed him that the notes were all right, and would be paid at maturity, if it appear that, at the time such declarations were made, the maker was ignorant of such fraud and want of consideration, and that the holder at the time believed him ignorant thereof, unless he also show that he had informed the maker of the facts which had previously come to his knowledge affecting the validity of the notes.

Judgment of District Court and of the Common Pleas reversed, and cause remanded.

NUISANCE.

George Smith *vs.* The State of Ohio. Motion for writ of error to the Court of Common Pleas of Cuyahoga County.

The sentence and judgment required by the statute upon convictions for maintaining a nuisance under the act of April 15, 1857, can not be dispensed with upon a showing that the nuisance does not exist at the time such judgment is about to be rendered. In such case, however, an order to remove or abate the nuisance will not be issued to the Sheriff, as a matter of course; and on the hearing of a motion for such order, either party will be heard upon testimony, and if it then appear that such nuisance has ceased to exist, the order should not issue.

Motion overruled.

FORCIBLE ENTRY AND DETAINER.

The State of Ohio on relation of Newshauler & Jones *vs.* D. L. Wood, Justice of the Peace. Motion for the allowance of a writ of *mandamus.*

BY THE COURT: *Held:* 1. Section 137 of the Justices' act (1 S. & C. 794), authorizing the taking of exceptions to the opinion of the Justice upon "questions of law and evidence" in actions of forcible entry and detainer, does not extend to or include questions touching the weight or sufficiency of the evidence, but only such as relate to its competency or relevance.

2. Where there is evidence in such action of forcible entry and detainer, tending to sustain the finding of the Justice, and the only exception is to the finding itself, on the ground that it is not sustained by the evidence, the Justice is not bound to sign a bill of exceptions setting forth all the evidence in the cause, and the fact of such exception.

Writ refused.

KENTUCKY COURT OF APPEALS.

INCOME FROM SEPARATE ESTATE OF MARRIED WOMEN—HOW FAR CHARGEABLE WITH DEBTS.

Young and wife *vs.* Smith, &c. Louisville Chancery. Pryor, Judge.

Miles died many years since, devising his legal estate in trust for the sole and separate use of his only child, Mrs. Young, and appointing John and J. M. Lancaster, and Smith, his executors and trustees. The first of these qualified and acted until his death, then the second until his death, when the present executor and trustee qualified. About $30,000 of the trust fund was invested in county bonds, and afterward these bonds were sold by the trustee at a profit. Mrs. Young and her husband, residing on a farm, purchased live stock from Barbour, and

gave him an order on her trustee for the price ($900), to be paid out of the annual profits of the trust estate, amounting then to over $3,000. Barbour now seeks to subject a sufficiency of the annual profits to pay his debt.

Held—The will has been heretofore construed (10 B. Mon., 287), and Mrs. Young adjudged to be entitled to all the annual interest profits. She was also entitled to the profits on the sale of the bonds.

The trust property being the wife's separate estate, the interest and profits thereof assumes the same nature. But while the beneficiary had no power to alienate or encumber the trust estate, she could dispose of the annual income as she might see proper. As against her husband's creditors this income is regarded as her separate estate, but neither the will nor the statute will prohibit her from freely using or charging it. Should she attempt to dispose of it by anticipating the profits in such a manner as to deprive herself and family of its beneficial use, a court of equity would not hesitate to cancel the contract. Where the wife has ample means of support and the payment of her debts, the Chancellor would not refuse to subject the income of her separate estate, where she had full power over it, to the payment of a debt created by her for the benefit of herself and family. Her husband was at the time insolvent, and the writing shows that the credit was given to her to be paid out of her income.

The trustee must account to the beneficiary to the full amount of interest he received on the trust funds—eight per cent., but he is not chargeable with interest on any part of this interest.

PRINCIPAL AND SURETY—PLEADING—STANDING BY DEMURRER.

Bridges *vs.* Reed. Fayette. Pryor, Judge.

Bridges was principal and Reed surety in a note for $159, due six months after April 25, 1859. Bridges having failed to pay it, Reed brought this suit against him, alleging that he had paid the note, and that it had been assigned by the holder to him, and praying judgment for the amount so paid. Bridges filed a demurrer and an answer alleging that he had satisfied Reed's claim and the plea of limitation. The demurrer being overruled, and Bridges electing to abide by his demurrer, judgment was rendered against him for the amount claimed, from which he has appealed.

Held—This was not a suit upon the note, but upon the implied assumpsit. The note is not made a part of the petition, and the only allegation in reference to it is "that it was assigned by Swope to the plaintiff." It was, however, filed with the papers with the following indorsement by the obligee: "I do hereby assign to W. L. Reed all my interest in a note executed to me by I. T. Bridges, and himself security,

dated April 26, 1859, for $159, and he is entitled to the entire proceeds of said note."

If there had been an allegation in the petition that an agreement had been made between the plaintiff and the obligee, at the time of payment, that the former was to be substituted to all the rights of the obligee, there can be no doubt that the indorsement on the note would have been ample evidence to sustain such an allegation; but in the absence of such a statement in the petition, it must be regarded as an action upon a mere assumpsit, and the limitation of five years as defense would apply. (Smith *vs.* Latimer, 15 B. Mon.)

But the demurrer was properly overruled, as the petition contains every allegation requisite to maintain an action by the surety for money paid for the use of the principal. The filing of the demurrer and answer at the same time does not preclude the defendant from waiving his right to a trial upon the merits and standing by his demurrer. Having done so, and the petition presenting a cause of action, the judgment must be affirmed.

WHEN BORROWED MONEY IS REGARDED AS NECESSARIES.

Rhodes *vs.* Van Winkle and wife; from Louisville Chancery. Hardin, Chief Justice.

Van Winkle was insolvent, but his wife owned a house and lot. The taxes on the property were due, and the family were in need of the necessaries of life, when the wife induced the appellant to lend her three hundred and fifty dollars by representing that the debt would be a charge on the property, and executing with her husband a note for the amount.

Held—The term "necessaries" is one of relative signification, and should not generally be restricted in its application to such things merely as are proper and requisite for sustenance, but often includes much more, depending on the circumstances and peculiar situation of the parties. There can be little doubt that the money borrowed was used in relieving the property from its liability for taxes, and in buying provisions for subsistence.

These objects were certainly necessaries in the strictest sense of the term as used in the statute, and there is no good reason for discriminating between specific things or articles of property furnished as necessaries, and the money obtained for procuring, and actually expended for them.

TRIAL OF ISSUES OUT OF CHANCERY—EVIDENCE—JUDGMENTS AS EVIDENCE OF FORMER ADJUDICATION.

Crabb, &c., *vs.* Larkin, &c.; from Fulton. Peters, Judge.

The following questions of law are decided in this case:

1. The power of Courts of Chancery to order a matter of fact strongly

controverted to be tried by a jury, has long been exercised. It is proper that it should be done where the Judge conceives that justice will best be obtained, where on a material fact the evidence of witnesses equally credible, is so contradictory as to render it doubtful on which side the scale preponderates. (2 Daniels, Pl. and Pr., 1,330—1; 2 Bibb., 166.) Nor is it necessary, in order to have the issue tried by a jury, that it should be formed by the pleadings. It may be granted on exceptions to a master's report, as was done in this case.

2. McDaniel may not have heard all the conversation between Scott and Crabb, but what he stated he heard was a distinctive fact, and if true a controlling one, and was properly admitted to the jury for what it was worth.

3. The principle on which judgments are held conclusive upon the parties requires that the rule should apply only to that which was directly in issue. A judgment of a court of concurrent jurisdiction directly upon the point is, as a plea in bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court. The judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. (1 Greenl., 528.) The same matters were not directly in question, in the suit referred to, as are litigated here. The suit, as to the notes now litigated, had been dismissed before the judgment, and suit brought on them against another party in another court. As well might it be said that, when a party holding two notes on another, recovered on one, and afterward sued on the other, he could rely on his judgment on the first as evidence conclusive that the second had not been paid.

DIVORCE AND RESTORATION OF PROPERTY RECEIVED FROM EACH OTHER BY THE HUSBAND AND WIFE.

Phillips *vs.* Phillips. From the Louisville Chancery. Lindsay, Judge.

Appellant and appellee intermarried in 1864, and the husband afterward, "in consideration of one dollar and love and affection, conveyed in trust for her sole and separate use for life, with remainder in fee to any child or children of their marriage—if none at her death, to himself in fee—three hundred and sixty-five acres of land in Jefferson County, Kentucky. In 1866 the husband and wife removed to Missouri, and in 1867 the husband returned to Kentucky alone, the wife failing or refusing to come. After the separation of more than a year, the husband brought this suit against the wife, their infant child, and the trustee, for a divorce, and to annul the conveyance. A divorce *a vinculo matrimonii* was adjudged, and the property ordered to be re-

stored to him on the ground that it "came to her by virtue of, or in consideration of, the marriage."

Held: There was nothing showing that the consideration was other than that recited in the deed, or that it was executed pursuant to an ante-nuptial agreement, or by way of jointure, or as a marriage settlement, or in the discharge of any obligation, legal or moral, incurred by reason of the marriage. It was a mere voluntary conveyance, which might have been attached by the creditors of the husband, but which was valid and binding between the parties.

Section 6, Art. 3, Chap. 47, Revised Statutes provides that "upon final decree of divorce from the bond of matrimony the parties shall be restored such property, not disposed of at the commencement of the suit as either obtained from, or through the other, before or during the marriage in consideration, or by reason thereof." Section 462 of the Civil Code limits the property to be restored to that obtained during the marriage. The Code was intended to regulate the manner of enforcing the restoration rather than to supersede the statutes on this subject. (3 Met. 486.) It is clear that the mere fact that property was obtained by one of the parties from or through the other before or during the marriage, does not entitle the party from or through whom it was obtained to have it restored on divorce; otherwise the words "in consideration or by reason of the marriage" used in the statute would have been superfluous. The mere existence of the marital relation did not constitute a consideration for the conveyance in the sense in which that term is used in the statute. The term "consideration" used there means the act of marriage, or some agreement or contract touching or relating to the act of marriage, and the expression "by reason thereof" relates to such property as either party may have obtained from or through the other by operation of the laws regulating the property rights of husband and wife.

LIABILITY OF EMPLOYER TO EMPLOYE—NEGLIGENCE.

Sullivan's Administratix *vs.* Louisville Bridge Company. Jefferson Common Pleas. Pryor, Judge.

Sullivan, an employe of the appellee, while assisting in building its bridge across the Ohio River, fell from a plank walk into the river, and was drowned. The walk consisted of a plank about one foot wide, placed on another of the same width, and extending from a truck loaded with stone to a boat alongside a crib. Sullivan and others were placed on the plank, and the stones passed from one to another to the crib. He lost his balance by the giving way of part of a stone handed him.

Held: A contractor is liable to his employes for injuries sustained by them, resulting from the negligence of himself or his agent. The

relation existing between the two requires that the employer shall use ordinary care in the selection of materials to be used by the laborer in the course of his work, and to exercise the same degree of care and caution in the selection of those who are to control and manage his hands. Where the employer knows, or with the exercise of ordinary vigilance ought to have known, that the materials furnished by him for the use of the laborer in the construction of work was defective, and the latter, by reason of this negligence, is injured, he may recover damages. But where the employe undertakes to perform labor attended with danger to himself, he so far assumes the risks as to require the exercise of ordinary prudence and caution on his part. He is not bound to engage in work that places his life in peril, but when he does, and an injury occurs, he can not look to his employer for damages on the ground of negligence, if by the exercise of ordinary vigilance he could have avoided the accident. Where the employe knows that the material furnished him is defective and unsafe, and voluntarily uses it, he is without a remedy for any injury sustained.

Sullivan had been employed for several days on the plank from which he fell, and was fully aware of the danger attending it, having once refused to go upon it. Voluntarily placing himself in the position where he lost his life, when, by the exercise of ordinary care for his own safety, he might have avoided it, no recovery can be had.

REMOVAL OF CASES FROM STATE TO THE FEDERAL COURTS—FINAL TRIAL.

Hall & Long *vs.* Ricketts. Jefferson Common Pleas. Hardin, Chief Justice.

This action having progressed to a verdict and final judgment in the lower Court, on an appeal to this Court that judgment was reversed and a new trial awarded. On the return of the case the lower Court granted a new trial in obedience to the mandate, and afterward the defendant (Ricketts) filed his petition, suggesting that he was and ever since the commencement of the action had been a non-resident of this State, and alleging in effect that he had reason to and did believe that from prejudice or local influence he would not be able to obtain justice in the State Court in which the action was pending, and then came, and upon executing bond as required by law, moved the Court to remove the case into the United States Court for the District of Kentucky, and that motion, although resisted, was sustained by the Court, and the case transferred to the Federal Circuit Court, and from that decision the plaintiffs have appealed to this Court.

The order of removal, involving as it does a final determination of the question of jurisdiction in the State Court, there can be no doubt as to the jurisdiction of this Court to revise that decision; but the es-

sential question in the case is whether the order of removal, at the time it was made, was authorized under the act of Congress of March 2, 1867, which provides, "That where a suit is now pending, or may hereafter be brought in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State Court an affidavit, stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such State Court, may at any time, before the final hearing or trial of the suit, file a petition in such State Court, for the removal of the suit into the next Circuit Court of the United States." [14 U. S. Stat. at Large, 559.] This act is an amendment of that of July 27, 1866, in which the language used is, that the petition may be filed "at any time before the trial or final hearing of the cause." [Ib., 307.]

The import of the language of both acts as to the time within which the application for removal may be made is manifestly the same, the transposition of the words being merely accidental. As has been already sufficiently shown, the case, when the order of transfer was made, had been fully and completely tried in the lower Court, and the action of that Court upon the last trial, which resulted in a verdict and final judgment for the defendant, had been, on the appeal of the plaintiffs, regularly revised by this Court, and the judgment reversed. The reversal certainly had the effect of annulling the judgment of the lower Court, but the trial nevertheless remained effectual as a physical fact, and instead of becoming a nullity, as if it had been a mere mistrial in the Court below, was the means of enabling the Court authoritatively to determine the principles of law governing the rights of the parties, and directing their proper application by the lower Court upon a retrial of the case. The doctrine is well settled, and has long been recognized by this, as well as the Courts of other States, that although a judgment be reversed for errors committed by the lower Court in trying the case, and the case remanded consequently for a new trial, still the decision of the Appellate Court, based on the former trial of the case, as to questions of law involved by and decided upon it, becomes the law of the case, as finally disposing of those questions, and binding not only on the inferior Court, but also upon the Appellate Court upon another appeal in the same case. This being undoubtedly so, we should not hesitate to decide that the last trial of this case in the Court below was a final trial, and such as to preclude the appellee from availing himself of his residence in another State for avoiding the jurisdiction of the lower Court according to the provisions of the act of

March 2, 1867, *supra*, even if the question were altogether a new one, and unaffected by the decisions of the Courts of other States entitled to be respected as authority. Of the numerous decisions which might be cited as sustaining the constructions, which we must give to said act of March 2, 1867, we deem it only necessary to refer to the able and exhaustive decisions in the case of Ackerly *vs.* Villas, 24 Wisconsin, 165, and Home Life Insurance Company *vs.* Dunn, administratrix, 20 Ohio, St. 175, and the authorities therein cited.

We are of the opinion that the Court below erred in sustaining the application to remove the case into the United States Circuit Court.

"Wherefore said order of removal is reversed," &c.

FRAUDULENT CONVEYANCES TO PREFER ONE CREDITOR OVER ANOTHER.

Warner *vs.* Bryant. From Louisville Chancery Court. Hardin, Chief Justice.

Appellant recovered a judgment against Bush for $2,600, and an execution thereon was returned "no property found." Bush, however, was the owner of a tract of land at the time the execution issued, and the legal title had been conveyed to him by Tichens, and the deed acknowledged and lodged for record, but not recorded. This deed was withdrawn from the office and destroyed by Bush. He was then owing Bryant $2,500, and Tichens $6,000 of the consideration. Bryant bought the land from him, discharging his debt of $2,500, and paying Tichens the $6,000, and Tichens conveyed to him the title. Bryant then sold and conveyed the land to Deppin, for $8,500.

Held—The legal title to the land being in Bush when the execution came to the officer's hands, a lien attached in favor of the appellant, which might, and perhaps would have been rendered effectual by a levy of the execution, if the Sheriff had known of the existence of the deed, and it is reasonable to suppose that it would have been discovered if it had not been destroyed. Bush's conduct was fraudulent, but it does not appear that Bryant had personal knowledge of appellant's judgment and execution; but it does appear that he undertook for Bush to effect a sale of the land, and negotiated a sale to Deppin before the deed to Bush was destroyed. Though the conveyance to Bryant and Deppin may have estopped Bush from asserting title in opposition to the claim of Deppin, the destruction of the deed by Bush did not legally divest him of his title to the land. [2 Washburne on Real Property.] The assent of Bryant to the suppression of the title of Bush by the destruction of the deed, and his acceptance of another deed to himself, are therefore badges of fraud. The unusual and irregular mode adopted for disposing of Bush's interest in the land can be attributed to no other cause than an arrangement between Bush

and Bryant to defeat, for the benefit of the latter, the enforcement of rights already existing in other creditors, by a levy and sale of the land.

Bryant should be considered as holding in trust for appellant the difference between the price he received from Deppin and the price he paid Tichens for the land.

SUPERIOR COURT OF CINCINNATI.

SPECIAL TERM.

Geo. W. Johnson *vs.* Alfred Miller and Firman Jessup.

YAPLE, J. Miller and Jessup were partners. Jackson sued them, individually, on certain firm promissory notes they made to him. Jessup had become a non-resident of the State, and the plaintiff caused an attachment to be issued against him. His copartner, Miller, owed him money; but Miller had been declared a bankrupt by the U. S. District Court, and E. S. Throop was his assignee in bankruptcy. Jackson garnished him. Throop answers, setting up that he is such assignee, and has certain effects of Jessup in his hands, as such, which are coming to Jessup from Miller. He denies that this Court can make any order upon him for want of jurisdiction, that being in the U. S. District Court alone, and asks to be discharged.

I do not think that this Court can make any order upon him. Plaintiff, Jackson, should have a receiver of Jessup's effects appointed by this Court. He would represent Jessup in the bankruptcy distribution, and would receive from Miller's assignee all moneys coming to Jessup, and then account to this Court, in this case, for them.

Property in the hands of an assignee in bankruptcy that may be payable to any creditor is not subject to attachment against such creditor. *In re* Bridgman, 2 B. R., 84. *Bump*, Bkr., 430.

Whether the plaintiff can have a receiver appointed or not—Jessup being a non-resident of the State, and none of his property in the jurisdiction of the Court—will not be passed upon until a receiver shall be applied for.

BOOK NOTICES.

CONTRIBUTIONS TO MENTAL PATHOLOGY. BY ISAAC RAY, M.D., Author of "Medical Jurisprudence of Insanity" and "Mental Hygiene." Octavo, cloth, 550 pages. $3. Published by Little, Brown & Co., Boston. 1873.

To those who have read "Ray's Medical Jurisprudence of Insanity," the author of this work needs no introduction; to others, however, who have not made themselves familiar with that standard work on insanity, it may not be amiss to say that the writer of the book, which we design to present to their notice, is a man who has spent the greater portion of his life in the endeavor to ameliorate the condition of the insane, and in the study of the different forms of the terrible disease with which they are afflicted. This latest work of Dr. Ray on the subject of diseases of the mind (Contributions to Mental Pathology) will not detract from his well-earned reputation, of being an authority on insanity, and a writer possessed of the happy faculty of imparting useful information in such a manner as to make the acquisition of it a pleasure.

We find, upon a careful examination of the work, that its character has been tersely and truly described by the author in his preface, where he says, "Though the lawyer and physician will meet with much in the book strictly within the line of their professional studies, yet the general reader will find in it nothing unworthy the attention of any thoughtful mind." The opening chapter consists of an address delivered on the occasion of laying the corner-stone of the State Hospital for the Insane, at Danville, Pennsylvania, August 26, 1869, which, though of no practical importance, either in law or medicine, yet contains views regarding the duties of the public to the insane that can not fail to arrest the attention of thinking men, and lead them to remark, with the late Horace Mann, of Massachusetts, that "the pauper insane are the wards of the State." In the address may be found an historical account of the recognition by the people of Pennsylvania, of their duties to this unfortunate class, and the provision made for them by the State, from the year 1752, to the time of the delivery of the address. The "causes of insanity" are treated of at some length. The scope of the chapter is comprehensive, and, although some passages are not strictly germain to the subject, they will, nevertheless, receive the consideration to which they are justly entitled; for instance, in his treatment of the topic above mentioned, the author says: "The question whether a certain act is, or is not, the offspring of insanity, must often be decided, not by the intrinsic qualities of the act, but by the circumstances of the case. A person of doubtful mental condition must not be considered as responsible for an act of violence, merely because a Fejee Islander, or a professional bravo, might do the same thing as a matter of business or pleasure. And the converse of the proposition, I admit, is generally true. An act of violence must not be attributed to insanity, merely because, to a person of high culture and correct morals, it seems inexplicable on the ordinary principles of human conduct." Under the head of "Statistics of Insanity," are dis-

cussed their general unreliability, and the almost insurmountable difficulty of making them exhibit the truth in regard to this malady.' "Moral or Emotional Insanity," and its relation to crime, is presented in an able manner. The subject is interesting to the general reader, but more particularly to those who make a specialty of criminal law. As we design to present to the notice of our readers only such portions of the work as may be interesting to them in connection with the law, we leave the topic of "doubtful recoveries" for the consideration of the medical profession. A strangely interesting chapter is the one on "Delusions and Hallucinations," in which may be found a clear and succinct statement of the technical meaning of the terms, together with a number of remarkable instances in illustration of the differences between these two conditions of the mind. In his consideration of the "Criminal Law of Insanity," the author attributes the frequency of the plea of insanity as a defense in criminal cases to "*the increased prevalence of the disease.*" A number of cases, in which the question of insanity was presented in some peculiar manner, have been collected and published by the author in this book, the compilation of which is valuable for reference, as it contains cases which are not at all times accessible, and which not only relate to criminal matters, but also to testamentary capacity, and the degree of mental vigor necessary to contract. In the former class of cases we find the Trials of Rogers, Baker, Cangley, and Winnemore. The latter consist of the Hinchman case (in which a verdict of ten thousand dollars was obtained for alleged false imprisonment); a portion of the "Parish Will Case," and the "Angell Will case." The "Insanity of Seduced or Deserted Women" is discussed, and the case of Mary Harris, who murdered a Government clerk in Washington City, commented upon. The chapter on "Medical Experts" will probably receive more attention from members of the Bar than any other portion of the book; the topic seems to be fully understood by the writer, and suggestions are made of great practical importance concerning the remedies to be applied to correct certain abuses connected therewith; the feasibility of plans suggested by others, is ably discussed. The remainder of the book is devoted to a general consideration of insanity, divided into four chapters, under the respective heads of "Management of Hospitals for the Insane"—"Insanity of King George III."—"Shakespeare's Illustrations of Insanity," and "Illustrations of Insanity by Distinguished English Writers."

The importance of a knowledge of this disease is felt by the community at large, but more particularly by Physicians and Lawyers, who recognize the fact that it is a subject worthy of the most careful thought and study; we have, therefore, endeavored to direct the attention of our readers to this, the latest work on this subject. We predict for the book a favorable reception from the legal profession.

Two very valuable treatises have just been received by us: "FREEMAN ON JUDGMENTS," published by A. L. Bancroft & Co., San Francisco, Cal., and "SUGDEN ON VENDORS," published by Kay & Brother, Philadelphia, Pa., which we shall take pleasure in reviewing in our next issue. Robert Clarke & Co., Cincinnati, Ohio, can supply the profession with the former (one volume) at $6 50, and the latter (two volumes) at $15.

MISCELLANY.

The transcript of Magna Charter, now in the British Museum, was discovered by Sir Robert Cotton in the possession of his tailor, who was just about to cut the precious document out into "measures" for his customers. Sir Robert redeemed the valuable curiosity at the price of old parchment, and thus recovered what had long been supposed to be irretrievably lost.

The craft of authorship is by no means so easy of practice as is generally imagined by the thousands who aspire to its practice. Almost all our works, whether of knowledge or of fancy, have been the product of much intellectual exertion and study; or, as it is better expressed by the poet,—

"The well-ripened fruits of wise decay."

Hume wrote his History of England on a sofa, but he went quietly on, correcting every edition, till his death. Every edition varies from the preceding. Robertson used to work out his sentences on small slips of paper; and, after rounding them, and polishing them to his satisfaction, he entered them in a book, which, in its turn, underwent considerable revision. Burke had all his principal works printed two or three times at a private press before submitting them to his publisher. Johnson and Gibbon were the least laborious in arranging their *copy* for the press. Gibbon sent the first and only manuscript of his stupendous work (The Decline and Fall) to his printer; and Johnson's high-sounding sentences were written almost without an effort. Both, however, lived and moved, as it were, in the world of letters, thinking or caring of little else—one in the heart of busy London, which he dearly loved, and the other in his silent retreat at Lausanne.

THE

AMERICAN LAW RECORD.

VOL. 1. MAY, 1873. NO. 11.

INTRODUCTORY LECTURE

—ON—

EQUITY JURISPRUDENCE.

Delivered at the Law School of Cincinnati College, Cincinnati, Ohio, October, 1872.

J. BRYANT WALKER, Professor of Equity.

GENTLEMEN OF THE LAW SCHOOL.—The subject of my lectures to you, the present year, will be, as you have already learned, *Equity.*

In the present lecture, I propose to give you first a slight historical sketch of the growth of that system of jurisprudence, one branch of which we are to examine together, and then by the aid of that, to point out to you the limitations of our present subject, and the difference between those doctrines formerly held about it, and those which are now held, though too often overlooked by some judges. In this way I hope to impress more clearly upon your minds the actual limitations of our subject.

The first thing almost, that strikes any one who begins to investigate the system of English law, upon which the law of all our States, except Louisiana, is founded, is the presence in that system of two entirely distinct classes of courts, exercising different powers through different means—governed by different rules—and with wholly different methods of procedure.

Palgrave says in his essay on the original authority of the King's Council (1834) p. 3:

"Amongst the many peculiarities which characterize our legal institutions, there are none more remarkable than those offered by the courts of equitable jurisdiction, when distinguished from courts of common law. It must appear a singular anomaly to a foreigner when he is informed that our English tribunals are marshalled into opposite

and even hostile ranks, guided by maxims so discrepant, that the title which enables the suitor to obtain a decree without the slightest doubt or hesitation, if he file a bill in equity, ensures a judgment against him should he appear as plaintiff at common law; and exercising their respective jurisdictions by means of forms and pleadings, which have as little similarity as if they existed amongst nations whose laws and customs were wholly strange to each other."

Nor is it only to the foreigner that it seems strange, but I know to many natives, not learned in the law, the difference is wholly inexplicable.

It is true, that in this State, and in almost all the others, we have done away with the distinction of courts and confide both powers to the same judge. In England the Court of Exchecquer used in former times also to exercise a double jurisdiction, but the change there has been in the opposite direction, so far, and that court has been deprived of its equitable jurisdiction. There is, however, a good deal of discussion on the subject, and it is very probable, that before very long the distinctions in tribunals will be done away with there.

But this union of the powers in one court renders the distinction still more curious, for now a suitor will find different treatment and different success in the very same court, dependent upon the mode in which he approaches it.

In this State, too, and in the others which have adopted codes of practice, we have done away with most of the distinctions in the mode of procedure which formerly distinguished the two branches, and the "civil action," answers all the purposes of the various actions of law, and also performs the functions of a bill in equity.

Yet, still none of these changes go to the root of the matter. The distinction between common law and equity is important as ever. The change being in the mode of procedure, the rights of parties are not altered. When your client comes to you for advice, and states his case, you have still to examine whether he could have sustained either an action at common law *or* a bill in equity. If he could have gained relief in either way, then he can get it now by the civil action. But if he could have done neither, then, in the absence of statutes, he is without remedy.

In still other ways under the codes, the question as to whether a given state of facts is the ground for an action at law or in equity is continually coming before all practicing lawyers. For instance, the constitution of the United States, and of every State, so far as I know, except Louisiana, contains a guaranty of the right of trial by jury. This has been universally settled to mean a right of trial by jury in those cases n which the common law gave it, and not as prohibiting equitable pro-

ceedings, in which there never was a trial by jury. Thus, continually, in order to determine your remedy here, you must decide whether under the old system you must have proceeded at common law or in equity. If at common law, the legislature can not take away your right to a jury in any way. If in equity, there being no constitutional guaranty, the legislature may send you to a jury or not. They have generally left such cases to the judge.

Nor is it always easy to decide. But a short time ago, when I was solicitor for the city of Cincinnati, two cases came up concerning the building of the hospital in this city. They were both, one of them especially, long accounts of the measurement of the different kinds of work: one having about one hundred and fifty, and the other two hundred different items, and with varying questions upon the different items, both of fact and law. I was very desirous not to have these cases tried by a jury, believing that it would result simply in a guess one way or the other. I wanted them to go to a referee, who could deliberate over the testimony, decide upon each item, and fairly state an account. The other party had brought a simple action for work and labor done, and preferred a jury. Could I escape it? The code gave the judges power to refer any case in which the parties *were not entitled by the Constitution to a trial by jury.* The question was simply then, whether I could show that this was a case in which, under the old system of practice, equity would have had jurisdiction. If I could, I could accomplish my object. Opposed to me was one of my present colleagues, Judge Hoadly. I succeeded in the lower court in getting a reference, and incline to think the Supreme Court will sustain it, if it ever gets there. But however that may be, the instance shows you that the importance of knowing the exact boundaries which separate the jurisdiction of courts of equity from courts of common law is as great as ever, and you must not imagine that we are wasting our time on useless technicalities. No man can be a profound lawyer unless he understands the history of the law even in matters which are now obsolete. But the matters which we are going to study are far from obsolete; they impregnate the whole of our present system; you meet them in one shape or another at every turn; and without knowledge of them, no man can be even a fair lawyer—can do even moderate justice to his client's case.

Strange as this mixed system may seem to you, it has nevertheless had many ardent admirers, one of whom, (Francis, in the preface to his maxims) compares its results to the mingling of two herbs, which, of themselves, are poison, but together, make a wholesome medicine.

I can not think of any way as good as a historical comparison of the growth of these two branches, to give you in a short time a tolerably clear idea of their relations. It is a subject which you should study your-

selves, and which you will find fully treated in Spence's Equitable Jurisdiction of the Court of Chancery, and the other books referred to in it. But this evening I can give you but a general sketch of the subject, passing over many disputed points without a word, and only trying to give you what seem to me the best considered opinions on the subject.

Whether the antiquity of the two branches was equal is one of the much disputed points into which I have no leisure to go. It is unquestionable that the common law developed itself much the earliest, and became a well-defined and fixed system before equity developed or became at all understood. The question of absolute antiquity is of only theoretical, or historical interest; *practically* there is no doubt that the common law was the older system, and that it governed and controlled all through its development what was *practically* the junior system, and I own that it seems to me most reasonable to suppose that this also is the most correct historical statement, though undoubtedly some of the officers of Chancery are as ancient as those of the common law.

The common law was in the beginning, and in a certain sense, still is a system of UNWRITTEN LAW. That is, there was no book or statute, or compilation which contained the law. As we have it now it is embodied in a vast number of decisions of particular cases, each one of which is a precedent for the decision of subsequent similar cases. In the earlier times when books did not exist, and writing was a comparatively rare acquisition, the law rested in the bosoms of the judges. In after years it was said that there were statutes at its foundation, which had been lost and forgotten by length of time, but this was purely the invention of another age. The judges represented a king of undefined and vast powers, who almost certainly in ancient time sat in the courts himself, at times, as the proceedings in the Court of King's Bench are still said to be *coram rege ipso* before the King himself, though so long ago as the reign of James I, this practice had been so long disused that in spite of this evidence, the judges gave it as their opinion when this King desired to revive the practice and sit himself, that such a course would be illegal, that the King could only dispense justice in courts of law by his judges.

In the very earliest times, all justice seems to have been dispensed in the King's special council, *aula regis*, from which the different courts afterwards split off.

If the King himself sat in old times, it would render the judgments entirely analogous to a rescript of the Emperor under the civil law. At all events, the decisions of the judges had great weight. They were not supposed, however, to make law, but only to announce what the law was: not *jus dare*, but only *jus dicere*. There was supposed to be *some-*

where, in nubibus, you might say, a complete body of law, the visible evidences of which were to be found mainly in the decisions of the judges, but partially also, in later times, in the treatises of some standard authors. The law was said to be founded on "reason" and "equity," and the judges professed to decide in accordance therewith. Although this is the theory, and although from the multitude of decided cases, instances of entirely new points can not often arise, yet they do occasionally, and in such instances the action of the courts much more nearly resembles legislation than a decision—has much more of the *jus dare* than of the *jus dicere*.

For instance, in England in 1852, a question came up whether an action was maintainable for the diversion of water from a stream in consequence of sinking a well, the water diverted, being underground water, which, but for the well, would have percolated into the stream. The Court of Exchecquer held the action maintainable. The question was almost a new one, and the judgment of the court settled, or was supposed to settle it (Dickenson *vs.* The Grand Junction Canal Company, 21 L. J. N. S. Ex. 241.)

But in 1856, the same question coming before the Court of Exchecquer Chamber, a court of higher authority, was decided *the other way*, and the law was then ascertained differently (Chasemore *vs.* Richards 26 L. J. N. S. Ex. 393, 1857). It is possible that the House of Lords, the highest appellate tribunal, may differ again when the question comes before it.

In the early times, however, when there were few or no reports, and what decisions there were, were simply, or mainly, matters of tradition, the power was much more undefined, though there is little question that in older times, much greater respect was paid to the civil law than has been since. Indeed the works of the very earliest writers, such as Bracton's, are largely indebted to it.

Gradually, however, a hostility to it grew up and increased, until it was almost entirely neglected by English lawyers.

Absolute arbitrariness was, however, soon checked by the doctrine of adhesion to precedents, which holds so prominent a position in our law. Each decision was held to ascertain finally the law applicable to a certain state of facts. It might be overruled, it is true, but until then, it was followed, and, if overruled, it was not on the ground that it was improper or bad law, but that it was not law at all.

The respect paid to precedents was curious. They were regarded as almost sacred, as something beyond mere human wisdom as it were, and more binding by far than the opinions of text writers.

Thus Coke says (9 Rep. Pref. XXXVIII) "whereunto (in those cases "that be *tortuosi* and of great difficulty, adjudged upon demurrer, or re-"solved in open court) no one man alone, with all his true and utter-

"most labors, nor all the actors in themselves, by themselves out of a "court of justice, *nor in a court* without solemn argument, (where [I "am persuaded] Almighty God openeth and enlargeth the understand- "ings of the desirous of justice and right) could ever have attained to."

In this way, then, the common law grew. Each precedent adding something to the ascertained stock, and furnishing a guide to future judges. But the same cause which gave it stability, under a servile adherence to precedent, deprived it of its flexibility and power of adaptation to new circumstances as they arose. The theory of the existence of a complete system of principles applicable to all cases was not carried far enough, and the judges refused to take notice of matters growing up under their very eyes. A good instance of this is in the matter of uses and trusts, which we shall at some future time have to consider more thoroughly, but now I can only give it a passing notice. All over the kingdom, from various causes, a custom sprang up of giving land to A. for the use of B., that is, to let B. enjoy the fruits of it, either by cultivating it himself, or by delivering to him the profits. Now the courts of law refused to adapt themselves to this new usage. They entirely declined to recognize this new kind of ownership. They declined to look beyond A., or to see that B. got his rights, or to have anything to do with him. But the evident intention of the grantor was thus set at nought. Hence arose, as we shall see, one great source of jurisdiction to courts of equity. Had a similar course been followed in Lord Mansfield's time the whole field of commercial law almost, might have passed out of their hands. But a wiser course, and one more consistent with theory prevailed, and the customs *of the kingdom* were then recognized as on strict principle they would *have been before.*

In this way the courts of law began to fail to do justice to the people. They proved unable to meet the need of the times. There were also various things in the forms of their procedure, the mode in which cases were presented, and the remedies, which they administered, which greatly increased this want of power to do justice, and the same spirit of adherence to precedent also came in here to increase this difficulty.

I shall only notice a few of these. The first place among them must be given to the forms of action.

In early times among the Saxons, there existed a proceeding by "plaint" (1 Spence 62, 223) in the lower county and burrough courts at least, which strongly resembled our "*civil action*" under the code apparently—that is, the party stated his ground of complaint in his own way without being tied down to any forms.

But after the conquest, this was superceded by forms of action similar in many respects to the actions of the Roman law. Into the particulars of these actions I can not go. Suffice it to say that these actions

could only be begun by *writ*. "This writ was in the form of a precept or "mandate from the King, under the great seal, addressed to the Sheriff "of the county in which the cause of action arose, or where the defend- "ant resided, commanding him to cause the party complained of to ap- "pear in the King's Court at a certain day, to answer to the complaint. "Every writ was founded on some principle of law—*regula juris*—which "gave the right on which the action was founded; and the facts were "stated with so much of detail only as to bring the case within such "principle of law."

Some writs were styled *de cursu*, and issued as of course, which, before Bracton's time, had become fixed in form, and could not be changed (Bracton 413 b.) New writs were also at first framed to meet new circumstances, and a register of them was kept. But the common law judges who decided upon the validity of the writs, with increasing rigor insisted upon an adherence to the writs in the register, until finally the enumeration of actions and of writs became identical (1 Spence 227, Stephen on Pleading 9).

Where no writ existed suited to the case, the subject was without remedy. As early as 1285, this evil was beginning to be seriously felt. In that year the thirteenth Edward I, the statute generally called the statute of Westminster the second was passed, the twenty-fourth section of which directs that, "Whensoever, from henceforth, it shall for- "tune in chancery that in one case a writ is found, and in like case fall- "ing under *like law* and requiring *like remedy*, is found none, the clerks "in the chancery shall agree in making the writ, or the plaintiff may "adjourn it into the next parliament; and let the cases be written in "which they can not agree, and let them refer themselves to the next "parliament, by consent of men learned in the law, a writ shall be "made, lest it might happen after that the court should long time fail "to minister justice unto complainants.

Under this statute grew up the action of trespass on the case with its various branches as trover, and assumpsit with the common counts, including that for money had and received, which was afterwards said to be founded on principles of justice like a bill in equity.

But whether from the *negligence* of the clerks of the Chancery or from the *want of liberality* on the part of the judges, as Blackstone seems to think (3 Com. 52), the full benefit was not derived from this statute, although the fictions on which the action of trover rested, as the allegation of the loss of the goods by the plaintiff, and the finding of them by the defendant, and the mode of construction by which the action of trespass on the case was first extended to include all actions *ex delicto*, and afterward causes of simple nonfeasance of duties imposed by contract, hardly seem to sustain the charge of illiberality on the part of the judges. Its effect ceased with the introduction of these actions.

It was a consequence of this method of procedure also that it threw upon the party the responsibility of determining what his relief was. He must bring the right action or he failed and had to pay the costs. And it was often very difficult to determine what was the correct remedy, as the distinctions taken were extremely nice. Yet if he failed, however clear his rights, he must lose that suit and pay the costs.

Take for instance the boundary line which separated trespass, and trespass on the case. If you threw a log into a public way, and it struck a man and injured him, trespass would lie, but not trespass on the case; but if the log fell, and lying there the man stumbled over it and was injured, trespass would not lie, but you must bring your action *on the case*, as it was shortly called (1 Spence, 242 n.).

Or take the noted squib case (Scott *vs.* Shephard 2 Blackstone 892, 1 Smiths L. C. *210) though there the majority of the court held that the action was rightly brought. That was a case where a man threw a lighted squib into a market place which fell on a stall, the owner of which, in self-defence, picked it up and hurriedly threw it off, and after being thus thrown by several hands, it exploded and put out the plaintiff's eye. The plaintiff sued the original thrower and brought trespass, and the judges finally sustained it, though one of the judges dissented, by constructively extending the force given by the first thrower, through the subsequent throws, and thus holding him liable for the final consequences. So narrowly did the plaintiff escape failure.

Still another difficulty lay in the restriction as to the remedy which the court could award. *Damages*, money was in courts of law the sole remedy for all earthly ills in ordinary cases. Nor is there any power of molding the judgment to suit the emergencies of the case.

Now, there had been among the officers of the kingdom from the earliest times one called the *Chancellor*. It was from his clerks in the Chancery that all writs were obtained as we have before seen. He was also a member of the King's special council, the authority of which was very undefined, but which seems, from very early times, to have exercised an extensive judicial authority, and was the keeper of the great seal of the kingdom. From this special council, or *aula regis*, as the increase of business required it, the Common Pleas, King's Bench and Exchecquer grew, and, to a certain extent, the Court of Chancery itself (Haynes lectures on equity, *39).

For a long time the office was almost exclusively held by ecclesiastics. Parning, in the fifteenth year of Edward III, (A. D. 1341) was the first lay Chancellor; Thorpe and Knyvit in 1371 and 1372, the next. Then the office returned again to its accustomed channel. From 1558 to 1621, lawyers held the office, and it was not until from 1621 to 1625, afterward that Williams, the last clerical chancellor sat. (1 Spence *339, Campbell's Lives).

He was one of the highest dignitaries of the realm, the King's confidential adviser, and, it was said, the keeper of the King's conscience.

He had also a considerable common law jurisdiction in the way of writs of *scire facias* to repeal letters patent, of petitions of right, for obtaining possession or restitution of property from the King, writs of *scire facias* upon recognizance, &c., (1 Spence 335-7) but with this jurisdiction we have nothing to do.

This special council seems in the earliest times to have exercised jurisdiction in all cases, and after the formation of the common law courts, to have continued to do so in cases where they gave no relief, whether from defects in the law, or from extraneous causes. Petitions appear to have been presented to them, on which they made various endorsements. Such as "sue at common law," "sue in chancery," that is before the Chancellor in the exercise of his common law jurisdiction, "a remedy shall be provided," and the like.

In the reign of Edward I, (A. D. 1272, 1307) we find the King sending certain of the petitions addressed to him, to the Chancellor, or the Master of the Rolls by writ under the privy seal, directing them to give such remedy as should be consonant to *honesty* (*honestati*); and in the twenty-second, Edward III. (A. D. 1348) the King by a writ or ordinance referred all such matters as were *of grace* to be dispatched by the Chancellor or the Keeper of the privy seal (1 Spence 335, 337).

Whether the extraordinary jurisdiction of the court was really referable to this or a similar order, as Spence thinks probable, or whether it was simply a gradual devolution upon him of the authority which the King in his select council had exercised, the growth of the extraordinary jurisdiction of the Chancellor seems to have been steady. The claim in the first instance seems to have been of the broadest nature. As we have seen above, he was to give in one case such remedy as should be consonant to *honesty*.

The principles which governed the court were said to be those of *honesty*, *equity*, and *conscience*. The latter as a principle had not been mentioned in the common law. Equity was well known to the civil law, and had been recognized to some extent at the common law. The old writers on the common law, while it was still an unwritten law, had always maintained that its principles were founded on reason and equity. Lord Coke said, (10 Rep. 108 A.) speaking of the multiplication of services reserved out of land says that when one only is reserved in the lease, it shall not be multiplied because the reservation of the donor or lessor in his title only, and when he himself reserves but one, the law which is *always grounded upon right and equity* will never increase it, or give him more than he himself has reserved." Again, in Hurberts case (3 Rep. 13 b.) But conscience was a new principle in name, and of clerical introduction, and it would appear from the instances that in the begin-

ning the attempt actually was to create a tribunal that was to be guided simply by the right, the conscience of the judge, and that should remedy all wrongs of whatever kind. So we find in the early cases the most varied applications to the Chancellor. He was asked to enforce clear legal rights because the defendant was so powerful that the plaintiff could not contend with him at law. There is even a bill in 1 Calendars in Chancery 24 to enjoin the defendant from practicing witchcraft upon the plaintiff, and many other singular cases. This was analogous to the early state of the common law, when the judges did decide according to reason.

It is to this state of the law that most of the earlier writers refer in their unbounded eulogiums upon their subject, and their extravagant description of its powers.

Thus, in a little book called Grounds and the Rudiments of Law and Equity, which was published in 1749, and which has been sometimes attributed to Richard Francis, the author of Maxims in Equity, it is said:

"Equity is that which is commonly called just and good; and is a "mitigation or moderation of the common law in some circumstances "either of the matter, person, or time, and often it dispenseth with the "law itself."

"The matters of which equity holdeth cognizance in its absolute "power are such as are irremediable at law, and of them the sorts may "be said to be as infinite almost as the different affairs conversant in "human life." And the author adds: "Equity is so extensive and va-"rious that every particular case in equity may be truly said to stand "upon its own particular circumstances; and, therefore, under favor, I "apprehend precedents, not of that great use in equity as some would "contend; but that equity may thereby be made too much of a science "for good conscience."

The preface to Francis' Maxims is so curious in its defence of these extended claims, that I am tempted to quote from it at greater length.

"It is a common objection against our courts of equity, that their "power being absolute and extraordinary, their determinations must "consequently be uncertain and precarious; that not being bound by "any established rules or orders, nor circumscribed within the "limits of positive laws, the unhappy suitor must enter into "a court of equity with doubts and fears; and if he has "succeeded once, it is great chance but he may fail upon "a second trial, either the humor of the judge, or the judge "himself being changed; and that this is true in fact, for that after "the most solemn arguing of causes, in all their niceties and circum-

"stantials, decrees made thereon, have been frequently reversed by "the same, and more often by succeeding, chancellors. It is a pity that "Englishmen, who are so wont to boast of that invaluable blessing of "freedom of property, should be heard to give themselves so broad a "lie as to say that those courts of justice, where matters of property of "the greatest value are daily determined, are arbitrary and precarious "in their determinations. It is surely to say that there is freedom of "property in Turkey as well as in England, if the courts of justice, in "which such properties are determined, are arbitrary in both places."

"But to this objection it may be answered in general that where con- "science is to direct the judge, that court can not with any propriety of "sense or speech be said to be arbitrary. The judge knows, and is sen- "sible, that he sits there, not to dictate according to his will and pleas- "ure, but to be guided by that infallible monitor within his own breast; "and surely he, who is bound to determine according to the original "and eternal rules of justice, is no more arbitrary than he that is "bound to judge according to positive laws and statutes; since the "one has no more power to alter his own conscience, than the other to "change the law."

"But if it should then be asked, why are not all our judges to deter- "mine according to conscience? And why are positive laws made "since it must be confessed that many times the rigor of them is op- "pression and injustice? "To this it may be answered that it were to be "wished that such men could always be found that would judge accord- "ing to conscience; but as the depravity of human nature is too appar- "ent, and the precept of conscience too often disregarded, it is abso- "lutely necessary to restrain judges to determine according to positive "laws, and to annex even punishment to a breach of duty in determin- "ing contrary thereto."

"Since, then, human providence is too weak to make laws which shall "prove just in all cases; and human nature is too corrupt to be left "solely to the guidance and directions of conscience; from hence will 'appear the excellency of our English polity, which has so wisely ob- "viated the inconvenience arising from both these extremes, either of "having no positive law at all, or to strictly adhering to it.

"The judges in our courts of law are bound by their oaths to ob- "serve the strict rules of the law; and therefore, as upright judges, "they must determine according to the known customs and statutes "of the realm, although they are sensible that even in so judging they 'do an act of manifest injustice. On the other hand, the judge in a "court of equity is bound not to suffer an act of injustice to prevail, "though it be warranted by the forms and proceedings of law; and "therefore, he moderates the rigor of several penalties; relaxes the

"strict ties of unreasonable conditions; aids against unavoidable losses, "clandestine frauds and the like; and hence, it is, that judgment shall "be given in the same case against a man on one side of Westminister "Hall, and quite contrary for him on the other; and yet both these "agreeable to justice. The narrow-minded person who labors under "his great affection for form and order can not see the beauty of this "contrivance, whereby justice is produced from such jarring jurisdic- "tions, and what neither strict form and order, or absolute latitude in "judging, can separately produce is effected by the excellent tempera- "ture of both together."

Lord Bacon, in his treatise *De Augmentis Scientiarum* (Libr. 8, Aph. 35) says, that courts of equity have the power, both of mitigating the rigor and supplying the defects of the law; "*Habeant similiter curae praetoria potestatem, tam subveniendi contra rigorem legis quam supplendi defectum legis.*"

Finch, in his treatise on the law says also, that the nature of equity is to amplify, enlarge, and add to the letter of the law.

Thus it is also said in "the Treatise on Equity," edited by Fonblanque, and generally known by his name. (Book 1, Ch. 1, Sec. 3).

"Equity, therefore, as it stands for natural justice, is more excellent "than any human institution; neither are positive laws even in mat- "ters seemingly indifferent, any further binding than they are agreea- "ble to the law of God and nature. But the precepts of the natural "law when enforced by the law of man, are so far from losing anything "of their former excellence, that they thence receive an additional "strength and sanction; yet, as the rules of the municipal law are finite "and their subject infinite, there will often turn out cases which can "not be determined by them, for there can be no finite rule of an in- "finite matter, perfect. So that there will be a necessity of having re- "course to the natural principles, that that which was wanting to the "finite, may be supplied out of that which was infinite, and this is "properly what is called *Equity* in opposition to strict law. * * * * * "And thus in chancery every particular case stands upon its own par- "ticular circumstances, and although the common law will not decree "against the general rule of law, yet chancery doth, so as the examples "introduce not a general mischief. *Every matter, therefore,* that hap- "pens inconsistent with the design of the legislature, or is contrary to "natural justice, may find relief here. For no man can be obliged to "anything contrary to the law of nature, and indeed, no man in his "senses can be presumed willing to oblige any one to it." It is true that the author afterwards admits that chancery will not relieve against an express act of parliament, or a precise and definite rule of law."

These extraordinary claims naturally and justly exposed the whole

system to censure.

Thus Bentham characterizes equity as "that capricious and incon-
"sistent mistress of our fortunes, whose features no one is able to de-
"lineate. (Bentham on Government. Pref. p. 9, cited Warren's L. S. 187.)

Selden, too, based his attack on the same ground:

"For law, we have a measure and know what we trust to. Equity is "according to the conscience of him that is chancellor, and as that is "larger or narrower, so is equity. *It is all one as if they should make the "standard for the measure the chancellor's foot.* What an uncertain meas-"ure would this be? One Chancellor has a large foot, another a small "foot, a third an indifferent foot. It is the same with the Chancellor's "conscience."

I have given you these extracts at some length, (and they could be easily multiplied) to show you to what extremes the older writers on the subject go, and I think that the fact is that the earlier Chancellors did really proceed upon as extensive a theory as this. But the same causes that affected the common law affected equity. It was found intolerable that the rights of individuals should depend solely upon the opinion of the person who then happened to be the happy holder of the great seal, which was, and is, the Chancellor's badge of office.

As Blackstone puts it: (3 Com. 343) "In short if a court of Equity in "England really did act, as many ingenious writers have supposed it "(from theory) to do, it would rise above all law common or statute, "and be a most arbitrary legislator in each particular case."

Chancellors began to follow precedents, to regard the decisions of previous chancellors as guides to enlighten them, and finally as settling the principles upon which relief was to be given; cases were reported and cited, and equity finally reached the same condition which the common law had reached not strictly of being a written law, but that of having such a body of decisions which were binding upon the judges, that the principles upon which they proceeded were known and settled.

But equity had profited by the mistakes of its predecessor; instead of the cramping actions, its machinery was a bill in which the plaintiff stated the facts on which he based his claim to relief.

Instead of the formal judgment it had the flexible decree, shaped to suit the circumstances developed by the case, and it also had the valuable assistance of compelling the defendant to answer *upon oath*, and thus escaped the contradictory pleas which were so frequent in law, so that it is said that in an action for damages by cracking a borrowed kettle, the defendant pleaded

1. That the kettle was cracked when he borrowed it.
2. That it was whole when he returned it.

3. That he never borrowed the kettle at all.

Now all pleadings being by our code, and most of the others, required to be sworn to, this scandal is escaped, though soon after the code, one distinguished lawyer, wedded to the old system, in a work published upon the code, openly declared that the swearing is a hindrance to the administration of justice. It gives the dishonest altogether the advantage over the honest man in a court of justice. (Nash's Pleading, Pref. viii, Ed., 1858.)

In the course of this process of definition, as I think it may be properly termed, this reproach of arbitrariness has been taken away from equity, and the doctrine now gives no such unlimited powers to the Chancellor, as were formerly claimed.

To show you the extent of these changes, and to contrast the present theory with the old, I cannot, I think, do better than to give you some citations from later distinguished judges, to compare with the preceding ones.

Lord Redesdale, formerly Mr. Mitford, author of Mitford's Chancery pleading, says in Bond *v.* Hopkins, 1 Scholes and Lefroy, 428, 429.

"There are certain fixed principles on which courts of equity act "that are very well settled. The cases which occur are various; but "they are decided upon fixed principles. Courts of Equity have "therefore, in this respect, no more discretionary power than courts of "law. They decide cases as they arise by the principles on which "former cases have been decided, and may thus illustrate or enlarge "the operation of these principles.

"But the principles are as fixed, and as certain, as the principles on "which the courts of common law proceed."

Lord Eldon said in Jee *v.* Pritchard, 2 Swans. 414:

"The doctrines of this court ought to be as well settled and made as "uniform almost as those of the common law; laying down fixed prin-"ciples, but taking care that they are to be applied according to the "circumstances of each case. I can not agree that the doctrines of this "court are to be changed with every succeeding judge. Nothing would "inflict on me greater pain in quitting this place than the reflection "that I had done anything to justify the reproach that the equity of "this court varies like the Chancellor's foot."

Sir Jos. Jekyl, M. R. in Cowper *v.* Cowper, 2 P. Wms 685, equally strongly, though in a more pedantic way, disclaims any such unlimited discretion.

"The law is clear, and courts of equity ought to follow it in their "judgments concerning the titles to equitable estates, otherwise great "uncertainty and confusion would ensue. And though proceedings "in equity are said to be *secundum discretionem boni viri*, yet when it is

"asked *vir bonus quis est?* the answer is, *qui consulta patrum qui leges "juraque servat.*"

And as it is said in Rook's case, 5 Rep. 99 b., "that discretion is a sci- "ence not to act arbitrarily according to men's wills and private affec- "tions; so the discretion which is exercised here, is to be governed by "the rules of law and equity; which are not to oppose, but each in its "turn to be subservient to the other. This discretion in some places "follows the law implicitly, in others assists it, and advances the reme- "dy; in others it relieves against the abuse, or allays the rigor of it, but "in no case does it contradict or overturn the principles thereof, as has "been sometimes ignorantly imputed to this court. That is a discretion- "ary power which neither this nor any other court, not even the high- "est, acting in a judicial capacity, is by the constitution entrusted with.

Let me also call your attention to one of the latest English cases, decided December, 1871, and reported in the number of the Law Reports for March, 1872. A testator gave his property by will to trustees to sell the real and personal estate immediately after his decease, or as soon thereafter, as the trustees might see fit to do so. The personal estate comprised some shares in a banking company with unlimited liability, but of high repute, and which the testator regarded as his best investment. The trustees kept the shares for two years and three months, when the bank failed, and the trustees were decreed to make good the loss.

Malins, V. C., said:

"No judge can decide a case, such as this, against trustees without regret; but I feel, that unless I can come to the conclusion that the will gives power to retain the shares for an indefinite period, I must conclude that it meant within a reasonable time, which is one year from the death of the testator."

And again:

"I feel great reluctance in coming to the conclusion I have done, and the more so, because I am told the circumstances of the trustees are such that they will be compelled to become bankrupts. I should be sorry if such were to be the effect of my decision, because *I think they acted for the best according to their judgment*, and the filing of this bill was certainly not an act of good feeling on the part of the father of these children. It is evident, indeed, that there has been a great deal of personal feeling mixed up with the matter, and the plaintiff must see that it could never redound to the benefit of his children to force these gentlemen into bankruptcy, the effect of which will be that all prospect of recovering their property will be lost."

And he expressed himself ready to listen for any proposition for a compromise. (L. R. 11, Eq. 240, 241.)

Compare this with Francis' statements, which I have read to you.

You will now, after this hasty sketch of the growth of the system, perceive why it was impossible for me to start out with any logical definition of what equity was.

The inspiring idea of the whole system was to supplement the deficiencies of the common law. As a system, standing alone, it is necessarily incomplete and fragmentary—it can not stand alone—its limitations and excellencies can only be understood by studying it alongside of its companion system.

But equity did not gain its pre-eminence without hard struggles. Many were the petitions sent to parliament against the arbitrary decisions of the early Chancellors, though the absolute need of some relief beyond that which the courts of common law could give, sustained it, and finally brought it out victorious when redeemed from its imputation.

But when the Chancellors first attempted to enjoin a suit at law, or the collection of a judgment at law, which it is now well settled, a Chancellor will in some cases do, the courts resisted bitterly, and Lord Coke himself, entered the lists against Lord Ellesmere, the then Chancellor.

He insisted that the suing out of a subpœna in chancery to examine the final judgment of a court of common law, was an offence which subjected all concerned to the penalties of a praemunire, that is, *an unlawful usurpation of power*—an encroachment upon the power of the crown as it were, the penalties of which were outlawry and confiscation of property. (4 Stephens, Com. 212.)

He pronounced a judgment in a case where the Chancellor had granted an injunction against proceedings at law, and bailed out, and afterwards discharged a person who had been committed by the Chancellor for the breach of an injunction against proceeding at law. But the Chancellor persisted and granted another injunction against execution on a judgment which had been obtained by fraud. Coke then tried to get him indicted by the grand jury for a praemunire, and a most remarkable scene took place, in which he attempted to browbeat the grand jury into finding the indictment, sending them out three times, telling them that it was a plain case, and that he would commit them if they did not find the bills. They still refused, and were discharged. Then a case was submitted to the King, who referred it to certain law officers, who reported that it was not a praemunire, and that the Chancellor had the authority claimed, and James I. decided accordingly, and ordered the decree to be enrolled in the court of Chancery, to settle the question for all future time. (2 Campbell's Lives 211-2).

Coke made no further resistance, but still retained his opinion, and in his Third Institutes, C. 54, p. 125., maintained his old doctrine.

The question was still occasionally mooted, and a treatise published in defense of Coke's position in 1695, but the jurisdiction was never afterward resisted, and is now firmly established.

All this time it was an admitted doctrine of equity, "that equity followed the law," singular as it may seem, and in many respects this is true; the limitations to it are many, however, and at some future time we shall probably have to examine them together.

I think this sketch of the growth of equity is the best guard I could give you against the error, too common still among lawyers and judges, of imagining that a court of equity now is superior to all rules, and that a judge sitting as Chancellor need only look to what he thinks *good conscience* requires in the case.

Equity in its natural sense is, it has been said, natural justice. No human system of law attempts to, or can, or ought, to cover this ground. Many acts must be *wrong*, morally, for which the law can not give damages, nor punish them as crimes; many acts *ought* to be done which a Chancellor can not compel a man to do. But on the other hand, so far as the law does enforce obligations, it should, and I think we may safely say, that it does act in accordance with the precepts of the moral law.

But within the domain of those obligations which the law does take cognizance of, a large portion falls into the domain of the common law, and are, therefore, outside of our present subject. That is limited, as Story has put it, "to that system of remedial justice which is exclusively administered in courts of equity, as distinguished from that portion of remedial justice which is administered by a court of common law," which is as near an approach to a definition as the subject admits of.

Or as Story has stated it in another place, § 33, a court "of equity" has jurisdiction in "cases of rights recognized and protected, where a "*plain*, adequate, and complete remedy can not be had in the courts of "common law. The remedy must be plain, for if it be doubtful, or ob- "scure at law, equity will assert a jurisdiction; it must be adequate, for "if it falls short of what the party is entitled to, that founds a jurisdic- "tion in equity.

"And it must be complete; that is, it must attain the full end and "justice of the case. It must reach the whole mischief and secure the "whole right of a party in a perfect manner at the present time and "in future; otherwise, equity will interfere and give such relief and aid "as the exigency of the particular case may require. The jurisdiction "of a court of equity is therefore sometimes concurrent with the juris- "diction of a court of law; it is sometimes exclusive of it, and it is "sometimes auxiliary to it."

But while I have been thus careful in guarding you against too broad an idea of the scope of equity, you must not understand me as depreciating the system itself. On the contrary, the more you examine it, the more will you have occasion to admire the justice and true equity of the principles on which it acts, and the lofty morality which it inculcates throughout.

A rapid sketch of the officers, through which a court of equity has acted, and now acts, will aid you, I think, in understanding the cases to which you may have occasion to refer in the reports, and explain various matters in the text-books, and I know of no place where it can be more conveniently done than in such an introductory lecture as this.

The Lord Chancellor is the head of the department in England. Enough has been said of him in the previous history of the growth of equity.

The Master of the Rolls was originally the Keeper of the records in chancery, and the chief of the Masters. How, or when, he first acquired a judicial authority is involved in even more doubt than the original jurisdiction of the Chancellor, but for a long time he has exercised a limited judicial authority. He could hear a cause, and pronounce a final decree therein, subject only to appeal to the Chancellor, but he could not, until 1833, dispose of pleas and demurrers, or hear motions. In that year he was given this power also, and thus placed on an independent footing.

The subordinate officers were in early times the *Masters*. They conducted inquiries into matters referred to them by the Chancellor or Master of the Rolls, and took accounts. Sometimes, in the earlier times, some of them, with the Master of the Rolls, sat with the Chancellor and assisted him with their advice. In 1852, there being great discontent on account of the delay of business in chancery, provisions were made for the gradual abolition of the office, and they will soon be extinct if they are not by this time.

Their place was supplied by an Accountant General, with his staff, who take care of the money paid into court, and by chief clerks, two of whom were allotted to each judge.

The business of the court increased so, that additional judicial force was necessary. In 1811, a Vice-Chancellor was added, and in 1842, two more, on the abolition of the equitable jurisdiction of the court of Exchequer.

In 1851, two Lords Justices of the court of appeal were added, who have all the powers and jurisdictions of the Chancellor.

In important cases, or when the state of the appellate business permits it, the three sit together. When the business is pressing, the

Lords Justices sit as one court, and the Lord Chancellor as another The House of Lords is the final court of appeal.

A cause may be brought before any one of the Vice-Chancellors, or the Master of the Rolls; the bill is addressed to the judge that it is desired shall hear it.

As to the disposition of equity powers in this country, New Jersey is the only State, which now occurs to me, which still keeps the two courts entirely separate.

In the other States, I believe, the powers are vested in the same judges, and where codes exist, as they do in many States, the modes of procedure are also assimilated.

In some, as in Kentucky, some local Chancery Courts exist.

PROPERTY—PART I.

By J. H. BALFOUR BROWNE, Author of "The Medical Jurisprudence of Insanity," "The Law of Carriers," &c.

The policy of the times is changed. Formerly men were content with ease, and thought that the back of every day was just sufficient for its own burden of care and evil. They thought it was time enough to think about things when they became troublesome. Thus it was that the stomach was disregarded until it became officious in the affairs of the human economy, and that the cure, not the prevention, of disease was the province of the leech. So it was with law. Evils were allowed to demand remedy pretty loudly before any remedy was devised; and, although that is occasionally the case at present, there is, at the same time, a tendency to anticipate the necessity, and to prevent the clamor by a timeous removal of the cause. If legislation is to be a science, this must be its aim; and if it is to do this successfully; if it is, to prevent the social diseases which flagrantly, and as if in groans, demand legislative interference; if it is, at the same time, to avoid that meddlesome and unnecessary legislation which leads to the hypochondriasis of the nation, it is necessary for it to understand the principles of all law, as well as the historical facts of the time. It is time that abuses ceased to be our law-makers. It is all very well shutting the stable-door after the horse is stolen; you may by that means secure the others, but still one is lost.

With the view of throwing a little light upon one or two of the questions connected with the principles of law, we purpose, in this paper, to look somewhat carefully into the subject of Property.

It has been found out that familiarity and accuracy of thought are in the inverse ratio, and it may be owing to this fact that we really know so little about property. We are familiar with a hundred things which are called property. This book is the property of somebody; this es-

tate belongs to a certain person; that horse has an owner; but we would find it difficult to say what the exact relationship between these things and the persons to whom they are said to belong really is. We are so familiar with the concrete fact that we never thought of inquiring about the abstract principle, and we are not much helped by books in this matter. The Institutes of Gaius and Justinian do not define property. Our English writers upon jurisprudence deal somewhat ineptly with the subject. Bentham says, that "the idea of property consists in an established expectation;" that in society this expectation is founded on law, and that consequently property is entirely a creature of the law. Austin says nothing definite about it; and Heron remarks, that property is the right of using. That these utterances are unsatisfactory will hereafter appear.

If we look at an instance of proprietorship it may throw some light upon the question under consideration. Say that a man is the owner of a wheelbarrow, and that there is only one man and one wheelbarrow in existence. Now one thing is evident, that the wheelbarrow exists only for the man; if he were annihilated the wheelbarrow would stand on the blank face of creation, with all its uses, useless. The wheelbarrow is, indeed, without any end of its own; it is, in so far as its uses go, external to itself, it can not possess itself. But if there are a million wheelbarrows, instead of one, the fact is the same: proprietorship only exists in men in relation to things. But this is not a passive relation of side-by-side existence, for in his passiveness man is no more than the wheelbarrow, and passively he can no more possess it than it can actively possess him. As passive, a man is not a person, and it is only a person that can be an owner. But the attribute of a person is activity, and activity is the result of will. Here, then, we come face to face with *the* fact of property, and that is will. The one man in the empty world might stand amidst hills and cities, but as long as he does not move, so long as he stands passive, without thought and without will, he can not be said to be a proprietor of any of these things. It requires an act to become an owner; and yet that act need not be a bodily act. I need not take a thing in my hand, or enter into a house to become its owner; the act required is an act of will. I can own things I have never seen; and, as Bentham points out, even by swallowing I do not necessarily become the proprietor of the food I have swallowed.

But there is a circumstance to be noted in this place, and that is, that this act of will is not optional, but necessary. Of course, this looks like a paradox. To say that I will, and then to say that I must will, is to deprive the will of its volitional character. But there is one process in all thought, and it is discoverable in the act which constitutes the relation of proprietor and property. All thought is an outward and return voyage. I look at things and they, as it were, come back with my

vision into thought. This is a process of realization. We have a hundred theories, but we distinguish these from their practical realization. But theories exist in mind, they are realized in something other than mind, and we know their practical realization in our returned thought. So it is with feeling. After some great sorrow you may hear one who has been suffering dumbly say, "I can not realize my grief." This, if it means any thing, means that the numbing effects of sudden bitterness prevent thought from thinking out, in relation to the real premises of facts, all the infinite sorrows which this death in time to come will bring. This realization of grief is exactly analogous to the other instances given above. It is the outgoing and incoming of thought. But these acts are parts of one process. This fact is as deep as thought, as wide as the universe. It is true of all thought, and therefore it is true of will, which is self-determined thought. Will in the person exists, but it *must* realize itself, and to do so it must make that outward and inward voyage—it must realize itself through or by means of a thing. Like realized grief it becomes more definite in this connection. And this realization of will in the person through a thing is the act of proprietorship, and the thing thus willed is property. We have seen that the thing apart from man is abstract, but the man apart from all things would likewise be abstract. A man who did not will would be *a thing*, but he must will a thing, and that thing is property. The person, by this realization of will, has become more complete; the thing has risen to the level of property, and may anon be turned to use. Here, then, we see that will must will, that a man must be a proprietor. But the fact of this process of realization which remains to be dwelt upon is, that thought always realizes itself through something other than itself, through *its other*. It is as if I threw a ball—it, in motion, will return to me if it strike against a wall at rest; and so it is with thought, it is realized through matter, and so is will. I can not will another will, for that would not realize my own; it must be something inert, will-less, destitute of soul. It is upon this ground that slavery can not be, and any attempt to enforce it can not be right. We shall consider this question of property in man hereafter; here we would only distinguish such property from that which can exist in animals. They are soulless, will-less, and therefore it is competent for me to realize my will through them, to give them an end in will, which they in their willlessness have not; for they, in their will-lessness, are not self-ended—they are externalities, and therefore things. Their destiny is to realize man's will.

But, again, this realization must take place through its immediate other. Externality is the immediate other of internality. So, in the person, the will is single and the immediate other of single will must be

single things; and hence, as it has been pointed out, a man can not become possessed of genera or of the elements, as of the genus vegetable or of the element air. His limitation implies limitation in the objects of his proprietorship. But, as it has often been pointed out in works upon political economy, it is possible to conceive circumstances under which air would be a part of the wealth of the community and of the property of individual men. If it were usual to reside where air had to be "laid on" like water, or if air became so scarce that it could be monopolized, then it would acquire a high marketable value, from the fact that it was capable of becoming the property of men; that men were, in other words, able to realize their wills through it.

In this, then, we have the real explanation of that many-sided fact, property. Its explanation is not to be found in established expectation, as Bentham would have us believe, which is an after-fact; nor is it in a "right to use," as Heron argues, which itself requires explanation, and grafts property on use instead of use on property; but in will. This has at last been recognized, and now it remains only to be thoroughly appreciated. The important matter to remark throughout is, that it is always man's nature that dictates the nature of the explanation, and never the nature of the thing. True, a house, a horse, a wedding-ring, are material things, but the proprietorship of these is a mental fact. It is not in them, but in the man that owns them. But this observation is true not only of the constitutive element of proprietorship, it will be found to be true with regard to all the means of acquisition of property.

Now, with regard to these means of acquisition of property, it is well to note that all these are simply enunciations of the act of will. The single man in the empty universe would simply require to will; he would there and then become the proprietor of all the wheelbarrows, hills, and cities. In a world which is not empty of human beings, my will, when I have willed, requires manifestation. It is not because I have *seen* a thing first that I become the proprietor of that thing; it is, as we have seen, because I have willed it mine—I have posited my will in it, I have realized my will through it. But unless I do something which will let others know the fact that I have willed it mine they will be unable to recognize my will in the dead, will-less thing. To manifest my proprietorship to others requires some outward act; to realize my proprietorship to myself requires only an outgoing and incoming of thought. But this manifestation of my will in the thing may be made in various ways. I may set forth the fact of my will by seizure, by use, by formation, by designation. But all these manifestations of will have reference not to myself, not to the thing itself, but to other wills—to other persons, who, but for my will, might realize their own will by means of these things. But to realize one's will by means of the

property of another is impossible: for that which is willed mine can not be the immediate other of your realizable will, and any attempt to realize your will by means of things which I have made mine is a crime. It is somewhat curious that there should have been so much written about property, and so much of the actual truth spoken with regard to it, and yet at the same time that the central fact of the whole system should have been overlooked. Most writers seem to imagine with Bentham that property derived its sanction from law; but this is no answer to the question of its authority. It would be as much an answer to the question, Where does the light come from? to say, the moon, nay, even to say the sun itself—these are no answers. Where got the moon its light? and who lit the taper of the sun? It is from that torch that we get our days. The real fact is, that law and property have their sanction from the same source, and that sanction is thought—is reason. We can not go farther than that. That is an answer; for, as Condillac (a materialist) has said, "Though we should soar into the heavens, though we should sink into the abyss, we never go out of ourselves: it is always our own thought that we perceive."

So far then, simply as the history of the matter goes, there is an obvious error: those tribunals which existed in early States with a view to the repression of violence, and to the accomplishment or realization of liberty, did not give effect to occupancy as occupancy, but gave effect to occupancy as a sign of will. Mere firstness never could give a title, else the animals were the possessors of the earth, and men were violent aggressors. If mere *firstness* were the whole fact of proprietorship, air or light might be the owner of the world and man might be a thief. But it is only that which has a will that can be an owner, and it is only in relation to the activity of that will that things can become property. Suppose the first man a somnambulist. Suppose that he wandered over the world, seeing nothing but the vague pictures which wander over the dark retina, hearing nothing but anticipatory echoes of coming sound, is it possible to suppose that his bodily presence in the places he has burrowed through in this tunnel of sleep have made them his, and to suppose that the second man who ploughed one of the meadows the somnambulist wandered over, or built a house upon a rock upon which he had rested in his dark journeyings, is an aggressor on the rights of the sleep-walker—is not, in very truth, the real owner of that meadow and that rock? Yet, those who argue that occupancy is the ground principle of ownership, and that the imperative quality is a creature of the law, must be prepared to argue thus. The real fact is, that occupancy is nothing but a sign of will; and if the occupancy is of such a nature that it does not indicate the presence of will, it never can amount to proprietorship, although it should exist for a thousand years. A corpse gains no title by occupancy. If it is argued that it is

the combination of occupancy and law which makes things property and men owners, that will not serve for an answer. Law, as we have said, must have some sanction. Some people seem to think that an act of Parliament can do any thing; could make murder legal, and, as in many of our English codes of morals right and wrong are understood to mean only the permitted and the forbidden, could make murder right. But, after all, the omnipotence of law-makers is very limited, and all their Acts of Parliament have, even after receiving the royal assent, to go through an Upper House, which annuls or confirms these efforts at legislation. There is such a thing as right, as justice; and it is no more in the power of Parliament to decree that which is unjust than it is in its power to make all the rivers in England run from the sea upward. True, they may pass an unjust law, as they may dam the Thames; but the reserves of water from the hills are hurrying down to sweep away the foolish mud-bank, and the Thames will soon be at the sea; the reserves of nature are speeding to annihilate the foolish act, and men will again be free to do right. Now, this higher court of appeal, this Upper House, which annuls wicked acts, is rational conscience. There is much misunderstanding about the term conscience at the present time. Many psychologists argue that there is no such thing as a moral sense, and that we judge of the rightness and wrongness of actions by the same faculties as we judge of the excellence of a book or the beauty of a work of art. Common people, on the other hand, assert, and many ethical philosophers support their assertion, that there is a sense by which we judge of right and wrong, as there is a sense by which we judge of sweetness or bitterness, and a sense by which we judge whether a thing is white or black. Now, there are fatal misconceptions mixed up with both these theories, and it is necessary, if we would understand the real principles of the law of property, that these misconceptions should be understood.

We have seen that the outgoing and the return of thought is its deepest law. This is not the place to argue about the truth of idealism, but it may be well to point out that to the idealist this law is the only law; he sees thought pass out of itself and become objective; it becomes things; it is the universe, and it returns to itself in this realized form. But with that theory we have nothing directly to do in this place, but with the law which it illustrates we have assuredly to deal. In human nature there are two very palpable facts, an appreciation of which is necessary to the thorough understanding of the matter in hand; and these are free-will and self-will. This distinction is constantly drawn in practice. The moral man, whose code is as iron chains, is said to be free; and the immoral man, whose code is as ropes of sand, is said to be a slave—the slave of his passions. The man who dares do all that may become a man, is brave; who dares do more is no man.

He who is capricious is at the beck of his desires; he who is moral, is at the beck only of reasoned motives. The former is the slave of nature; the latter is free, because he governs himself. But we have to consider these facts, in relation to the law of thought which compels realization. Self-will realizes itself in the gratification of desires. Its object is pleasure. But free-will, moral will, must realize itself to the attainment of its aim—its end, which is freedom, and it consequently realizes itself in the State. The State and laws are, therefore, the necessary realization of free-will; not in one individual, but in all. It is not self-will realized; it is not a single will realized; but it is free-will realized, and it is free because it is reasoned, and because it is reasoned it is the will of all. This latter fact is of permanent interest. What is reasoned is not mine; it is yours; it is everybody's. That two and two make four is not a private, subjective, singular matter—it is a public, objective, universal fact. It is true for everybody. But it is not that simple fact alone, but any conclusion correctly arrived at in arithmetic is universally true; it can not be rejected by any, but it must be accepted by all. But reason is not confined to numbers and figures; it has to do with thoughts and acts, and wherever a law is founded upon reason, wherever a State is the direct realization of pure free-will, it is the law, it is the State, not of the lawgiver, any more than it is the law, than it is the State of the ruled. Where, however, caprice and self-will have to do with the making of the laws, where the institutions (those factual laws) of a State are the realization of caprice and not of free-will, they are condemned by the rational conscience of mankind; they are in all their dictates tyrannical, as the self-will of another never can become my free-will, and they are as false and foolish as a law by which men might attempt to alter the diurnal revolution of the earth.*

The State, then, is the realization of liberty, and not, as some of the make-shift theories of the day would have us believe, a contract by which each man gives up a portion of his own liberty with the view of avoiding the effects of the license of his neighbors, a system by which the cosmos of order is kept in existence by the limitation of liberty in the midst of a chaos, anarchy. These theories have been fostered by the

* There is a fallacy in the utterances which Rivers has put into the mouth of one of his characters in "False Delicacy." He says: "Laws were never made for men of honor. They want no law but the rectitude of their own sentiments, and laws are of no use but to bind the villains of society." Now laws are of use even to honest men, for it is in the law that their own free-will is realized. But there is a little truth in the assertion, too, for out of law comes morality; indeed, morality is only another phase of law. In law we must respect the person; in morality we must respect the neighbor and friend. So that morality is transfigured law.

politics of to-day, or rather of yesterday. *Laisser faire* has been the rule. Reduce State interference to a minimum, and let that minimum be the police; things can manage themselves; self-interest is a very good principle in trade; these were their principles. How false they were, has already been discovered. Professors of political economy begin to understand that *laisser faire* is possible only when much has already been done. Politicians begin to think that the health of the community is as legitimate an object of their care as the property of the people, and that disease kills more than highwaymen. Physicists can see that things have no tendency to manage themselves; and philosophy can teach that self-will and self-interest never can be a principle of just and honorable trade; and that if trade would be just and prosperous, it must conform to reason; it must bow to universal will.

From what has been said it will be evident that occupancy sanctioned by law is not the fundamental fact of property, but that the realization of will in an external thing constitutes the vital relation of ownership. The sanction which law could give to occupancy would be of no higher authority than that which is given by will. Property and law derive their sanction from the same source; but still law has much to do with property. These do not form two systems, but one; their common origin dictates a common growth.

This fact of occupancy which has been so laboriously misunderstood is, as we have seen, one phase of seizure, which is the enunciation of will. But this expression, as it is made with a view to the information of another, must vary according to circumstances, and it is because the conditions of civilization have varied from age to age that the ceremonies connected with seizure, occupation, and the like, have varied. Before considering the principles of these, it may be well to regard the other forms of volitional expression. Formation is a sign of will in the substance formed; occupation or seizure, is a somewhat crass manifestation of will. To hold a thing is an evident but coarse way of manifesting the positing of will in it. Formation is a more intelligent method of possession. By formation the dead thing is rescued from its deadness by transfusion, not of blood from my veins, but of will from my spirit. By formation I show myself in it; the thing becomes diaphanous, and my will shines through. Every lawyer is familiar with a hundred instances of proprietorship as manifested by formation. The cultivation of the soil, the planting of plants or trees, the building of houses are instances of formation, but this question will be best illustrated by a reference to the Roman law. In the Institutes of Justinian* the question of forma-

* B. II., Tit. 1, sec. 25.

tion in conection with property already owned is considered. The question there proposed for answer was, whether, when a man has made a thing of materials belonging to another, the thing as formed was to be held the property of the person who had made it, or the property of the person to whom the materials belonged? Thus, suppose, in the words of the Institutes, "a person has made wine, oil, or wheat from grapes, olives, or ears of corn belonging to another; has cast a vessel out of gold, silver, or brass belonging to another; has made mead with another man's honey; has composed a plaster or eye-salve with another man's medicaments; has made a garment with another's wool; or a ship, a chest, or a bench with another man's timber?" There was a controversy as to the answer which should be given to this question. The Proculeians said, the thing is a new thing, and its maker is the owner; the Sabinians said, the materials remain although the form is changed, and they held that their proprietor was still their owner. Now, the distinction sanctioned by Justinian is peculiarly interesting to us in this place, for he decided that the question of ownership should be decided by the fact of there being, or not being, a new thing made, "*si ea species ad materiam reduci possit, eum videri dominum esse, qui materiae dominus fuerit; si non possit raduci, eum potius intelligi dominum, qui fecerit.*"

Here, then, we have property manifested, both by occupation and by formation, in reference to the same thing, and we see that the question of real ownership is decided, although not explicitly, in conformity with the principles of will. For the individual will was posited in an individual thing, say an ingot of gold. When that is formed into a cup, or vessel, the will of the owner of the gold is not defeated by this change of form; the shape can be beaten out of it, and he can have his bullion again. But if his neighbor has made wine from his grapes, he can not have his grapes again. That in which his will was is no more. The will, as manifested in formation, has made a new thing, and his will is thereby defeated. He never willed the wine his; what he willed his was the grapes, and these are no longer in existence. But at the same time the formation of wine is a monstration of the will of another, and consequently of the proprietorship of that other.

In connection with these statements it must be remembered that, although the ownership might thus be claimed by the person who had formed the new thing, and might be vindicated by a real action (*vindicatio*), he was not allowed to become thus possessed of the property of others without a payment equivalent to the value of the materials he had used, and this payment might be enforced by a personal action (*condictio*).

There can be little doubt that formation is a more excellent, a more civilized, method of showing forth the fact of proprietorship than seiz-

ure, or occupation, but those who would find in formation, not the manifestation, but the ground of property, are in grievous error. Yet we find that the reasons which form the justification, in an economical point of view, of property in land, are, according to Mr. Mill, only valid in so far as the proprietor of land is its improver. Mr. Mill holds the principle of property is to assure to all persons what they have produced by their labor, and accumulated by their abstinence; and consequently, he holds that this principle can not apply to the raw material of the earth, or to the land itself.* This is very much upon a level with Fichte's suggestion, that of the gold cup which I have made, the cup only is mine, and that any other may take the gold if he can. If he can! But such speculations are idle. The fact is that man places his will in a thing, and that thing becomes his; and Mr. Mill in supposing that it is only the productions of industry which can properly be the objects of proprietorship, that it is simply the inseparability of products of industry from the raw materials of nature which makes the latter possible property, and that a man must indicate his proprietorship of the latter by means of the former, is unduly exalting formation, and confounding, as many writers have done, that method of possession, use, with the subject of property. It is true, that where labor has been introduced into a thing it is an excellent means of showing proprietorship, and whether it is a bog that has been drained and cultivated, a Bedford level which has been dried and tilled, a flock of wild animals which have been domesticated, in each of these ways has something become more serviceable to mankind, but it is not on account of the increased usefulness of the marshes, or the animals, that they are the property of him who has drained and trained them, but simply because his will is posited in them.

It is true that the non-use of a thing is an indication that the will of the individual is withdrawn from it, for use is, as we have said, a means of possession, but a man may use without improving; and the assertion that a man must use up to its highest possibility, in other words, improve, in order that he may indicate the continuance of his will, is absurd. But absurd assertions are the natural fruit of absurd premises, and we find Mr. Mill, in another place, asserting that the "appropriation of land is wholly a question of general expediency," and that when private property is not expedient it is not just. And upon such a principle he thinks himself qualified to speak of property, and to say what the grounds and the reasons of it are. Expediency! as if one could ever arrive at any knowledge of right and wrong from that nebulous

* Political Economy, B. II. ch. ii. sec. 6. Locke also founds the right of property on labor.

matter of opinion, and as if that mist of thought was to stand in place of the clear, bright, shining truth of reason. Expediency, so far as any meaning can be attached to it, is the universal of individual opinion, of self-will in thought; but where the universal of individual judgment, of free-will, is possible, expediency is wrong. The code of expediency is one of maxims, the code of reason is one of laws.

But Mr. Mill falls into other errors in this connection. Thus he complains of the pretentions of two dukes to shut up a part of the Highlands, and exclude the rest of mankind from many square miles of mountain scenery, to prevent the disturbance of wild animals, as an abuse; and he adds: "When land is not intended to be cultivated no good reason can be in general given for its being private property at all; and if any one is permitted to call it his, he ought to know that he holds it by sufferance of the community, and on an implied condition that his ownership, since it can not possibly do them any good, at least shall not deprive them of any which they could have derived from the land if it had been unappropriated." But, after all, are not these two dukes using their land? are they not in one aspect cultivating it? and instead of raising domestic animals, such as cattle and sheep, are they not raising wild ones, such as grouse and deer? Where is self-interest, which Mr. Mill thinks so much of, as a principle of conduct to begin, if men are to farm their land under the directions of their neighbors? But the whole argument is founded on a fallacy. Men do not hold their property "by sufferance of the community." It is true that a community can deprive them of it; but because a thief may rob me of my watch, it does not follow that my ownership derives its title from the will of the criminal. It is true that whole nations have lost their sense of honesty, that whole nations have become thieves and murderers, but it does not follow that it is simply the meekness of robbers and cut-throats which gives a man a right to his estate, or to his life. It is not upon the sufferance of his fellows that a man is a proprietor. As the Gow of Perth fought for his own hand, he holds of his own will, and not of the self-wills of his neighbors.

[*To be Continued.*]

SUPREME COURT OF CALIFORNIA.

REDINGTON *v.* WOOD, *et als.*

A. was a merchant with a bank account at F. bank. He sold goods to B., who, after purchase, requested and received a check for $30 to send away. The next day a stranger

Supreme Court of California.

bought of H. $3,500 worth of legal-tender notes, and paid for them in a check purporting to be drawn by A. for $2,931 to the order of H. on the F. bank. While counting the money, H., as a precaution, indorsed the check and sent it to the bank for verification. The bank-teller paid the check, and said it was all right, the messenger having told him a stranger had presented it. When the messenger returned, the stranger had left H.'s place with the greenbacks. Some three weeks thereafter, it was found the check was altered from the $30 check. The bank and A. at once notified H., but made no demand until a month thereafter. Since then an offer to return the check has been made. A. and the bank employed officers to search for the forger. The court below found that H. received the check in good faith and for a valuable and full consideration.

The paying-teller at the bank was the one who paid all the checks from A.'s house. A. and members of his firm, filled checks, also his book-keeper. This altered check was in a heavier hand than usual. It was found that H. never doubted the genuineness of the check.

The question is, Should the loss fall on A., H., or the F. bank? In the court below, A. had judgment against H.

Held—The drawee is bound at his peril to know the handwriting of the drawer, and if the signature is forged he must suffer the loss, as between himself and the drawer, or an innocent holder to whom he has made payment. But this presumption against the drawee does not extend to the writing in the body of the check.

The rule is, that if the drawee, in good faith, and without negligence, pay even to an innocent holder a check which has been fraudulently altered in amount, after it left the hands of the drawer, he will, ordinarily, be entitled to recover back from the person to whom it was paid, the excess over the true amount of the check.—*Pacific Law Reporter.*

Opinion by Crockett, J., Wallace, C. J., Rhodes and Belcher, JJ., concurring.

The plaintiffs were merchants doing business in San Francisco, and kept their bank account with the "London and San Francisco Bank, limited." On the 11th of February, 1870, they sold to a stranger a small bill of goods, who, after concluding his purchase, requested them to issue to him their check for $30, which, he said, he desired to send to the country. This request was complied with, and the check issued in the usual form, payable to John Crane or order, and the stranger paid for the check $30 in gold coin. On the following day, a person who was unknown to defendants (who were stock and money brokers, also doing business in San Francisco), called at their place of business and inquired the price of United States legal-tender notes, saying he wished to purchase three thousand five hundred dollars of such notes. On being informed that the defendants would sell him the notes at a specified price he left, without concluding the purchase; but returned in about half an hour, and produced a check, purporting to have been made by the

plaintiff, bearing date on that day, February 12, and payable to the defendants or order for $2,931 25, drawn on the "London and San Francisco Bank, limited," with which bank the plaintiffs kept their bank account. The amount specified in the check was the exact sum requisite to purchase three thousand five hundred dollars in legal-tender notes at the rate before mentioned. The check was offered and accepted in payment for the notes; but as the employes of the defendants, who were making the transaction, were wholly unacquainted with the person who offered the check, they deemed it prudent to send the check to the bank for payment while they were counting out the notes. The check was accordingly indorsed to the defendant and a messenger was dispatched with it to the bank for collection. The messenger proceeded immediately to the bank and presented the check to the paying-teller, saying that the defendants knew the house of the plaintiffs was all right, but that they did not know the man who presented it, who was a stranger, and they asked him to go to the bank and collect it for them.

After first looking at the face of the check, and then at the back of it, the teller, in answer to the question of the messenger, "Is that good?" remarked that it was all right, and immediately paid the check, and stamped it with the usual words indicating payment by the bank. But before the messenger reached the defendants' place of business with the money, the transaction with the stranger had been concluded, and he left the defendants' office, with the legal-tender notes, several minutes before the messenger returned. One of the clerks of the defendants, however, followed a short distance behind the stranger, for a block or two, so as to observe his movements, until the latter entered a cellar on Kearney Street, and was out of sight, whereupon, the clerk returned to the office, and, on his arrival, found the messenger there with the money received for the check. On the first or second of the following month, the plaintiffs and the officers of the bank discovered for the first time that the check issued by the plaintiffs, on the 11th of February, for $30, had been fraudulently altered by changing the date from the 11th to the 12th of February, and by inserting in the body of it the name of the defendants' firm as payees, and by raising the amount from $30 to $2,931 25, and, in this altered form, the check was paid to the defendants as above stated. On the same day on which the fraud was discovered, the plaintiffs and the officers of the bank notified the defendants of it; but no formal demand was made upon the defendants for a return of the money until the 9th of March. The check has never been returned, or offered to be returned to the defendants; but, immediately on the discovery of the fraud, the plaintiffs and the bank employed detectives to search for the person who delivered the check to the defendants; but they were unable to find him, and he has not been discovered. The court finds that the defendants received the

check in good faith, in the usual course of their business, and for a full and valuable consideration. It also appears from the findings that it was the custom for each member of the plaintiffs' firm to draw and fill up checks, and that occasionally the body of the check was filled up by a book-keeper or clerk; and that during the whole period during which these checks were being drawn and paid, the paying-teller at the bank was the same who paid the check in question. It further appears that the writing in the altered check, except the signature of the drawers, was in a heavy hand, and very unlike in appearance any of the genuine checks produced at the trial, of which there were more than forty drawn during the same month in which the altered check was issued. The court also finds that the defendants never doubted the genuineness of the check, but wanted it cashed, as they did not know how the man who presented it came by it. A stipulation was filed in the cause, to the effect that, in order to avoid circuity of action, and to end the litigation concerning the check and its payment, the court might determine in this action whether the loss should fall upon the plaintiffs, the defendants, or the bank, and might enter the appropriate judgment, with like effect, as though the appropriate action had been brought. On these facts, the court enters a judgment for the plaintiffs, from which the defendants have appealed.

The rule is well settled that the drawee of a check is bound at his peril to know the handwriting of the drawer; and if he pays a check to which the signature of the drawer was forged, he must suffer the loss, as between himself and the drawer or an innocent holder to whom he has made payment. As between himself and the drawer, he undertakes that he will pay no checks, except such as have the genuine signature of the drawer, which he assumes to know; and, as he is presumed to be acquainted with the signature, he will not be allowed to recover the money back from an innocent holder, who is not presumed to have such knowledge. But there is no presumption that the drawee is acquainted with the handwriting in the body of the check, inasmuch as checks are often filled up in handwriting of persons other than the drawer, and with which the drawee is not presumed to be familiar and may have had no opportunity whatever to become acquainted. If the rule were otherwise, the drawee could never safely pay a check filled up in a handwriting that was new to him until he had first satisfied himself by inquiry from the drawer whether the check had been properly filled up. This would result in such delay and inconvenience as greatly to interfere with commercial transactions which are so largely carried on by means of checks. The rule is, therefore, now well settled, that if the drawee, in good faith and without negligence, pay, even to an innocent holder, a check which has been fraudulently altered in amount

after it left the hands of the drawer, he will, ordinarily, be entitled to recover back from the person to whom it was paid the excess over the true amount of the check. "The rule requiring the bank to know the customer's handwriting is confined in its practical effect to requiring a knowledge of his signature. Neither law nor the ordinary course of business renders it a matter of suspicion that the body of the check or bill is not written in the drawer's hand. Nevertheless, a false or fraudulent alteration in a material point, made in the body of the check or bill, renders the document a technical forgery, just as much as the simulating the signature itself. Knowledge of the drawer's signature is, of course, no possible guide for the detection of this description of forgery, and, in such cases, a modification of the general rule, that payment on forged paper is no payment, has to be made in deference to the sheer necessities of justice." Morse on Banks and Banking, 300.

In the *Bank of Commerce* v. *Union Bank*, 3 Comst. 234, Ruggles, J., in delivering the opinion of the court, says: "The payment of a bill of exchange by the 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. * * * * The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payer, from imputed negligence, must bear the loss."

In support of his proposition he quotes *Price* v. *Neal*, 3 Burr. 1,384; *Wilkison* v. *Lutwidge*, 1 Strange, 648, and Story on Bills, section 262, to which many other authorities might be added. "But," he says, "it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill. There is no ground for presuming the body of the bill to be the drawer's handwriting, or in any handwriting known to the acceptor. * * * * No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption, that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases, it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust." The same principle is recognized in *National Park Bank* v. *Ninth National Bank*, 55 Barb. 124, in which, after conceding that the drawee of a check is bound, at his peril, "but the liability extends no further, and where the genuine draft has been altered not only in the name, but in the amount to be payable, I do not think that rule should hold the drawee

liable for any more than the amount of the original draft; and for the balance, the plaintiff should recover. * * * * I think the rules, as heretofore settled, viz.: The drawee is bound to know the handwriting of the drawer, and is liable for a draft which he pays, although forged; and the other, that where the body of the draft is altered, the drawee may recover the amount from the person receiving it, may both be applied to this case, and should lead to the result before stated." The same case was taken to the court of appeals and is reported in 46 N. Y. 77. In that court, the judgment was reversed, on the ground that the signature of the drawer was forged, and, for that reason, the drawee was not entitled to recover. But there is nothing in the opinion of the court in conflict with the proposition, that if the signature of the drawer had been genuine, and the bill had been altered only in the amount, the drawee would have been entitled to recover. There is, indeed, little or no conflict in the authorities on this point; and the rule that the drawee is not presumed to know the handwriting in the body of a bill or check, and is not bound, before payment, to ascertain at his peril that the amount has not been altered in the body of the bill, is founded on principles of reason and justice, and ought not to be disturbed. There may, however, be exceptions to this general rule. If the alteration be made in such manner that, on the face of the paper, there appears enough to excite a reasonable suspicion of fraud, or if the drawee has information which would lead a prudent person to suspect that the bill had been altered, it would, doubtless, be his duty to decline payment until the doubt was removed. I am, therefore, of opinion that if there was no such suspicious circumstances in this case, and if the bank was guilty of no laches after the discovery of the fraud, it is entitled to recover. It is claimed, however, for the defendants, that the handwriting in the body of the check, so different from that usually found in the plaintiff's checks, was, of itself, sufficient to excite a well-founded suspicion in the paying-teller that the check had been tampered with; and that when there was superadded to this the information given to him by the defendants' messenger, common prudence required that he should investigate the matter before payment. We have already seen that the fact, that handwriting in the body of the instrument was not that of the drawer, raised no presumption that the check was not genuine. The findings show that checks of the plaintiff's firm were filled up, sometimes by the member of the firm who signed the firm name to it, and, at other times, by the clerks and book-keepers; and the bank-teller can not be presumed to know but that the plaintiffs had employed a new clerk or book-keeper who had filled up the check. But, aside from the consideration, the mere fact that the body of the check is in a different handwriting from that usually employed was not,

of itself, sufficient to raise the slightest suspicion of fraud. The practice is so common, in all commercial communities, of causing checks of the same drawer to be filled up in different handwritings, that it is not to be presumed the attention of the drawee will be particularly called to the handwriting in the body of the paper. It is the signature which verifies the instrument and not the writing in the body of it, and if the signature be genuine, and the writing in the body of the paper in the usual form, though in a different handwriting from that usually employed, there will be nothing in the latter circumstance to excite the slightest suspicion of fraud.

Nor was there anything stated by the messenger to the teller which could justly arouse a reasonable doubt in respect to the genuineness of the check. The only fact stated by him was that the "defendants knew the house of plaintiffs was all right, but that they did not know the man who presented it (the check), who was a stranger, and they asked him to go to the bank and collect it for them." The only fact included in this statement was that the man who presented the check was a stranger to the defendants; and if this of itself should have put the bank upon inquiry, much more should it have had that effect with the defendants themselves who were about to part with a large sum of money to the stranger on the faith of this check; and who had brought the check to them payable to their order, and for the precise sum necessary to purchase the legal-tender notes. There was, certainly, more to excite the suspicion of the defendants than of the teller; and yet, instead of sending their messenger to the plaintiffs to ascertain if the check was genuine, and how it came into the stranger's possession, they sent him to the bank with no other instructions than to collect the money. They did not expect the teller to enlighten them as to the stranger, or how the check came into his possession. If they were seeking information on that point, they would naturally have applied to the drawers of the check, and not to the officers of the bank, who could not be supposed to have any information on the subject. If there was negligence on either side, it was on the part of the defendants, and not the bank. *Commercial and Farmers' National Bank* v. *First National Bank*, 90 Md. 11.

But it is said the bank was guilty of laches, after the discovery of the fraud, in not promptly demanding payment of the defendants, and in never having returned or offered to return the check. It appears from the findings that, on the same day on which the fraud was discovered, the defendants were notified of it, but a formal demand of payment was not made until about nine days thereafter.

It is clear that a demand was not necessary, if viewed in the light of a condition precedent merely. If necessary at all, it was only on the

ground that, in view of it, the defendants may have had an additional motive for greater diligence in searching for the forger and seeking restitution. During the nine days which elapsed after the discovery of the fraud, and before payment was formally demanded, the defendants may, probably, have omitted all effort to discover the person from whom they received the check, under the belief that the plaintiffs, or the bank, had concluded to submit to the loss. If the omission to make the demand promptly is entitled to any weight (a point not decided), it is only for the reason that the defendants may thereby have been lulled into security and have omitted efforts they would otherwise have made to procure indemnity. In that view, the failure to make the demand may, possibly, have been laches. But I deem it unnecessary to decide the point in this case. The failure to return, or to offer to return, the altered check to the defendants presents a question of more difficulty. In the case of the payment of counterfeit bank-notes, the rule appears to be well settled that, in order to recover the consideration from a person who innocently paid them out, the holder must return them promptly. The case of the *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33, was an action of that character, and the court held that a delay of fifteen days in returning the notes was fatal to the action. In delivering the opinion of the court, Chief Justice Parker says: "The true rule is, that 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. This principle will apply in all cases where forged notes have been received." After saying that the delay of fifteen days was too great, he continues: "The defendants then had no means of looking up those from whom they had received the notes; and, although there is no evidence in the case from which it can be ascertained that they could have saved themselves, if they had received earlier notice, the law will presume that a change of circumstances had taken place which would justify them in resisting the action." The same rule was announced by the Supreme Court of the United States, in the case of the *Bank of the United States* v. *Bank of Georgia*, 10 Wheat. 333. This, also, was an action to recover consideration paid for counterfeit bank-notes which were not offered to be returned until after the lapse of nineteen days from the time when they were received. Mr. Justice Story, in delivering the opinion of the court, says: "The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and, therefore, to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will, therefore, presume a damage, actual or potential, sufficient to

repel any claim against the holder. Even in relation to forged bills of third persons, received in payment of a debt, there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time, and any neglect will absolve the payer from responsibility." In *Thomas* v. *Todd*, 6 Hill, 341, Mr. Justice Bronson says: "Although the bill has no intrinsic value, it should be returned to the debtor, so as to enable him to trace out and fall back upon the person from whom he received it. And, for the same reason, the bill should be returned without any unnecessary delay."

These cases, it is true, grew out of the payment of counterfeit bank-notes; and we have been referred to no case adjudicating the precise point involved in the action, nor have we been able to find one, after a somewhat diligent examination of the books. In the case of counterfeit bank-notes, the person who receives them is held to great diligence, not only in returning them on the discovery of the forgery, but, also, in the detection of the fraud. In the case of the *Gloucester Bank* v. *Salem Bank*, *supra*, the court held that the person 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 reason assigned for the strictness of the rule is, that delay in returning the notes would render it more difficult to trace out the person from whom the prior holder had received them, and to obtain restitution for the consideration paid for them. As between two innocent persons, neither should be allowed to impair or jeopardize the rights of the other by any negligence whatever, and he who commits the negligence should suffer the loss. In the case of bank-notes, a greater degree of diligence in detecting the fraud and returning the notes would, doubtless, be exacted than in respect to forged bills of third persons received in payment of a debt concerning which, as we have seen, Judge Story said, in *Bank of the United States* v. *Bank of Georgia*, *supra*, that "the notice of return must be within a reasonable time; and any neglect will absolve the payer from responsibility." In general, it is more or less difficult to identify a particular bank-bill as that which was received from a particular person; and, in a majority of cases, it would, perhaps, be impossible to do so after a considerable delay. For this reason, the return should be more promptly made than in the case of a forged bill of a third person. But, in each case, the person from whom the spurious paper was received is entitled to the fullest opportunity to obtain indemnity, if he can, from the prior indorsers or guarantors, if there be any, and, if there be none, then from the person to whom he paid the consideration. If there be prior indorsers to whom he may look, it is quite obvious that his remedy would be incomplete, and, perhaps, ineffectual, without the possession of the forged paper. There may have been several prior indorsers, and

each in turn would be entitled to the bill, in order the more effectually to assert his rights against those who preceded him. But, if there were no prior indorsers, his remedy against the person from whom he received the forged check or bill is plain. If the defendants in this case had refunded the money, on being notified of the forgery, or on the subsequent demand of payment, their right to proceed against the stranger, from whom they received the check, would have been unquestionable; and it is clear that they could not effectively have prosecuted civil proceedings against him without the possession of the check. It may possibly be that he also was innocent of the fraud, and received the check in good faith, in which event, on refunding the money he received, he would be entitled to the check to enable him to assert his rights against the person from whom he received it. But it is insisted on behalf of the plaintiffs: First, that the defendants waived a return of the check; and second, that a return of it could not have benefited them, inasmuch as the person from whom they received it immediately disappeared, and can not now be found after diligent search. On the first point, it is sufficient to say that the record furnishes no evidence of a waiver; and, on the second point, the reply may be found in the language of Judge Story, already quoted, where he says the law will "presume a damage, actual or potential, sufficient to repel any claim against the holder;" or, in the words of Chief Justice Parker, in *Gloucester Bank* v. *Salem Bank*, "the law will presume that a change of circumstances had taken place which would justify them in resisting the action." I am, therefore, of opinion that a failure to return, or to offer to return, the check to the defendants is a valid defense to the action; and, on this ground, the judgment must be reversed, and the cause remanded for a new trial. But, in view of another trial, it may be proper to notice the proposition urged by the plaintiffs, to the effect that, by indorsing the check, the defendants guaranteed that it was genuine, in respect to the amount appearing on its face. There is no conflict in the authorities on the point that the holder of a bank check who accepts payment thereby undertakes that all indorsements, prior to his own, are genuine, and that he is the lawful holder and owner of it. As we have already seen, he does not undertake that the signature of the drawer is genuine. With that the drawee is presumed to be acquainted, and is bound at his peril to know it. But there is no such presumption in respect to the signatures of the payee and indorsers, all of whom may be strangers to the drawee, and of whose handwriting he is not presumed to have any knowledge. When, therefore, the holder presents a check or bill for payment, the title of which he derives through prior indorsements, he undertakes with the drawee that these indorsements are genuine, and that he has a valid title, and, consequently, a right to receive the money. If it afterward transpires that one or more

of the indorsements were forged, the drawee will be entitled to recover back the money from the person to whom he paid it, on the ground that the latter had no title to the bill or check, and the payment was, therefore, made without consideration, under an innocent mistake. But the indorsement of the holder receiving payment can have, at most, no greater legal significance than this. It implies, at best, only an undertaking that he has a valid *title* to the bill or check, and, consequently, a right to receive payment on implication, which the law raises without the indorsement. But the indorsement, *proprio vigore*, imposes upon him no other or greater liability to refund money paid upon an altered check than would attach to him without the indorsement. In other words, the indorsement does not, of itself, import an undertaking that the check has not been altered; and, in a proceeding to recover back the amount paid on an altered check, the indorsement could not be made the foundation of the action, as importing a promise to refund the money in case it should afterward appear that the amount in the body of the check had been fraudulently altered. In such cases, the right of recovery does not rest, in whole, or in part, upon the indorsement as importing a promise to refund the amount received upon the altered check, but upon the fact that the money was paid by the drawee without consideration, under an innocent mistake. The authorities in support of this view of the question are numerous and uniform, and we have been referred to none to the contrary.

Judgment reversed and cause remanded for a new trial.

UNITED STATES SUPREME COURT.

DECEMBER TERM, 1872.

COL. S. BUCHANAN, GEORGE F. PERKINS, EDWARD GOODWIN, JR., and BENJAMIN W. BUCHANAN, Receiver, etc., of the Cascade Paper Manufacturing Company of Penn Yan, Appellants,

versus

GABRIEL L. SMITH, Assignee in Bankruptcy of the Cascade Paper Manufacturing Company of Penn Yan.

Appeal from the Circuit Court of the United States for the Northern District of New York.

BANKRUPTCY—EXECUTION—PREFERENCE—INSOLVENCY DEFINED—MEANS OF KNOWLEDGE—CREDITOR ISSUING EXECUTION—APPOINTMENT OF RECEIVER IN STATE COURT—RIGHTS OF JUDGMENT CREDITOR.

1. *Execution — Preference.*—HELD, that the corporation respondents, within four months before the filing of the petition against them in bankruptcy, did procure or suffer their property to be attached, sequestered, or seized on execution by the principal appellants, with a view to give a preference to such creditors by such attachment, sequestration, or seizure over their other creditors.

2. *In Contemplation of Insolvency.*—That the corporation respondents were insolvent at the time, or in contemplation of insolvency.

3. *Reasonable Cause to Believe, etc.*—That the judgment creditors, at the time their said debtors procured or suffered such attachment, sequestration, or seizure of the property belonging to said debtors, had reasonable cause to believe that the said debtors, whose property was so attached, sequestered, or seized, were insolvent, and that they procured or suffered such attachment, sequestration, or seizure of such property to be made to secure such preference, and in fraud of the provisions of the Bankrupt Act.

4. *Meaning of the word Insolvency.*—That insolvency in the sense of the Bankrupt Act means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions, and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they mature in the ordinary course of business.

5. *When not actually Insolvent—Means of Knowledge.*—That such a party who is a creditor securing a preference from his debtor over the other creditors of the debtor, can not be said to have had reasonable cause to believe that his debtor was insolvent at the time, unless such was the fact; but if it appears that the debtor giving the preference, whether a merchant or trading company, was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances

were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact by reasonable inquiry.

6. *Creditors issuing Executions.*—That creditors issuing executions on judgments obtained on demands long overdue against a bankrupt who has been pressed in repeated instances to pay or secure the demands, and has failed to do so because of his inability, must be held to have had reasonable cause to believe that this debtor was insolvent.

7. *Judgment Creditors of a Corporation.*—The court states the proper way for the judgment creditors of a corporation to proceed.

8. *Appointment of Receiver by State Court.*—That neither the decree of the State Court appointing the receiver, nor the order enlarging his powers, nor any of his proceedings under those powers, afford any defense to the bill of complaint.

9. *Right of Creditor to Judgment and Execution.*—The court considers the clarm of the creditor that he has the right to use diligence, and proceed to judgment and execution against his debtor, etc., but does not concur therein.—Ed. Legal News.

Mr. Justice Clifford delivered the opinion of the court.

Preferences, as well as fraudulent conveyances, are, under certain circumstances, declared to be void if made by a debtor actually insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him as a bankrupt. (14 Stat. at Large, 534.)

Those circumstances, so far as that rule of decision is applicable to this case, are, if the debtor procures any part of his property within that period to be attached, sequestered, or seized on execution, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, that such attachment, sequestration, or seizure is void, provided, it also appears that the creditor making the attachment, sequestration, or seizure, or the person to be benefited thereby, had reasonable cause to believe that the debtor was insolvent, and that the attachment, sequestration, or seizure was procured in fraud of the provisions of the bankrupt act.

On the ninth of September, 1869, a creditor of the corporation respondents, filed a petition in bankruptcy against the company, in the office of the clerk of the District Court, and on the twenty-fourth of the same month, the District Court adjudged the said Paper Manufacturing Company to be bankrupts, within the true intent and meaning of the bankrupt act.

Pursuant to that decree, the appellee, on the tenth of November following, was duly appointed assignee of the estate of the bankrupts, and the register having charge of the case, there being no opposing interest, by an instrument in writing, under his hand, assigned and con-

veyed to the said assignee all the property and estate, real and personal, of the bankrupts.

By virtue of that instrument of assignment and conveyance, all the real and personal estate of the bankrupts, with all their deeds, books, and papers relating thereto, became vested in the appellee as such assignee. Such instrument of assignment and conveyance embraced the several parcels of real estate described in the bill of complaint, and certain personal property at that time in the hands of an assignee, appointed by the State Court, or in the custody of the sheriff of the county, but which has since been in part sold by the sheriff, and the proceeds have been paid into the registry of the District Court. Five policies of insurance upon the property of the bankrupts, which had been destroyed by fire, and for which losses the insurance companies were liable, were also included in the said instrument of assignment and conveyance.

Complaint is made by the appellee, in the bill, that the respondents, or the three first named, on the third of August, prior to the decree adjudging the corporation respondents brankrupts, recovered two several judgments against the bankrupt company, in the Supreme Court of the State, amounting in the aggregate to the sum of eleven thousand eight hundred and fifteen dollars and sixty-five cents; that the said judgments on the day following, were docketed in the office of the clerk of the county, where the judgments still remain of record, and constitute an apparent lien upon the property and estate so assigned and conveyed to the appellee as such assignee, and are a cloud upon his title.

Apart from that, he also claims that the same parties took out executions upon the said judgments, and delivered the same to the sheriff of the county, and that the sheriff, on the eleventh of the same month, levied the executions upon certain personal property of the bankrupt company, which he held in possession when the petition in bankruptcy was filed, and he alleges that the sheriff, by order of the District Court duly entered, has since sold the said personal property and paid the proceeds into the registry of the Bankrupt Court; that the other respondent claims that he has been appointed receiver of the several policies of insurance, and that he has commenced actions against the insurance companies to recover the losses suffered by the burning of the property covered by the said policies, in consequence of which the insurance companies refuse to pay said losses to the complainant.

Both the allegations of the bill and the proof show that the corporation respondents, on the said third of August, and long prior thereto, were utterly insolvent and bankrupts, and the complainant charges that they procured and suffered the said judgments in favor of the parties named to be entered, and their own property be attached, sequest-

ered, and seized, as alleged, with intent to give to those creditors a preference over their other creditors, and that they intended by such disposition of their property, to defeat and delay the operation of the bankrupt act; that the said judgment creditors, throughout these proceedings, had reasonable cause to believe that the debtor company was insolvent, and that the judgments were entered, the executions issued, and the levies made in fraud of the provisions of the bankrupt act, and that the proceedings were commenced and prosecuted with a view to prevent the property from coming to the assignee in bankruptcy, and from being distributed under said act.

Service was made, and the said judgment creditors appeared and filed an answer, and a separate answer was filed by the respondent claiming to be the receiver of the policies of insurance. Proofs were taken, and the parties were heard, and the court entered a decree for the complainant, and from that decree the respondents appealed to this court.

Most, or all of the defenses which it becomes material to consider, consist of denials that the charges contained in the bill of complaint are true, and in that respect the two answers are substantially alike. Briefly described, the answers deny that the corporation respondents did procure or suffer the said judgments to be entered, or their property to be taken upon legal process issued upon said judgments, with intent thereby to give to those judgment creditors a preference over their other creditors, or with intent to defeat or delay, by such disposition of their property, the operation of the bankrupt act, or that they had reasonable cause to believe that the respondent company was insolvent, or that the judgments were entered, or the executions issued, or the levies made in fraud of the provisions of the bankrupt act; or that such proceedings were instituted with a view to prevent the property of the bankrupts from coming to the assignee in bankruptcy, or to prevent the same from being distributed under the said act, as charged in the bill of complaint.

Fraudulent preference is the gravamen of the charge, and the complainant, as the assignee of the estate of the bankrupts, prays that the said judgments and all the proceedings in the suits may be decreed to be void and of no effect, and that the judgments, executions, and levies may be vacated and set aside, and that it may be decreed that he, as such assignee, is entitled to have and receive all the real and personal estate of the bankrupts, free and clear of any lien by virtue of the said judgments, or of any of the aforesaid proceedings, and for an injunction.

Three things must concur to entitle the complainant, as such assignee, to the decree as prayed in the bill of complaint. (1.) That the corporation respondents, within four months before the filing of the petition against them in bankruptcy, did procure or suffer their property, or

some part thereof, to be attached, sequestered, or seized on execution by the said judgment creditors, with a view to give a preference to such creditors, by such attachment, sequestration, or seizure, over their other creditors. (2.) That the corporation respondents were insolvent at that time, or in contemplation of insolvency. (3.) That the judgment creditors at the time their debtors, the corporation respondents, procured or suffered such attachment, sequestration, or seizure of the aforesaid property belonging to the said debtors, had reasonable cause to believe that the debtors whose property was so attached, sequestered, or seized, were insolvent, and that they procured or suffered such attachment, sequestration, or seizure of such property to be made to secure such preference, and in fraud of the provisions of the bankrupt act.

Equal distribution of the property of the bankrupt, *pro rata*, is the main purpose which the bankrupt act seeks to accomplish, and it is clear to a demonstration that the end and aim of those who framed the act must be defeated in this case if the proceedings of the judgment creditors are sustained, as they have perfected liens by those proceedings upon all, or nearly all, of the visible property of the bankrupts.

Until the debtor commits an act of bankruptcy, it is doubtless true that any creditor may lawfully sue out any proper process to enforce the payment of debts over-due, and may proceed to judgment, execution, seizure, and sale of his property, but it is equally true that the appointment of an assignee, under a decree in bankruptcy, relates back to the commencement of the bankrupt proceedings, and that the instrument required to be executed under the hand of the judge or register, assigns and conveys to the assignee all the estate, real and personal, of the bankrupt, including equitable as well as legal rights and interests, and things in action as well as those in possession, which belonged to the debtor at the time the petition in bankruptcy was filed in the District Court. (14 Stat. at Large, 522.)

Conceded, as that proposition must be, it is obvious that the judgment creditors could not acquire any interest in the property of the debtor by virtue of the order of the State Court extending the powers of the receiver previously appointed to collect the several amounts due from the insurance companies, to all the other estate, real, personal, and mixed, of the bankrupts, as it is admitted in the answer that the order in question was passed subsequent to the filing of the petition in bankruptcy, which is the foundation of the decree adjudging the corporation respondents to be bankrupts. Suppose it were otherwise, still the same conclusion must follow, as the court is of the opinion that all the essential allegations of the bill of complaint are established.

Much discussion to show that the paper company was insolvent is certainly unnecessary, as the answer admits the fact to be as alleged in

the bill of complaint. They failed to meet their paper at maturity as early as the fourth of March, 1869, as conclusively appears from the letter of the principal appellants to the treasurer of the company, acknowledging the receipt of a telegram from him to the effect that the company could not pay their note falling due on that day.

It appears by the record that the bankrupt company was engaged in the manufacture of paper; that they had for a long time purchased goods for the purpose of the principal appellants, on credit; that the appellants at that time held six notes against them, some of which were over-due; that the mills of the company, on the twentieth of the same month, were destroyed by fire, which prevented the company from transacting any further business.

Correspondence immediately ensued between the appellants and the bankrupt company or their superintendent. Two days after the fire, the company informed the appellants of their misfortune, and the appellants replied on the following day, promising to take care of one of their notes, and to advise them, in a few days, as to another which would fall due in a short time. Immediately one of the appellants visited the superintendent of the bankrupt company for the purpose of ascertaining the extent of their loss, and whether they would be able to take care of their unpaid notes.

Application was soon after made to the appellants by the company that they should consent to renew the notes, and for an extension of the time of payment, which led to further correspondence, and to some crimination, the appellants charging that the officers of the company had promised that all the notes should be promptly met, and that they had failed to make good their promise, and insisting that they must provide funds for that purpose. Urgent demands to that effect were made by the appellants, as appears by the letters given in evidence, but the bankrupts failed to supply the necessary funds, and the appellants, though they at first refused so to do, finally consented to renew all of the notes except two, reducing the number from six to four, as appears by their own testimony.

Those four notes were as follows: (1.) Note dated April 2, 1869, for four thousand seven hundred and one dollars and forty-two cents, payable in sixty-three days from date. (2.) Note dated May 4, 1869, for two thousand three hundred and eighteen dollars and seventy cents, payable in fifty-five days from date. (3.) Note dated November 6, 1868, for two thousand three hundred and five dollars and ninety-four cents, payable June 4th, next, after its date. (4) Note dated November 16, 1868, for two thousand three hundred and eighteen dollars and sixty-nine cents, payable the third of July next after its date.

Repeated demands for payment having been ineffectual, the appellants, on the 9th of June subsequent to the fire, suggested to the super-

intendent of the company that the chances of collecting the insurance money would be better if the policies were placed in their hands, and urged that the company should assign their claims under the policies of insurance to them, "or at least enough of them to cover our claim, which, in round numbers, is about $12,000." Such a course, it was suggested in the same letter, would be the very best means they (the company) could adopt to avoid litigation and loss, which affords convincing evidence that it was the purpose and intention of the appellants to secure a preference over the other creditors of the company.

Persuasion having failed to accomplish the purpose, the appellants in a letter dated three days later, and addressed to the president of the company, presented a schedule of the notes renewed and unpaid, complaining that they had been very unfairly treated, and informed him that unless one-half of the amount due to them was remitted by return mail, they should instruct their attorneys to commence suits against him and the superintendent of the company as indorsers of the notes. Instead of yielding at that time to the threat of the appellants, the corporation bankrupts on the twenty-first of July following, made, executed, and delivered to one Benjamin L. Hoyt, an indenture of assignment, wherein they pretended to convey to the said assignee all their real and personal property in trust, to convert the same into money, and with the proceeds to pay the debts of the company.

Extended discussion of that transaction, however, is quite unnecessary, as both parties agree that the said assignment was made in contemplation of insolvency, contrary to the provisions of the revised statutes of the State, and to hinder, delay, and defraud creditors. Whether the instructions were given to the attorneys, as threatened, does not appear, but it does appear that the notes over-due were protested, and that those notes, on the nineteenth of the same month, were put in suit against the bankrupt company, and that a second suit was commenced against the company upon the other two notes immediately after they fell due.

Enough appears, both in the pleadings and proofs, to show that those suits, on the third of August following, were pending in the State Court, and that the principal appellants on that day recovered judgment in both suits against the corporation defendants. Judgment in one of the suits was rendered for the sum of seven thousand one hundred and eighteen dollars and fourteen cents, and in the other for the sum of four thousand one hundred and ninety-seven dollars and fifty-one cents, as appears by the record. Both judgments were ordered and perfected on the same day, and on the following day transcripts thereof were duly filed, and the respective judgments were duly docketed in the office of the clerk of the county, so as to become, at least, in part a lien on all the estate, real and personal, belonging to the bankrupt corporation.

Argument to show that the purpose of the principal appellants, in attaching, sequestering, and seizing the property of the bankrupt company, as charged in the bill of complaint, was to obtain a preference over the other creditors of the company, is hardly necessary, as the charge is fully proved, and it is equally certain that the debtors throughout the entire period from the commencement to the close of those proceedings were hopelessly insolvent, and the acts, conduct, and declarations of the appellants, in the judgment of this court, afford the most convincing proof that they had reasonable cause to believe, even if they did not positively know, that such was the actual pecuniary condition of their debtors.

Attempt is made to satisfy the court that the debtors themselves did not know that they were insolvent, but the theory, in view of the evidence, is not supported, and must be rejected as improbable, and as satisfactorily disproved.

Even suppose that is so, still it is insisted by the appellants that the decree is erroneous because it is not proved, as they contend, that the bankrupts procured or suffered their property to be attached, sequestered, or seized by the appellants, as charged in the bill of complaint, within the true intent and meaning of the bankrupt act. Properly viewed, they insist that their acts and conduct only show that they have used the process of the State Courts, as they had a right to do, to collect their debts due from the insolvent company, and they submit the proposition, that a creditor may lawfully do all that he might have done before the bankrupt act was passed to collect his debts, provided he has no active or passive assistance from his debtor, whom he has reasonable cause to believe to be insolvent, to help him to secure such a preference over the other creditors of the debtor.

Creditors, it is conceded, are forbidden to sue out State process, within the said four months, and employ it to create and perfect such liens on the property of their debtor, by his active or passive assistance, but the proposition submitted is that whatever they can obtain of their insolvent debtor in that way, under such process, by their own energy and activity, in spite of the debtor, they may lawfully retain, and that such liens are not displaced or dissolved, by any subsequent bankrupt proceedings.

Strong doubts are entertained whether the proposition could be sustained, even if the theory of fact which it assumes was fully proved, as the fourteenth section of the bankrupt act provides to the effect that the required instrument of assignment, when duly executed, shall vest in said assignee the title to all the property and estate of the bankrupt, although the same is then attached on mesne process as the property of the debtor, where the attachment was made four months

next preceding the commencement of the bankrupt proceedings, but it is not necessary to decide that question at this time, as the evidence is full to the point that the judgment creditors in this case did have the passive assistance of the bankrupt debtors in obtaining their judgments, and in perfecting their liens, under the State process and laws, upon all the property, real and personal, of their debtors.

Throughout it was plainly the purpose of the principal appellants to obtain a preference over the other creditors of the bankrupt company, either by payment or assignment, and it must be conceded that the officers of the company for a time refused or declined to comply with any such request or intimation, or in any way to promote their purpose, but the facts and circumstances disclosed in the record fully warrant the conclusion of the Circuit Court, that they ultimately acquiesced in what was done by the appellants, even if they did not actively promote the consummation of the several measures, which they, the appellants, adopted to perfect liens upon all the visible property of the bankrupt company, unless it exceeded in value the amount of their judgments. (Hilliard on B., 3d ed., 325-331.)

Sufficient is shown to satisfy the court that those having charge of the affairs of the corporation respondents knew that they were insolvent, and that they also knew that it was the purpose and intent of the principal appellants to secure a preference over the other creditors of the bankrupt corporation. Insolvent as they knew the company to be, they could not, as reasonable men, expect that all the debts of the company would be paid, and they must have known that the appellants would secure a preference over all the other creditors of the company if they suffered them, without invoking the protecting shield of the bankrupt act, to recover judgments in the two pending suits, and to perfect the other measures which they subsequently adopted, to give effect to their liens upon all the property of the corporation bankrupts. (Marshall *v.* Lamb, 5 Add. & Ell. N. S., 126.)

Tested by these considerations, the court is of the opinion that the findings of the Circuit Court were correct, and that the allegations of the bill of complaint are sustained, as follows: (1.) That the corporation respondents within four months before the filing of the petition against them in bankruptcy, did procure or suffer their property to be attached, sequestered, or seized on execution by the principal appellants, with a view to give a preference to such creditors by such attachment, sequestration, or seizure over their other creditors. (2.) That the corporation respondents were insolvent at that time, or in contemplation of insolvency. (3.) That the judgment creditors, at the time their said debtors procured or suffered such attachment, sequestration, or seizure of the aforesaid property belonging to the said debtors, had reasonable cause to believe that the said debtors whose

property was so attached, sequestered, or seized, were insolvent, and that they procured or suffered such attachment, sequestration, or seizure of such property to be made to secure such preference, and in fraud of the provisions of the bankrupt act. (Shawhan *v.* Wherritt, 7 How. 644; Fernald *v.* Gray, 12 Cush. 596; Scammon, assee., *v.* Cole et al., 5 N. B. R. 207; same case, 3 N. B. R. 100; Smith, assee., *v.* Buchanan, 4 N. B. R. 133; same case, 8 Blatch. 153.)

Insolvency in the sense of the bankrupt act, means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions, and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, in a case like the present as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they mature in the ordinary course of business.

Such a party, that is, a creditor securing a preference from his debtor over the other creditors of the debtor, can not be said to have had reasonable cause to believe that his debtor was insolvent at the time unless such was the fact; but if it appears that the debtor giving the preference, whether a merchant or trading company, was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the creditor securing the preference, as clearly ought to have put him, as a prudent man, upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact by reasonable inquiry.

Ordinary prudence is required of a creditor under such circumstances, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. (Toof *v.* Martin, assignee, 13 Wall. 40; Scammon, assignee, *v.* Cole, 5 N. B. R. 213.)

Such proceedings, therefore, must be held invalid, as they were promoted and prosecuted by the parties acting in fraud of the bankrupt act, and inasmuch as that conclusion affects the judgments recovered by the appellants, it will not be necessary to bestow much consideration upon the subsequent proceedings to perfect the liens, or to the order for the appointment of a receiver, or to the second order extending his jurisdiction, and enlarging his powers. Evidently the judgments must be set aside as being superseded by the proceedings in bankruptcy, and if so it is quite clear that all the subsequent proceedings founded upon those judgments, become inoperative and ineffectual to prevent the assignee in bankruptcy from exercising the same power and dominion over all the property and estate of the bankrupts, as he might have

exercised if such judgments had never been rendered, or no such subsequent proceedings had ever taken place.

Creditors issuing executions on judgments obtained upon demands long overdue against a bankrupt, who has been pressed in repeated instances to pay or secure the demands, and has failed to do so, because of his inability, must be held to have had reasonable cause to believe that his debtor was insolvent. (Wilson *v.* City Bank, 5 N. B. R. 270; Foster *v.* Goulding, 9 Gray, 52.)

It was suggested at the argument that the appointment of the receiver was an independent order of the State Court, and that the action of the State Court must be regarded as valid until it is set aside by some direct proceeding, but it is a sufficient answer to that objection, to say that the State statute under which the appointment was made, has no application whatever to corporations, and that the proceeding must be regarded as wholly unauthorized and void. (Code, secs. 292, 294; Hinds *v.* Railroad Co., 10 How. Prac. R. 487; Sherwood *v.* Railroad Co., 12 How. Prac. R. 136.)

Judgment creditors of a corporation, it is said, do not obtain a preference by such a proceeding, but must proceed according to the provisions of the article relative to the sequestration of the property and effects of corporations for the benefit of creditors. (Sess. Acts, 1825, page 449; 2 Rev. Stats. 463; Morgan *v.* Railroad, 10 Paige, ch. R. 290; Loring *v.* Gutta Percha and Packing Co., 26 Bark. 329.

Viewed in any light, the court is of the opinion that neither the decree of the State Court, appointing the receiver, nor the order enlarging his powers, nor any of his proceedings under those powers, afford any defense to the bill of complaint.

Decree affirmed.

BRADLEY, J.—I dissent from the opinion of the court just read. In my opinion, an adversary suit against an insolvent person may be prosecuted to judgment up to the very moment of bankruptcy. The diligent debtor can not be deterred from such prosecution by a knowledge that his debtor is insolvent, or by any apprehensions that bankrupt proceedings may be in contemplation. He is not bound, himself, to petition against his debtor in bankruptcy, nor does the neglect of his debtor to file such a petition, deprive him of his fairly gained preference, unless complicity between them can be shown, of which, in my opinion, there was no evidence in this case.

Mr. Justice DAVIS did not sit.

THOS. M. NORTH, of New York, for appellants.

GEO. GORHAM, Esq., of Buffalo, for appellees.

SUPREME COURT OF OHIO.

TO APPEAR IN VOL. 22, O. S. REP.

FACTOR—ESTOPPEL.

Samuel Frank *vs.* Jenkins, Bro. & Chipman. Error to the Superior Court of Cincinnati.

WELCH, J.:

1. The nature and extent of a factor's power to sell or dispose of goods intrusted to him must be determined by the law of the place where the sale or contract of disposition is made.

2. An action by the owner of goods to recover their price and value from his agent, who without proper authority has consigned them for sale on commission, and received advances upon them, is *prima facie* evidence of a ratification of the consignment.

3. Goods were consigned by an agent, without proper authority from the owner, for sale or commission by the consignees, who in good faith advanced money upon them to the agent, supposing him to be the owner of the goods. While the goods were in transit the owner replevied them from the carrier, and also brought an action against the agent to recover their price and value. In an action of replevin, subsequently brought by the consignees against the owner, to recover possession of the goods, it appearing that the owner's said action for their price and value was still pending, and their being no evidence that it was brought or prosecuted under any mistake of the facts: *Held*—That under the circumstances, the owner was estopped from denying the authority of his agent to make the consignment.

4. A judgment in replevin against the carrier of the goods, replevined while in *transitu*, does not estop the consignee, who was no party to the action, and in nowise participated therein, from setting up his claim to the goods.

Judgment affirmed.

PARTNERSHIP—AUTHORITY.

Samuel Feigley, surviving, &c., *vs.* John C. Whitaker. Error to the District Court of Perry County.

MCILVAINE, J.—*Held:*

1. Although the dissolution of a partnership revokes the implied authority of each partner to bind his copartners by any new promise or engagement, yet it leaves upon each partner the duty, and continues to each the right, of doing whatever is necessary to collect claims due to the partnership, and to adjust, settle, and pay its debts.

2. That in so far as a partner, after dissolution, acts within the scope

of such limited authority, his acts and admissions are admissible as evidence to charge his copartners.

3. In an action against A as survivor of B, partners in the late firm of A & B, it having been shown that certain dealings between the plaintiff and the firm were unsettled at the date of its dissolution, it is competent for the plaintiff to prove, as against the defendant, that the deceased partner B, after the dissolution, upon adjustment with the plaintiff of such unsettled business, admitted that there was due the plaintiff, on account thereof, the amount claimed in the action.

Judgment affirmed.

FORECLOSURE OF MORTGAGE.

Means, Clark & Co., *vs.* George Worthington, *et al.* Error to the District Court of Cuyahoga County.

WHITE, C. J.—*Held:*

1. In a suit to foreclose a chattel mortgage, where the court has jurisdiction of the parties in interest, it is not necessary to a decree of foreclosure that the mortgaged property should be within the territorial jurisdiction of the court.

2. The mortgagee of the undivided half of a vessel, registered and enrolled at the port of Buffalo, instituted a suit in the Court of Common Pleas of Cuyahoga County, in this State, against the mortgagors and the subsequent mortgagee, to obtain a foreclosure of his mortgage. The personal appearance of the defendant was effected to the suit, and by the final decree it was ordered that, unless they paid the plaintiff his mortgaged debt, within a time specified, the mortgaged property should be sold by a master as upon execution. *Held*—That to enable the officer to make a valid sale under an order issued in pursuance of the decree, it was not necessary that the vessel should be present, or under his control, at the time and place of sale.

3. Courts of equity in ordering a sale of property follow the rules regulating sales on execution, when they are applicable. But where the subject with which the court is dealing is such that these rules can not be applied without defeating the ends of justice they will be disregarded.

Judgment affirmed.

MUNICIPAL CORPORATIONS—ASSESSMENTS.

William M. Corry *vs.* John Gaynor. Motion for leave to file a petition in error to reverse the judgment of the District Court of Hamilton County,

STONE, J.—*Held:*

1. That the right of a municipal corporation to make assessments to

defray the expense of improving a street, and to make the same payable to the contractor doing the work, and the right of the latter to sue thereon in his own name, as authorized by the act of May 3, 1852 (S. & C., vol. 2, 1493), where the assessment was ordered and the contract made while that act was in force, are not affected by the repeal of that act by the Municipal Code (66 O. L.), but the same are within the saving clauses of section 725 of the latter act.

2. That the trustees of special road districts had no power, under the forty-sixth section of the act of May 3, 1852, above referred to, as amended by the act of May 12, 1853 (O. L., vol. 51, 376), to order the improvement of streets and charge the cost thereof upon the abutting lots, except upon the petition of two-thirds of the resident owners of the lots thus situated, and the finding of the trustees that such petition was presented is not conclusive of the fact.

3. Where, in such case, the trustees order the improvement, and let the contract for doing the work under a mistaken belief that the petition is signed by two-thirds of such resident owners, and the contractor, in ignorance of any defect in the proceedings, agrees to take the assessment for his compensation, and is induced to enter into such contract, and to do the work, by the assurances of one of the lot owners that if he did the work he should be paid: *Held*—In a suit brought by the contractor to collect the assessment, such lot owner is estopped from showing that the petition was not, in fact, signed by two-thirds of the resident lot owners.

On the plaintiff below remitting so much of the judgment as consists of charges for engineering, printing, and attorney's fees, the motion will be overruled. If such remittitur be not made within thirty days, the motion will be granted.

PARTITION—LIEN.

Joseph Comer, *et al.*, *vs.* Joseph B. H. Dodson, *et al.* Motion for leave to file a petition in error to the Superior Court of Montgomery County.

DAY, J.:

Where one of the parties in a proceeding in partition, during the pendency of the case, assigned to several persons specified amounts of his share of the money to be realized from a contemplated sale of the land, and afterward a creditor of the same party obtained judgment against him and levied an execution on his undivided interest in the land, also, at the same time proceeded by cross-petition to subject such interest to the payment of the judgment, and the proceeding in partition resulted in the sale of the land: *Held:*

1. The lien acquired by the judgment creditor on the interest of the debtor in the land was divested by the sale in partition, and his equitable right to that portion of the proceeds of the sale belonging to the

debtor, having accrued after a part thereof had been assigned by the debtor, is subordinate to the rights of the assignees, and, in the distribution of the fund, the amount assigned to them must be first paid.

2. The debtor had the same right to the statutory exemption in lieu of a homestead, as against the creditor, that he would have it the creditor had levied an execution on the money in dispute; and the court having control of the fund, on the proper application of the debtor, may, in the distribution of the fund, refuse to apply the amount of such exemption to the satisfaction of the judgment.

Motion overruled.

TAXATION—INSURANCE COMPANIES.

The Farmers' Insurance Company *vs.* George S. Larue, Auditor, &c. Motion for leave to file a petition in error to the Superior Court of Cincinnati.

By the Court:

Insurance Companies organized under the act of the General Assembly of this State, passed April 11, 1856 [S. & C., 360], and subject to the provisions of the acts amendatory thereof and supplementary thereto, passed April 13, 1865 [S. & S., 228], and May 7, 1869 [66 O. L., 325], are bound, under the provisions of the act of April 5, 1859 [S. & S., 1,438], for the assessment and taxation of property, &c., to list for taxation all notes for unpaid balances on stock subscriptions.

Whether stockholders in such companies may, under the provisions of section 2 of the tax law of 1859 [Ibid], deduct the amount of such notes from their credits, we are not called upon to determine.

Leave refused.

KENTUCKY COURT OF APPEALS.

TWICE IN JEOPARDY OF CAPITAL PUNISHMENT—THE EFFECT OF THE DISCHARGE OF A JUROR.

Murty O'Brien *vs.* Commonwealth. Hickman. Pryor, Judge.

Murty O'Brien being indicted by the grand jury of Hickman County for the murder of Tim Hogan, appeared and pleaded not guilty, and filed a special plea of former jeopardy. The trial resulted in a verdict and judgment sentencing him to be hanged. The accused had been indicted before for the same offense, and had appeared and pleaded not guilty, and a jury selected and sworn according to law, and the accused legally and regularly put upon his trial. Witnesses were introduced on the part of the prosecution whose testimony conduced to convict the accused with the killing of Hogan, and while a witness for the prosecution was being examined, one of the jurors announced that he was

a member of the grand jury that had found and returned the indictment on which the prosecution was based; and, therefore, the court, of its own motion, and against the objections of the accused and his counsel, discharged this juror, and had another summoned in his stead. The trial then progressed, resulting in a verdict of guilty. The case was brought to this court and the judgment reversed, and on its return to the lower court, the indictment having become mutilated, a new one was found, under which the latter conviction was had, and to which the special plea of former jeopardy was filed.

Held—There is a great diversity of opinion among judges as to the power of a court at its discretion to discharge a jury during the progress of a trial in a criminal case where the punishment is death. The ancient common law doctrine on this subject was to refuse to discharge the jury in such a case, even with the consent of the prisoner, but this doctrine was discarded by many of the earlier English judges as unreasonable, and the jury permitted to be discharged in cases of absolute necessity. The discretionary power of courts over juries in capital cases has been greatly enlarged in many of the States of the Union, and in some it is held that while judges must be extremely cautious in interfering with the chances of life in favor of the prisoner, still in the exercise of their discretion they have a right to discharge the jury, and the only security the prisoner has is in the conscientious exercise of this power and the responsibility of the judges under their oaths. That courts have the power to discharge juries in criminal cases where the accused is even charged with a capital offense, and that without the prisoner's consent, is now too well settled to be doubted, but whether the exercise of this power is to be determined at the mere will of the judge, or only in cases of absolute and extreme necessity, is a question in regard to which we find many conflicting authorities.

Section 211 of the Criminal Code provides that a challenge for implied bias may be taken where a juror was a member of the grand jury that found the indictment, but in nowise disqualifies him unless challenged by the parties to the indictment. Where the fact is disclosed showing this implied bias, if the accused fails to object, or ask a discharge of the jury, it is a waiver of his rights, and (as decided by this court in the case of Fitzpatrick *vs.* Harris) he can not afterward, for this cause, avoid the verdict or obtain a new trial. The accused, however, in this case, after having accepted the juror, was still willing to be tried by him, and protested against the action of the court in discharging him, by excepting, and the court, disregarding his objections, required the trial to progress, after the substitution of another juror.

Section 248 of the Criminal Code provides: "That if, after retirement, one of the jurors becomes so sick as to prevent a continuance of his duty, or other accident or cause occur, preventing their being kept

together, or if, after being kept together such a length of time as the court deems proper, they do not agree on a verdict, and it satisfactorily appears that there is no probability that they can agree, the court may discharge the jury."

Section 249 provides: "That in all cases where a jury is discharged either in the progress of the trial, or after the case is submitted to them, the same may be again tried at the same or another term of the court." It could not have been intended by section 248 that the power of a court to discharge a jury in cases of necessity is restricted to the causes enumerated in that section; if so, all other causes arising during the progress of the trial, showing a clear and manifest necessity for the discharge of the jury, must be disregarded. This section of the Code was not intended to define all the causes upon the happening of which this power could be exercised, but was only intended as an adoption of the legal rule, that a case of actual necessity must exist before a jury can be discharged. Section 249 was intended to apply to such cases as are mentioned in section 248, and has direct reference to the latter. But giving it its most comprehensive meaning, and placing this right to discharge a jury under its provisions at the sole discretion of the judge, still its exercise, without any legal necessity, is an infringement upon the constitutional right of the citizen. The accused had the right, under the Constitution and laws of the State, to a fair and impartial trial of his case by a jury of twelve men, selected and sworn according to law, and when thus selected and chosen by him, it was their province to render, and his right to demand, a verdict as to his guilt or innocence of the offense charged. The withdrawal of the juror, against his objection, terminated the legal existence of the jury sworn to try the issue between him and the Commonwealth, a jury to whom he had been delivered in charge, and at whose hands he had a right to expect a safe deliverance. There was certainly no legal reason or necessity for discharging the juror. He was competent, and had been accepted by both parties, and nothing but his death, sickness, or some accident preventing his continuing on duty, authorized the court, without the consent of the accused, to say that he should no longer constitute one of the panel. Section 14 of article 13 of our State Constitution provides "that no person shall for the same offense be twice put in jeopardy of his life or limb." A similar provision is also made a part of the Federal Constitution, and that of almost every State in the Union. If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the State demands, or the attorney for the prosecution desires, this constitutional right is of little value. If he can discharge the jury in a case like this, he may discharge it on account of the absence of a witness for the prosecution, or in any instance, and as often as the testimony is deemed insufficient for a conviction. (6 Sergeant & Rowle; 3 Rowle, 498.)

It was not necessary that there should have been a verdict or judgment in order to put the accused in jeopardy. The word jeopardy means exposure to death, loss, hazard, danger, peril, &c., and when one is put on trial on a charge of murder before a jury sworn to decide the issue, he is then exposed to the hazard and peril of his life. Where one is put upon his trial upon a valid indictment for a capital offense, as it may result in his conviction, he is in jeopardy, and every interference on the part of the State, after the jury has charge of the prisoner, by which the accused is prevented from having a verdict declaring his guilt or innocence, unless on facts establishing clearly a case

of necessity or showing the prisoner's consent, must operate as an acquittal.

This is abundantly sustained by authorities. Cowth *vs.* Cook, 6 Sergeant & Rowle; Dobbins *vs.* the State, 14 Ohio; Huley's case, 6 Ohio; Mosset *vs.* the State, 14 Ohio; Poague *vs.* the State, 3 Ohio; 1 Bailey, 657; Wharton's Am. Crim. Law, 3,122; Stewart *vs.* the State, 15 Ohio. The authorities in conflict with these views are in almost every instance in cases of misdemeanors, where it is admitted the court as in civil cases can exercise a sound discretion in discharging the jury.

The court does not adhere to its decision of this question on the former appeal of this case. The accused then had no opportunity of presenting his special plea, and besides, no former adjudication gives to the State the right to take the life of the accused, when he is entitled to an acquittal. The judgment is reversed, and the court below is directed to discharge the accused from custody.

Judge Lindsay not sitting.

THE RESPONSIBILITY OF NOTARIES PUBLIC IN PROTECTING COMMERCIAL PAPER—ORDINARY DILIGENCE REQUIRED—OPINION IN FULL.

Neal, &c., *vs.* Taylor, from Franklin. Pryor, Judge.

Gray & Todd drew a bill of exchange on Pepper for $1,000, due in sixty days from November 11, 1867, and payable to E. H. Taylor, which was accepted by Pepper, and indorsed by Taylor to Temple, by Temple to Todd, and by Todd to Edwards & Co., the appellants, the paper being made and indorsed for the benefit of Pepper, the acceptor, and by him sold, with the various indorsements on it, to Edwards & Co. Shortly before its maturity, the bill was sent by its owners, Edwards & Co., who were bankers at Shelbyville, Kentucky, to the Branch Bank of Kentucky, at Frankfort, for collection, and at maturity, January 13, 1868, was protested for non-payment by the appellee, R. B. Taylor, a notary public and clerk in the Branch Bank of Kentucky. On the same day the notices of protest were inclosed by mail from Frankfort by the notary to Edwards & Co., at Shelbyville, which were received by the latter on the next day (January 14), at 11 o'clock A. M., and were forwarded by the evening mail of that day back to Frankfort to Todd and the other indorsers, all of them living in the latter city. Todd failed to receive the notice of protest from Shelbyville until the 15th of January, though it was shown that the mail reached Frankfort from Shelbyville late in the evening of the 14th. Edwards & Co. brought this suit against the drawers and indorsers of the bill, all of whom relied upon their discharge in bankruptcy, except Todd, and his defense was a want of notice as required by law, of the protest for non-payment. In the Circuit Court a judgment was rendered against him, which, on an appeal to this court, was reversed, for the reason that Todd, being a resident of the city of Frankfort at the time the bill was protested, was entitled to personal notice, or the same should have been left at his dwelling or place of business; that this is made the duty of the notary by an act of the Legislature, approved January 16, 1864 (Myers' Supp't, 354), and is also the law regardless of the statute. (Todd *vs.* Edwards, 7 Bush, 91.)

Edwards & Co., having failed in their action against Todd, brought this suit against R. B. Taylor, the notary, alleging among other things that by reason of the gross neglect, carelessness, and failure upon his part to discharge his duties as notary, imposed upon him by law, viz.,

in failing to give due and proper notice of the protest of the bill to Todd, the indorser, &c., they have lost their debt and sustained damages to the amount of $2,000. Taylor answered, traversing the allegations of the petition, and alleging due and proper diligence upon his part; and upon the trial a verdict and judgment were rendered for him, from which Edwards & Co. prosecute this appeal.

The record of the case of Edwards & Co. *vs.* Todd, containing the facts already recited, is made part of the present record, with the additional fact that the appellee, Taylor, knew at the time he protested the bill for non-payment that the indorser, Todd, was a resident of the city of Frankfort. The third section of the act of January 16, 1864, provides "that it shall hereafter be the duty of notaries public upon protesting any of the instruments mentioned in the first section of the act, to give or send notice of the dishonor of such paper to such of the parties thereto as are required by law to be notified to fix their liability on such paper, and when the residence of such parties is unknown to the notary public, he shall send the notices to the holder of such paper, and he shall state in his protest the names of the parties to whom he sent or gave notices, and the time and manner of giving the same, and such statements shall be *prima facie* evidence that such notices were given or sent as therein stated by such notary."

It was evidently intended by this enactment to alter the law in regard to giving notice of the protest of commercial paper, but the act itself is so indefinite in its mandatory clause that judicial construction was made necessary in order to enable notaries to know what their legal duties were by reason of its provisions. The act requires the notary when he knows the places of residence of the parties to the bill, to give or send the notices to them, and not to the holder of the paper; but whether he is to deliver the notices in person, send them by mail or private hands on the day of the protest, or the next day, or in a reasonable time, is nowhere stated, and the notary is left in entire ignorance as to the obligation it imposes. This court, in the opinion rendered in the case of Todd *vs.* Edwards & Co., was enabled, by the aid of the law and in connection with the act in question, to give it the only reasonable construction of which it was susceptible; and that was, "where parties to negotiable paper were entitled to notice in order to hold them liable, and live in the same town or city where the protest is made, that there should be a notice in person delivered by the notary, or left at the dwelling or business house of the party sought to be charged."

The law in such case requires that this notice should be delivered, either on the day of the dishonor of the paper, or before the expiration of the business hours of the succeeding day. The opinions rendered by this court prior to the case of Todd *vs.* Edwards, established no guidance, except the doctrine of the law merchant requiring the notices to be forwarded to the holder by the first mail after the protest, or on the day succeeding it. The notices in this case were sent to Shelbyville on the same day the bill was protested (January 13, 1868), and returned by mail from that place, at the instance of the holder, on the evening of the following day (January 14), but were not received by Todd until the morning of the 15th; and it might well be argued that under all these circumstances the notary had been guilty of no such laches as made him liable for the debt.

The principal business of notaries in this country is to protest commercial paper, and upon a faithful discharge of their duties in this re-

gard the holders of such paper must depend, in order to secure the liability of the drawer and indorsers; and if by reason of the negligence of the notary in the performance of this duty the holder of the paper loses his debt, the notary should be made liable therefor. In order, however, to fix this liability, the loss must be shown to have been on account of the want of skill and diligence on the part of this officer (Sherman & Redfield on Negligence, 483). He is required to possess reasonable skill, and to use ordinary diligence in his business; and by ordinary diligence and reasonable skill is meant that degree of diligence which persons of common prudence are accustomed to use about their own business affairs, and such skill as is ordinarily possessed and employed by persons of common capacity engaged in the same trade, business, or employment (Strong on Agency, 231). If the notary, when he assumes the duties of his office, is compelled to know all the law in relation to his business, then there is no doubt of his liability in this case; but we think the maxim, "*ignorantia lex non excusat*," is no more applicable to this case than in other employments where only ordinary care and skill is required. The ruling of this court prior to the construction of the statute of January, 1864, in the case of Todd *vs.* Edwards, upon similar questions, rather indicated that the notice to Todd was sufficient to charge him; or at least the law arising upon the facts in that case was involved in doubt, and learned counsel on each side of the case cited many authorities in support of the position assumed. An attorney could not have been held responsible for advising Edwards that Todd's liability existed, and if not, why should a judgment be rendered against the notary, the one being held to the same sort of diligence as the other?

In a case against an attorney for negligence or mistake of law, Lord Mansfield said: "Not only counsel, but judges, may differ, or doubt, or take time to consider; therefore, an attorney ought not to be liable in cases of reasonable doubt." (Pitt *vs.* Golden, 4 Ben., 2,061.)

It was shown in this case that the custom and practice of this bank, whose agent this notary was, had been, for more than twenty years, and until the case of Todd *vs.* Edwards was decided, to give notice through its notary as was done in that case; and, although this custom was not of itself a law, and could not prevail against a positive statute, still, with the confusion and uncertainty created by the enactment of January, 1864, in regard to notaries, we could not well hold them to any particular line of duty until some settled and fixed construction had been placed upon it by the courts; and this was not done until after this alleged liability was created.

It is insisted by appellant that an agreement was made between Todd and the Branch Bank of Kentucky, by which the former dispensed with personal notice, by agreeing that a notice placed in the post-office at Frankfort should be deemed sufficient, and that the notary should have complied with it. This agreement is exhibited, and bears date previous to the time at which the paper in controversy was protested. Waiving the question as to whether or not this agreement applies only to paper belonging to the bank (which we do not decide), yet the appellee, Taylor, was the acting notary and agent for the bank, and under its direction had sent all notices of protested paper in a similar manner, and can not be made liable by reason of this private arrangement with Todd, when the bank had directed him, as shown by its universal habit, to send notices to the holders of the bill, instead of the parties to be made liable.

Whether or not the instructions given by the court below contained the law of the case, is immaterial, as in our opinion there has been no such negligence shown upon the part of the appellee as to enable the appellant to maintain this action. (Mechanics' Bank at Baltimore *vs.* the Merchants' Bank at Boston, 6 Met. (Mass.) 26; Bank of Washington *vs.* Triplett, 1 Pet. 36.)

The judgment of the court below is affirmed.

BOOK NOTICES.

A TREATISE ON THE LAW OF JUDGMENTS, including all Final Determinations of the Rights of Parties in Actions or Proceedings at Law or in Equity. By A. C. FREEMAN, of the Sacramento Bar. A. L. Bancroft & Co., San Francisco, Cal., publishers. Price $6.50.

A treatise on the law of judgments must be welcome to the profession, for it supplies a want that has been most seriously felt by those of our brethren who understand the importance of the subject of which it treats, and the necessity of being familiar with this branch of the law. We have not yet had the time to give it that critical examination to justify us, understandingly, to speak at large of its many merits, but we have read sufficient thereof to warrant us in saying that it is a most excellent work, ably handled, and systematically arranged. The author deserves, and will receive, the thanks to which he is entitled for the great service he has rendered the Bar, for his work really fills a vacuum, and is one of the few American text-books that will outlive the first edition. This work, though not formerly subdivided in that manner, consists of seven parts: Part first, including chapters one to seven, shows of what the Record or Judgment Roll is composed, and states the various classifications and definitions of Judgments and Decrees, and the rules applicable to Entries and Amendments, and to the Vacation of Judgments at Common Law, and under the Code. Part second, consisting of the eighth chapter, is devoted to the law in regard to Jurisdictional Inquiries in collateral proceedings. The ninth and tenth chapters constitute the third part, and are designed to show *what persons* are bound by the judgment, by reason of their privity with the parties or their interest in the subject of litigation, or through the operation of the law of *lis pendens*. Part fourth treats of the important incidents attending judgments, viz.: Merger, Estoppel, and Lien; of the assignable qualities of judgments, and of their admissibility as evidence. Part fifth considers proceedings to revive judgments by *scire facias*, and to enforce them as causes of action or defense, with the rules of pleading applicable to those proceedings. The sixth part contains the chapters on Relief, Reversal, and Satisfaction; showing for what causes a judgment may be avoided in equity—what are the effects of its reversal by some appellate tribunal—and what are the means and circumstances which produce its satisfaction.

The seventh and last part treats of the different kinds of judgments, and the rules peculiar to each. The volume contains 575 clearly printed pages, with full notes and authorities.

REPORTS OF CASES decided in the Circuit and District Courts of the United States for the Ninth Circuit, embracing cases at Law, Civil and Criminal, in Equity, Admiralty, and Bankruptcy, and cases on appeal from the American Consular and Ministerial Courts in China and Japan. Vol. 1. Reported by L. S. B. SAWYER, Counselor-at-Law. Publishers: A. L. Bancroft & Co., San Francisco. Price $6.50.

The Judges of the Circuit and District Courts of the United States for the Ninth Circuit, have authorized Mr. Sawyer to report such of the numerous decisions rendered as may be supposed to be of a somewhat general and permanent interest to the profession. Among the many valuable and learned decisions, this volume contains the report of the first case brought to the Circuit Court from the Consular Court at Canton, in the Empire of China. We trust that the publishers will receive *substantial* encouragement from the profession in their laudable enterprise of furnishing these valuable reports, of which this is the first volume.

A CONCISE AND PRACTICAL TREATISE of the Law of Vendors and Purchasers of Estates. By EDWARD SUGDEN. Two Volumes. Publishers: Kay & Bro., Philadelphia, Pa. Price $15. Fourteenth English and eighth American edition.

To the older members of the Bar we need not introduce Sugden; it is simply to the younger portion of our brethren to whom he may not be as familiarly known as he should be, and we, therefore, take the pleasure of reproducing here the preface to the thirteenth English edition, written by himself, as follows: "After the lapse of half a century since the first publication of this work, I am about to send forth a thirteenth edition of it. Determined at my outset in life to write a book, I was delighted when I hit upon the subject now before the reader—the Law of Vendors and Purchasers. The title promised well, and many portions of the law had not previously been embodied in any treatise. Modern law treatises were, indeed, few at that period. When this work was announced for publication, nearly the universal opinion was that it would be a failure, as the subjects to be considered were too multifarious for one treatise. Nothing dismayed, I labored diligently, and, with the aid of Lincoln's-Inn Library, in which a considerable portion of the book was written—for my own shelves were but scantily furnished—I at length finished the work in its original shape. My courage then failed me. The expense of publication was certain; and success, I thought, more than doubtful; and it was not without some difficulty that I could be persuaded to refrain from com-

mitting the manuscript to the flames, and to join with a bookseller in incurring the risk of publishing it at half profit and loss, as it is termed. As soon as the book was printed, another bookseller bought my interest in the edition, and thus relieved me from my obligations. The amount I received as the price of the edition was small, but I have never since received any sum with any thing approaching to the same satisfaction. The book was certainly the foundation of my early success in life. It was published in February, 1805, and the edition was sold at once. The second edition, which was in royal 8vo, greatly enlarged, was published on the first of June, 1806. Both these editions were published before I was called to the Bar. The next, the third edition, was published in 1808, and it was the first which was divided into sections, with the placita numbered. The fourth was published at the end of November, 1813; and in the advertisement prefixed to it, I alluded to the difficulties of preparing it from the great accumulation of cases, and intimated the probability that I should not be able to undertake any further editions. Nevertheless, the previous labors were forgotten, and new editions continued to appear: the fifth in the beginning of September, 1818; the sixth in June, 1822; the seventh in May, 1826; the eighth on the first of January, 1830; the ninth in May, 1834, in two volumes, royal 8vo. All these six editions were published whilst I was in full practice at the Bar, and could ill afford the time required to re-edit the work. When I returned from Ireland, in 1835, and had, for the first time in my professional life, full leisure, I revised the whole of the work with great care, and published an edition of it—the tenth—with numerous additions, in November, 1839, in three volumes, royal 8vo. In several of the editions it was stated, that, in order to prevent a too frequent repetition of them, the number of copies had, at the several periods, been considerably increased; but still the work became out of print at the usual time. Whilst I was yet for the second time in office in Ireland, I prepared, and on the first of May, 1846, I published the eleventh edition, compressed into two volumes. At length there arose a demand for a more concise view of the subject, and in order to meet it, I reduced the work, with the exception of the chapter on Real Property Statutes, which was expanded into an essay and published separately, into one common 8vo volume, and in that form published it in June, 1851, as a concise and practical view of the subject, but, of course, with the cases and statutes brought down to that period. That edition, which in truth was the twelfth of the work in a compressed form, has in its turn been absorbed by the profession. I had not found it possible to compress the great mass of matter in the eleventh edition into the smaller one, without the sacrifice of some important subjects, and of many discussions which gave to the original work its character as a treatise.

When, therefore, the present edition was called for—the last that I can expect to publish—I determined to restore the work to its original shape as a treatise, and at the same time to preserve its character as a concise and practical view. The profession will judge whether I have succeeded. To accomplish this object, I have spared neither time nor labor. They only can judge of the labor and time required for such a task, who are in the habit of perusing all the voluminous reports of our many courts. The last edition contained some five hundred cases which were not quoted in the eleventh edition, and upward of twelve hundred cases are included in this edition which were not in the twelfth. The legislative alterations in the law have greatly added to the labor of every new edition, and have several times altered the very phraseology of the law. If it were allowable to doubt in 1803, when the work was first announced, whether the law of Vendors and Purchasers could be made the subject of one treatise, it seems to admit of no doubt that no man could in 1856 hope to write upon the subject at large from his own researches and upon his own resources. This branch of the law is, indeed, an extensive one, and the number of authorities referred to is very large. The reader will bear in mind that this collection of cases is the fruit of upward of half a century of research and labor. Every case cited I have perused in the original report, and every line of the book has been written by myself. I doubt not that there are errors which have escaped me; but I have endeavored to leave behind me this, my first work, in a shape in some sense worthy of the acceptance of the members of the profession to which I have the honor to belong, and I know by a long experience that I may safely rely on their indulgence." A *fourteenth* edition has appeared, in 1862, since the writing of the above preface, to which many additions have been made, and to the American editor, J. C. Perkins, LL.D., is due no little credit for the manner in which he performed his responsible duties in editing Sugden.

THE REVISED STATUTES OF THE STATE OF NEW YORK; as prepared by the Commissioners appointed under chapter Thirty-three of the Laws of 1870, for distribution to the Judges and others, for the purpose of receiving suggestions before the final review of the work by the Commissioners, and its submission to the Legislature. Part III. Drafted by MONTGOMERY H. THROOP, New York City; CHARLES STEBBINS, jr., Cazenovia, N. Y.; and JACOB I. WERNER, Albany, N. Y. Publishers: Weed, Parsons & Co., Albany, N. Y. 1873.

The Commissioners appointed to revise the Statutes of the State of New York, commenced their labors by dividing their projected work into four parts, but for reasons given in the annual reports to the Legislature, the work of revision was commenced with the third part, entitled "An Act relating to Courts and Officers of Justice, and Pro-

ceedings in Civil Cases." Its preliminary stage consisted of the selection, from the Statute Books, of all the enactments which related to the subjects embraced in that part, and their distribution under the appropriate heads. A printed slip, cut from the Statute Book, containing each enactment thus selected, was placed in a package, labeled to correspond with the chapter, title, and article to which it belonged. These packages formed the basis of the revision, which was then commenced, and has since been prosecuted, chapter by chapter, with an expenditure of time and labor of which no adequate conception can be formed, without some practical experience in a work of the same kind. It is to be hoped—sincerely hoped—that many of our judges, lawyers, and especially legislators, will peruse this volume with care and attention, for it suggests improvements which must commend themselves to the close observer of the present status of society, no less than to the statesman who ought to succeed the noodle who has been too long permitted to make laws both impracticable and discordant with the times. The work before us, prepared by these three able and experienced lawyers, deserves to be studied, for it reflects not only the opinions of these respective Commissioners, but of many legal gentlemen to whom copies of pamphlets containing these acts were sent, and who have courteously furnished valuable suggestions thereto. As to married women, for instance, a thorough improvement is recommended, making her, as far as her property is concerned, as liable as if she were a *feme-sole*. We find on pages 190–191 § 437: "Where a married woman is a party, her appearance, the prosecution or defense of the action in her behalf, and the joinder with her of any other person as a party, must be governed by the same rules as if she were single." Again, on page 522, § 1158: "Judgment for or against a married woman may be rendered and enforced, in any court of record or not of record, as if she were single." To which the Commissioners make the following comment: "There seems to be no sufficient reason for preserving any longer the remnants of the distinction between actions against married women, and actions against other persons." *Ainsley* v. *Mead*, 3 *Lans.* 116; *Morris* v. *Wheeler*, 45 *N. Y.* 708. Again, see page 557, § 1217: "A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed in this article. *A married woman may confess a judgment under this article, in the same manner and with like effect as if she were single.*" There is no ambiguity in these statutes; apparently Ohio legislators had nothing to do with making them.

THE

AMERICAN LAW RECORD.

VOL. 1. JUNE, 1873. NO. 12.

KENTUCKY COURT OF APPEALS.

THE COVINGTON AND LEXINGTON RAILROAD COMPANY AGAINST BOWLER'S HEIRS AND OTHERS—APPEAL FROM THE KENTON CIRCUIT COURT.

Opinion by Lindsay, J.

The Covington and Lexington Railroad Company, a corporation created by the laws of the State of Kentucky, had constructed, and in the year 1858, was operating its road from the city of Covington, in Kenton County, to the town of Paris, in the county of Bourbon, and had also secured a lease for the term of ten years of the Maysville and Lexington Railroad from Paris to the city of Lexington. Being largely indebted, the company made default in the payment of the interest falling due on certain of its bonds on the 1st of September, 1858, and on the 28th of November, thereafter, James Winslow, Trustee, in a deed of trust, made and executed April 8, 1853, to secure the payment of the principal and interest of these bonds, instituted a suit in equity in the Fayette Circuit Court, setting up this default, and asking that the court place him in possession of and allow him to control and manage the property, rights, and privileges of the company, for the purpose of paying the interest so in arrear, costs of suit, &c.

On the 27th of December, he amended his petition and prayed an absolute sale of the property, rights, and franchises of the company. Other persons to whom the company was indebted, and who were interested in the subject matter of the suit, made themselves parties thereto. After a feeble and ineffectual defense, a judgment was rendered directing the sale as prayed for. On the 5th of October, 1859, all the property, rights, credits, and franchises of the company, were sold at public auction for the sum of two million one hundred and twenty-five thousand dollars.

Wm. H. Gedge, who was at the time one of the Directors of the company, was the ostensible purchaser, but the actual purchaser was R. B. Bowler, who was also a director. Bonds were executed, and securities deposited with the Court's Commissioner, as was required by the terms of the judgment.

Branham, Desha, and other stockholders excepted to the confirmation of the sale; but upon hearing, their exceptions were overruled, the sale confirmed, and the road and all its appurtenances delivered to the purchaser. By its judgment the court reserved "full power, by summary proceedings against the purchaser, to enforce compliance with all the terms of sale, and until full payment thereof, to coerce said purchaser to keep the road in good repair and order, so as to do the business of the railroad with safety and dispatch; and in case of default on the part of the purchaser in making payment, or in complying with any of the terms of the sale, or in keeping the property in good order and repair, may appoint a receiver or order a sale thereof." This judgment can not be fully executed for many years, as a large number of the bonds of the company will not mature until the year 1885.

On the 1st of January, 1861, Bowler and certain other persons formed a joint-stock association for the purpose of acquiring, holding, and operating the road. Afterward, on the 1st of January, 1863, other persons became interested in this association, and the title was vested in Q. A. Keith and William Ernst, who were to hold as Trustees for the parties beneficially interested upon the terms and conditions, and for the uses and trusts set out, and declared in a deed made and executed to them by Bowler and wife on the 30th of January, 1863.

On the 30th of September, 1865, the Covington and Lexington Railroad Company instituted this action in the Kenton Circuit Court against Trustees Ernst and Keith, and the persons for whom they hold, including the widow and infant children, and the personal representative of Bowler, who was then dead, seeking among other things to have the court adjudge that the defendants held the road in trust for the benefit of the company, and to have the same, and the rights and franchises thereunto appertaining, surrendered to it. This relief was asked upon two grounds: First—Because Robert B. Bowler was a Director for the company and a Trustee for the stockholders at the time he purchased, and that by the well-established rules of equity his purchase enured to the benefit of his *cestuis que trusts*. Second—Because prior to the sale he had violated his duties as Trustee by wilfully mismanaging, or causing the Directory to mismanage and misappropriate the funds of the company, with

the view of bringing about the sale of the road in order that he might be enabled to possess himself of the property, intrusted by the stockholders to his care and management.

Appellees answered pleading: First, to the jurisdiction of the Kenton Circuit Court; second, estoppel by reason of a former adjudication; third, that the action was barred by lapse of time; fourth, specific and general denials of all the material allegations of the petition; fifth, that all persons interested, except the personal representative, widow, and heirs at law of Bowler, were purchasers in good faith for a valuable consideration, without notice, knowledge, or belief of the commission of any of the alleged frauds.

Certainly, the Kenton Circuit Court has no power to set aside, vacate, or modify the orders or judgments of the Fayette Circuit Court; and it is equally clear that "the judgments or decree of a court of competent jurisdiction is not only final as to all matters determined by it, but also is, in general, final as to every other matter incident to the cause which the parties might have put in issue and had litigated." But in this action appellant can have relief without disturbing the judgment of the Fayette Circuit Court. That judgment may, in fact must, remain in full force and effect until completely executed. The sale to Bowler can not be set aside, nor the order confirming it annulled in this or any other collateral proceeding; but the Kenton Circuit Court, having jurisdiction of the persons to be affected by its judgment, may rightfully determine and declare whether or not the appellees, who claim under this sale, hold in trust for the railroad company.

The statement of this question involves matters that were not pertinent to the suit in the Fayette Court. The right of Winslow and the creditors of the company represented by him, to have judgment for the sale of the road, was made perfect by the default for sixty days after demand in the payment of the interest due on the company's bonds. It was immaterial, so far as they were concerned, whether this default resulted from actual inability upon the part of their debtor to make the stipulated payment, or from the bad faith and mismanagement of Bowler and his co-directors. Besides, one of the grounds relied on for relief is the charge that the Directors, acting under the influence and control of Bowler, wilfully failed and refused to make an honest defense to Winslow's suit, and needlessly permitted judgment to be rendered in his favor, when it was within their power, by a proper application of the moneys of the road to have redeemed the forfeiture and protracted the litigation until terms could have been made with the company's creditors, and its debts

paid out of the rapidly increasing earnings of the road. The company could make defense to Winslow's suit only in its corporate capacity. With this defense Bowler, as a member of the Board of Directors, was charged. If he failed to perform this duty, those claiming through him, or under and by virtue of his purchase, can not demand protection upon the idea that he failed to do all things necessary to induce the Chancellor to exercise "a large equitable discretion in regard to the time and manner of enforcing Winslow's rights." It is of this failure the company now complains.

Even if it be true, as insisted by appellee, that the facts stated in the petition in this action would have constituted an equitable plea to the Court of Equity for relieving the company from the effect of the forfeiture, incurred by the default in the payment of interest, and of giving time to redeem that forfeiture, yet as this equitable plea ought to have been interposed by the Directors of the company, and was not the failure to present it, can not be regarded as a sufficient reason for protecting one of these faithless Directors in the enjoyment of the profit he realized from his breach of official duty. The purchase at the decretal sale was the culminating act of the fraudulent mismanagement charged against Bowler and his associate Directors, and it is the title or interest he acquired under that purchase with which the appellant here seeks to be invested. Winslow's judgment does not preclude it from seeking such relief in a new and independent action, and its right thereto was not, and could not have been determined in his suit. A judgment in favor of appellant need not result in a conflict of jurisdiction between the Kenton and Fayette Courts. It may be adjudged in this proceeding that Bowler held under his purchase, and that these appellees now held in trust for the company, and that upon the performance of certain prescribed conditions it is entitled not only to the property held, but to be substituted for the appellees in the management and control of that property, and yet it will be left for it to secure the exercise of this last-named right by applying to the Fayette Court, and submitting to, and performing the conditions imposed by its judgment upon the purchaser of the road, just as Ernst and Keith did when they appeared in that court, on the 11th of February, 1864, and claimed and were admitted to such rights of substitution under and by virtue of the conveyance made to them as Trustees by Bowler and wife, on the 30th of January, 1863. Neither court will be called upon to subordinate itself to the other. The Kenton Court will determine for whose benefit the appellees hold, and the Fayette Court will require the party claiming under this determination to hold and enjoy the property subject to the

duty of performing the judgment in favor of Winslow in the exact manner prescribed by that judgment. Bowler claimed that he had acquired under his purchase a vendible interest in the property. These appellees have distinctly recognized this claim by purchasing interests in the joint-stock association. Having an interest which may be sold and conveyed if it be held in trust for another, and those holding it repudiate the trust, the beneficiary may undoubtedly call upon a court of equity to declare the existence of the trust, and to compel the recusant Trustees to relinquish claim to the trust estate. Incident to this question of jurisdiction comes up the plea of estoppel. When the Commissioner of the Fayette Court filed his report of the sale to Bowler, certain stockholders, representing themselves and other stockholders, with no authority to speak for the corporation, and not pretending to have any such right, excepted to its confirmation, among others, upon the ground that "W. H. Gedge, the ostensible bidder, and R. B. Bowler, the actual bidder, were, at the time of the sale, Directors of the company, and in the matter of said sale acted against the direct interest and express wishes of the stockholders, and purchased for their individual benefit." In passing upon, and overruling this exception, the court determined the rights of those only who filed it. The stockholders, acting as individuals, could not raise an issue, nor provoke a judgment that would bind the corporation. The company did not object to the confirmation of the sale, and raised no controversy as to the right of the Chancellor to accept Bowler as a bidder, nor was it bound to raise this issue at that time, but even if, under ordinary circumstances, it would have been, this case would be an exception to the rule. There were then but eight Directors in office. One of them was the bidder, and three others, John T. Levis, the President, William H Gedge, and B. W. Foley, were sureties on the bonds executed by the bidder. By becoming parties to the transaction, these four Directors put it out of the power of the remaining four to act, and left the company without the legal capacity to object to the perpetration of the wrong of which it now complains. If Bowler desired to preclude the corporation by the judgment rendered upon the stockholders' exceptions, he should have taken the proper steps to make it a party to the issue raised by those exceptions. He failed to do so, and its rights are not affected by that judgment. [Browne *vs.* LaCrosse Railroad Company, 2 Wallace, 301; Angell & Ames on Corporations, section 370.]

We do not regard this as an action for the recovery of real property, nor an action for relief on the ground of fraud, in the

sense in which those terms are used in our Revised Statutes. It is a suit to declare and enforce an implied or constructive trust. The cause of action, if one exists, accrued when Bowler finally and decisively repudiated the claim of appellant, and asserted title in himself. The limitation to actions of this character is five years. Bowler, after the confirmation of the sale, recognized the claim of the company, and professed to be ready and willing to surrender the property purchased. He published in one of the Cincinnati newspapers a proposition looking to this end, which stood open till the stockholders' meeting, on the 22d of December, 1859. This proposition was not accepted, and from that time forward he claimed the property as his own, and the statute then began to run in his favor. Five years six months and twenty-eight days elapsed before suit was brought. Bowler, however, died intestate on the 4th day of July, 1864. The statutory bar was not then complete. There was then no administration upon his estate in this State until February 13, 1865. If the personal representative of Bowler is a necessary party to this action, it was commenced in time. Assuming, as must be done in settling this question, that Bowler originally held as Trustee for the corporation, he could not, if living, have been required to surrender the property until he was placed in *statu quo*. He would be entitled to have restored to him with legal interest all moneys that he had rightfully expended for the benefit of the company, and to reasonable compensation for his services, and to have himself and his estate relieved from all liability to the plaintiff in the Fayette judgment. He would, however, be required to account to the company for the earnings of the road. As he is dead, this account can not be stated, and a judgment rendered thereon, either for or against the appellant, without the presence of his administrator. The execution of the conveyance of January 30, 1863, by which Ernst & Keith were constituted Trustees for the joint-stock association, does not dispense with the necessity of making Bowler's heirs and representatives parties. If a *cestui que trust* bring a suit against a third person to whom the trustee has assigned the property in violation of the trust, the Trustee should be made a party, for he is ultimately bound for the due fulfillment of the trust. [Story's Eq. Pldg. Sec. 209; Bust *vs.* Dennet, 2 Brown, ch. 225; Land *vs.* Blanchard, 4 Hare R. 28.]

Notwithstanding the assignment to Ernst & Keith, Bowler continued to occupy the relation of Trustee for appellant, and in an action by the beneficiary to recover the trust property, his representative should be made a party. But if it be doubtful in cases in which no settlement of accounts is necessary, whether the representative of the deceased trustee is an indispensable

party, there can be no doubt but that *Bowler's heirs* are necessary parties to this action. This suit is in respect to the property held in trust for them by Ernst & Keith. It is not prosecuted merely to establish a debt, or create a charge which the Trustees will be compelled to satisfy out of the trust property, but it involves an absolute recovery of the property itself. In such a case the beneficiaries who have the equitable and ultimate interest to be affected, as well as the Trustees, are necessary parties. [Story's Eq. Pldg., Sec. 207; Mitford's Eq. Pldg., by Jeremy, 176 to 179.]

It is also to be observed that the conveyance under which Ernst and Keith hold as Trustees, does not invest them with that character of title that will authorize them to represent their *cestui que trusts* in a suit prosecuted for the recovery of the absolute trust property. It is their duty as Trustees to *hold* the property for the purposes and uses declared in the deed. They have no power to sell, and are to *hold* "subject to the Board of Control" of the association; and if said "Board of Control" should appoint other Trustees, they contract that they will convey the property to the new Trustees, upon the uses and trusts declared in the conveyance to them. They have no power even to convey, except as directed by the "Board of Control," and then only for such purpose or purposes as may be calculated to promote the interests of those for whom they hold. Now, it is a well-established rule of equity practice that if Trustees have no power of disposition, persons having demands against the trust property existing prior to the creation of the trust can not enforce these demands without making the persons claiming the benefit of the trust parties to their suit. [Story's Eq. Pldg. Sec. 140 and authorities cited.] As it would have been impossible to settle the controversy without the presence of Bowler's heirs, the court would have brought them in of its own motion, before proceeding to judgment, if appellant had failed to make them parties. [Sec. 40, Civil Code of Practice.] The death of Bowler so far interrupted the running of the statute as to authorize appellant to commence its action against his heirs and representatives after the expiration of five years from the accrual of its cause of action; provided, it instituted its suit within one year after the qualification of his personal representative. It did commence its suits within a year after administration in this State, and its right to sue was saved by the exception stated. [Sec. 5, Art. 4, Chap. 63, Rev. Stat.]

Bowler was not charged with the duty of selling the property intrusted to his management. Hence, he did not purchase at his own sale. But he was acting as Trustee for the stockholders and as agent and representative of the corporation, and was un-

der obligations to use his best exertions in its behalf in all matters relating to its affairs, and especially in a matter imperiling its very existence. He purchased the property of his *cestui que trust* at a sale made pursuant to a judgment from which he and his co-directors might have prosecuted an appeal. He thereby placed himself in a position in which his personal interests were adverse to those of the corporation. He continued to hold his place as a Director until the sale was confirmed and the road and its appurtenances delivered to him by the court, and until he was superseded by the election of a new Board. These facts are calculated to excite suspicion as to his faithfulness and diligence in the discharge of his fiducial duties.

He was made a Director in 1857, and at once became the controlling member of the Board. His skill as a financier was recognized by his associates, and it is manifest from the record before us that they deferred to him in all matters of importance. When he came into the Directory he found the company greatly embarrassed. It had been forced to suspend the payment of interest accruing on some of its inferior securities. It was regarded as a matter of prime importance that its road should be put in good repair and its rolling stock and machinery increased. It was estimated by a committee of Directors, reporting June 10, 1858, that to accomplish the ends proposed would require about $145,000. To use this sum would place it out of the power of the company to pay the next installment of interest on the third mortgage bonds, and it was resolved that this interest should not be paid. At the same meeting the Directors appointed a select committee to report a plan of operations to the holders of the company's bonds. Of this committee, Bowler was a member. On the 19th of the month the committee reported that it would require nearly $800,000 to put the road into complete condition, and that the expenditure of the amount indicated would render it necessary that the company should suspend the further payment of interest on all its indebtedness for the period of five years. This report was termed a "Proposition to Bondholders," and concluded with this extraordinary announcement: "Believing that it is to the interest of the bondholders to carry out the suggestion of this report, and that the repair and equipment of the road should be immediately commenced, the Board will proceed to do so, presuming that you will ratify this report." The Directory adopted the recommendation of the committee, and immediately resolved, "That so much of the resolution passed at the regular meeting of the Board in this month, as declares the company unable to pay the December interest on the third mortgage bonds, be and the same is hereby rescinded;" and it was or-

dered that such interest be paid out of any moneys belonging to the company. Without waiting for a conference with the company's creditors, the Directors proceeded to advertise for proposals for the repairs and improvements deemed necessary to put the road in a first-class condition.

The holders of the second mortgage bonds held a meeting on the 1st of November, 1858. They declined to accede to the "proposition to bondholders" by the 1st of January, 1859. The Board of Directors, upon notification of this demand, directed its President to inform the committee of bondholders that it would not be complied with in consequence of the absolute want of funds, but to give assurance that they had reason to believe that during the year 1859 the company "would be enabled to pay fully the coupons on the first and second mortgage bonds, matured and maturing up to that time, and regularly to continue to do the same at all times thereafter." The result of this communication was the institution, on the 29th of November, 1858, of Winslow's suit. The regular meeting of the stockholders of the company was held on the 16th of December, 1858. The President in his report to this meeting did not allude to this suit, although he was served with process on the first day of that month. At this meeting Bowler and his co-directors were continued in office. Notwithstanding Winslow's suit and the assurance given that the company would be able in 1859 to commence and thereafter continue the payment of interest accruing on its first and second mortgage bonds, the Directory, immediately after the re-election of the members of the Board, proceeded to carry out the design of putting the road in complete condition. On the 18th of March, 1859, a committee, of which Bowler was a member, was appointed and clothed with full power to ascertain and adopt the best and most valuable improvements across Townsend's Valley, for the permanent future use of the railroad, and after consultation with a competent engineer, to put the same under immediate contract. April 28th, the Board determined, upon the recommendation of a committee composed of Bowler, Gedge, and Foley, to close a contract for the purchase of depot grounds in the city of Covington, and on the 12th of May, the payment of twenty-seven thousand dollars, the purchase price therefor, was ordered.

Bowler was present and an active participant in every meeting of the Board after his election as Director, and until the road was sold and passed into his possession. The record discloses the further fact that during the most of the time he was active for the company as Director, he persistently depreciated the value of the bonds, and yet constantly bought them up at

their depreciated values. In the spring, summer, and autumn of 1859, Winslow was actively pressing his suit for a sale of the road, and Bowler was purchasing largely the inferior securities of the company, using the danger of the judicial sale, which it was his duty to avert, if possible, as proof that the price he was willing to give was their full value. By purchasing these securities he placed himself in a position either to purchase the road when sold, at greatly less than its value, or to realize immense profits upon the amounts invested in them. Before the sale of the road was adjudged he held more than one-half of the third mortgage bonds, and $369,000 of the income bonds of the company. Hence it was to his interest that the sale should be adjudged, and that no appeal should be prosecuted from the judgment when rendered. Accordingly, in August, 1859, he was contracting with other parties interested in these inferior securities, to estab ish a basis upon which to compromise their conflicting interests should they, or either of them, purchase the road. From the moment that Bowler concluded to prepare for the purchase of the road, his personal interests became antagonistic to those of the corporation, and he should have ceased to act as a Director. Instead, however, of doing so, he held on to his position, and when we contemplate his official acts in the light of subsequent events, we can not avoid the conclusion that, as a member of the Board of Directors, his influence was used for the promotion of his personal ends.

Instead of looking alone to the interests of the stockholders and creditors of the company, their rights were not only disregarded, but deliberately sacrificed that profit might result to him.

It was perfectly plain that the interest accruing on the first and second mortgage bonds must be paid as it matured, or terms made with the holders of those bonds.

The holders of the third mortgage bonds would naturally hesitate to resort to their legal remedies so long as the income of the company was faithfully applied to keeping the road in repair and to the payment of preferred debts. The cities of Covington and Cincinnati, and the county of Pendleton, had no option, so far as their bonds were concerned, except to pay them and the interest as it accrued, if the company failed to do so. The holders of the income bonds had no security at all except the earnings of the road, and hence it was their interest to keep it in the hands of the company. Such being the situation of affairs the refusal of the Directors to pay the interest on the first and second mortgage bonds, and the diversion of the com-

pany's funds to the purchase of depot grounds, and to the making of repairs and improvements on the road, which might have been readily dispensed with, evidences an intention on the part of those responsible for the line of conduct pursued, to bring the road to a sale. In 1858, the prospect for an increase of business, and consequently of increased receipts, was by no means discouraging. There had been a steady increase in earnings during the years 1856, 1857, and 1858. In the last-named year, the road after the payment of all running expenses, earned $198,316 80. Twenty-five per centum of this amount would have satisfied the interest falling due on the first and second mortgage bonds on the 1st of September, 1858. It was in the payment of this interest, which was less than forty-eight thousand dollars, that default was made. An agreement to pay it by the 1st of January, 1859, which might have been made and performed, would have prevented the institution of Winslow's suit. This the Directory not only declined to do, but after suit had been commenced, they, fully apprised of the inevitable result of their action, deliberately used the company's moneys in the purchase of the extensive depot grounds, and in making upon the road "the best and most valuable" improvements. The money used for these purposes, and in the payment of debts that were not pressing, and the collection of which the holders could not press without endangering their own interests, would have more than paid off the accrued interest on these bonds and redeemed the forfeiture on Winslow's mortgage. The whole amount of interest due and unpaid on the first and second mortgage bonds at the time judgment was rendered in favor of Winslow, was less than $100,000. In the year 1859, before the road was taken out of the hands of the company, its net earnings were $227,734 77. Out of this sum the interest unpaid at the time the mortgages were foreclosed, as well as that falling due on the 1st of September, 1859, might have been paid, and fully $100,000 devoted to improving and repairing the road, and to the payment of the floating debt of the company.

The judgment of foreclosure and the sale of the road were the direct and necessary consequences of this misapplication of the company's funds.

Bowler was not only an actual adviser and advocate of the non-payment of the interest accrued and accruing on the company's bonds (except of the third mortgages in which he was largely interested) and the expenditure of its means in rendering the road more valuable to the purchaser at the decretal sale, but in the month of June, 1859, while it was still possible to redeem the forfeiture, and leave Winslow without a cause of action, he was, as a party to Winslow's suit, urging a speedy sale

of the road, and resisted a postponement of the trial of the cause.

His conduct in the premises can not be defended upon the idea that his action as a Director was approved by his co-Directors. It is not denied that he exercised over them a controlling influence. Besides this, when we consider that he purchased the road when sold, through the agency of a co-Director, W. H. Gedge, that the President of the company, John T. Levis, and two of the Directors, W. H. Gedge and B. W. Foley, became sureties for him, on the bonds he was required to give, and that he made this President the Superintendent of the road, immediately upon receiving possession of it, and that Levis and Gedge became partners with him in the joint-stock association formed in 1861, we may readily infer why it was that he was able to dictate a line of policy resulting so profitably to himself. In March, 1859, Lucius Desha, the Director for Harrison County, resigned. A suitable person applied for the place thus made vacant, but the Directory, Bowler, Levis, Gedge, and Foley, being present, and constituting a majority of the members in the meeting, resolved that there was "no urgent, indispensable necessity for the election of a Director for Harrison County, before the next regular meeting of the Board." The vacancy was never filled, and when Levis, Gedge and Foley became parties to Bowler's purchase, the company was left without a Directory. There is no doctrine better settled, nor more universally recognized, than that an agent or trustee can not rightfully place himself in a position exciting in his own bosom a conflict between self-interest and the duty he owes to those for whom he acts. Generally such persons will not be allowed to purchase and make profit out of the estate of those toward whom they occupy a confidential relation. A purchase made by the trustee when the *cestui que* trust is *sui juris*, and after the relation is understood to be dissolved, will not be upheld, except where there is a clear contract, ascertained to be such after a zealous and scrupulous examination of all the circumstances, and it is clear that the *cestuique trust intended that the Trustee should buy, and there is no fraud, no concealment, and no advantage taken* by him as Trustee.

Testing Bowler's rights by this rule, and applying the doctrine announced to the facts of this case, we perceive no ground upon which a Court of Equity can rest a denial to appellant of the relief it seeks. The company has not lost its right to demand relief because of acquiescence in Bowler's purchase and possession. In no instance has it manifested an intention to abandon its claim to the property. Its refusal to accept the proposition made through the columns of a newspaper at the

stockholders' meeting of December 22, 1859, does not prejudice its rights nor raise the presumption of acquiescence on its part. To this proposition conditions were attached to which the company was neither legally nor morally bound to accede. It had the right to have its property delivered to it by placing Bowler in *statu quo*. He could not take advantage of the possession he had wrongfully obtained to compel the company to satisfy debts then due and payable, much less to indemnify him against loss on account of the investments he had made in its inferior securities. It was unreasonable and unconscientious in him to require, in addition to being relieved from all expense and liability incurred in making the purchase, that he should then be paid the amount, with interest, that he had invested in these securities. They were not then due, and, except for the unpaid interest, he had no right of action against the corporation. The distinction between this and the case of Roach *vs.* Hudson [8 Bush, 410], is that in the one the party holding under an implied trust offered in good faith to execute the trust, asking only to have returned to him the money he had actually expended, and in the other the Trustee demanded the immediate settlement of claims disconnected from and not growing out of the trust.

In addition to this fact, we can not regard Bowler's proposition as having been made in good faith. He knew that for the time it was impossible for the company to comply with it. Its Directory had been disorganized by the open defection of himself, Levis, Gedge, and Foley. Every cent of its available funds had been paid out under the orders of Bowler and his associates, and its only source of revenue was then in the hands of the faithless fiduciary who was dictating the terms upon which he would repair the great wrong perpetrated by him upon those who had trusted him. The refusal to entertain this proposition and the failure to sue until nearly the requisite length of time to bar its action had elapsed, present no obstacle to the interposition of a Court of Equity in behalf of the company. At most it but remained inactive when it might have prosecuted its claim for relief. But merely remaining passive does not deprive a party of the right to seek relief, unless in addition thereto he does some act to induce or encourage others to expend their money, or to alter their condition, and thereby render it unconscientious for him to enforce his rights. No such act upon the part of the company is shown in this case. We do not regard the question of the solvency of the company at the time of the Bowler purchase of the road as a matter of very great consequence. The fact that the Judge of the Fayette Circuit Court regarded it as insolvent doubtless induced

him to sell it instead of leasing, or placing it in the hands of a receiver. But notwithstanding that conviction upon the part of that Judge, if the insolvent company had bid off the road at the whole amount of the debts embraced by his judgment, and made the necessary deposits and gave the required securities for the performance of the judgment, its bid would certainly have been accepted. As a matter of law the bid of a person representing the company, and holding under his bid for its benefit, was accepted; the company demand to be allowed the benefit of its agent's purchase, and it is not for him to say that his principal was and is insolvent, and, therefore, will not be able to hold the property against its creditors. It is the duty of the company out of the earnings of the road to pay all of its debts. If this can not be done, then the members of the corporation, the holders of stock, are morally bound to take the necessary steps to regain the possession of the road, that it may be again sold for the benefit of those of the creditors of the corporation whose debts are not provided for, it being reasonably certain that a resale will result beneficially to them. We will not in this case inquire whether or not appellees hold the property for a resale. It is true that generally when a Trustee purchases trust property he holds for a resale, but this rule is not universal. [Longests' adm'r *vs.* Tyler's ex'r, 1 Duvall, p. 192.] Whatever the rule in this case may be, it can not enlarge the rights of the appellees. They can not demand that the property shall be again sold. When they are divested of title, and surrender the possession of the property to its owner, the company, its unpaid creditors may, if they choose, in the proper court, ask a resale, but it is not necessary, in the adjudication of the questions involved in this cause, that we shall anticipate such action upon the part of these unpaid creditors. An inspection of the conveyance from Bowler and wife to Ernst and Keith shows that none of the appellees are purchasers without notice of appellants' claim. After providing that the property shall be held primarily for the payment of the debts embraced by Bowler's bid, and reciting that it was expressly understood that said property was conveyed subject to the lien reserved by the judgment of the Fayette Court, and that the Trustees were always to provide for and protect that lien, the deed further provides: "That should said railroad be taken from said Trustees or said Bowler *by any other claim* in law or in equity, and said joint-stock association be deprived of the use, occupation, and profits thereof by any claim other than the bonded debts," &c., Bowler shall refund to his associates the amounts paid by them respectively, in manner and form, and out of a certain fund therein set out and described. As it was

a matter of public notoriety that Bowler's claim was not recognized by the company, and that for some considerable time after his purchase the possibility of a suit by the company to recover possession of the road was conversed in the public prints, we have no difficulty in understanding why it was that those purchasing from Bowler should require this covenant of special warranty to be inserted in the deed. They had reason to believe that the company had not abandoned its claim to the road, and they knew that Bowler was a Director of the company when he bought it at the decretal sale. They had such notice of the infirmity of their vender's title as put them on inquiry, and hence they contracted for indemnity against possible loss by reason of this infirmity.

For the reasons stated it is considered that the judgment of the Kenton Circuit Court, dismissing appellant's petition, be reversed. The case is remanded for a settlement of the accounts between the parties upon the basis prescribed in the mandate of this court, and then for a judgment as to the ownership of the property in litigation and the rights of the appellant to possession and control of said property, conformable to the views expressed in this opinion.

PROPERTY—PART II.

By J. H. BALFOUR BROWNE, author of "The Medical Jurisprudence of Insanity," "The Law of Carriers," &c.

(*Continued from page* 669.)

The third mode of indicating the proprietary will, is by means of designation. This is the highest development of intelligent occupancy. By writing my name on a thing, by marking it, I indicate that my will is in it. It may be observed that there is a gradual rise in perfection in these three kinds of occupancy. The first is a material occupancy: I take the thing in my hand, or in my arms; I live on it; I bring it into contact with my body to show that my will is in it. But this is a very large body for such a little soul. Still it was suited for the blind times of early civilization. In those days men had to fence their fields with swords—men's houses were castles; in those days self-will was *rampant*, free-will only limply *couchant*. For such times it required unmistakable signs of occupancy.

In information we have a higher form of occupancy; a man has placed his will in a thing—it stands there to represent him, even in his absence. This method of monstration was suited for later times. A

man's will was respected in his absence by those who had forethought sufficient to anticipate his future presence. Besides, the times were less lawless. Self-will was still *rampant*, but free-will was *passant* now. The monstration did not require to be so material. But a higher phase was possible, and that is visible in designation. Here we find the sign at its minimum, because honesty is at its maximum. Now, a man need neither hold nor form a thing to acquire it, to make it his against all comers. The naming of it is enough. A mark, a sign, a badge, a word is all that is required to constitute this idealized occupancy. In these days when the state is ethical, when universal morality and free-will has been realized in the state, it is no longer necessary to resort to the more palpable, almost threatening forms of indication: occupancy by a word or a mark is sufficient. In this way the possibilities of proprietorship are infinitely extended. By this means, I can possess things I have never seen. A similar idealization of signs, as between man and man, necessary for the transference of property, has taken place in time to that which we have been tracing. As these things depend upon circumstances, they must vary with circumstances. Here it becomes necessary to allude to an error which more than one writer has fallen into, and which, as we have seen, has led to some confusing in the utterances of Mr. Mill in reference to property. Use is a means of possession, and it is the non-use of a thing which has once been used which indicates the withdrawal of will from it, and which, in consequence, renders prescription possible. Use is really the realization of the particular will through the alteration of the thing willed mine. When will has realized itself through a thing, has made that thing its, will is a particular will or desire; and the thing, in becoming property, has been ministrant to the individual will—has been of use to it. Here we find the philosophical explanation of use, which has been called "the real side of property." But use is not a first, but a second in the act of appropriation, and the use can be parted with and the property retained; and hence Dr. Heron's definition of property, which he says is "the right of using" is wrong, and Mr. Maine's view of rent, which he looks upon as money paid in purchase of an estate for a certain time,* is also erroneous.

Before quitting this subject of Use, it may not be inexpedient to notice one or two erroneous remarks that have from time to time been made with reference to prescription. Property which has been willed mine, may cease to be mine, by my ceasing to will it mine. Proprietorship is not one act, but a continuance of acts. I may either positively will it not mine, which is alienation, or I may negatively not will it mine, which may give rise to prescription. If no will is posited

* Village Communities in the East and West. London, 1871.

in a thing, it is competent for any one to posit his will in it, and, in some cases, property will thus pass into the hands of another private proprietor, and sometimes become common property, in virtue of the wills of the community having been posited in it. It is in this way that rights of way are acquired. Of course, to enable a man to prescribe, the positing of his will must have commenced and must continue, without force or fraud upon his part, toward the real proprietor. The very fact that force or fraud had been necessary to secure his continued possession indicates that the proprietor's occupancy is still in will existing, and that the occupancy of the tenant who wishes to prescribe is wrongful. Neither would the ignorance of the tenant with reference to a prior title vested in some other person justify a prescription. The property must be property in which there is no will, and the principles which enable the acquisition of such property by an individual, or by the community, are those which have been already at some length discussed.

Those who argue about the expediency of prescription, and who deplore that a claim, originally just, should be defeated by mere lapse of time, and excuse this upon the ground of necessity, seem to us scarcely to understand the philosophical basis of prescription. Mere lapse of time never could defeat a claim which was just, and all the expediency in the world could not make that which was wrong right. There can be no reason, because an injustice is of old date, for looking upon it as just now. But the facts, as they are set forth, indicate that prescription is not an expedient injustice, but as right and just as was the original proprietorship. As to how long an estate shall lie fallow from the will of a proprietor before it can become the property of another before the ploughshare of another's will, we need not speak here. That is a question which is to be decided by the grounds and counter-grounds of understanding; and in some nations and some eras, it must necessarily be longer than in others. In deciding it, the means of the communication of knowledge, the average length of human life, and like circumstances, must be considered. But while these matters are to be decided by means of a reference to experience and expedience, prescription itself must be regarded as founded in right and on free will.

Much of the time and labor of our jurists has been bestowed upon the historical aspect of law. These labors have not been without good results, and from them we have what might be regarded as a natural history of law. These researches have enabled us to understand many things which, but for them, would still be dark. In relation to one point which bears upon our present subject, the distinction between posses sion and property—which was not by any means so well defined in the

Roman law, possession meaning not only physical appropriation and holding as it does with us, but physical detention, together with an intention to retain the thing for ourselves—we are indebted to the researches of Savigny for a satisfactory explanation. The explanation of that seeming peculiarity in the Roman law is to be found in the fact that the burghers of Rome were the tenants of the largest part of the public domain, at a nominal rent, and were, therefore, according to law, merely in possession of the land, and at the same time their mental attitude with reference to the property they held was one of intention to retain. But in this place we have no intention of entering upon any historical considerations except in so far as these throw light upon the question of property. It will be remembered by each one who cares to think of it that the early ages were much more histrionic than these latter days. The ornament of action had a fascination for rudimentary minds. It has been remarked with considerable truth that the ornamental always precedes the useful, that people in the first instance dressed because they were vain and not because they were cold; and it is a fact mentioned, so far as we can remember, by Humboldt, that he has seen savage women between whom and absolute nakedness there was not a fig-leaf, who would not think of quitting their wigwam without being painted. In such times all ceremonials were plays; and it is not to be wondered at that the stage for a long time disputed the place as first teacher with the pulpit. Even now we can see the remains of semi-barbarism in the stage-dresses which some nations still wear in the street. But not only was this histrionic feature of early times dictated by the desires of uncivilized men, but it was rendered necessary by the exigencies of the epoch. When kings were crowned they had to make that fact known by ceremony, and the splendor of the coronation was one way of confirming the dynasty. When events stood in place of calendars and almanacs, it was well to have important events simply as mnemonics: it would be useless having the dial of a watch upon the Victoria tower. But when property had to be transferred—and the *rationale* of such transfer will fall to be considered in another place—it was necessary to go through some little stage-play, in order that the transference might be well known to all those who were about the property. Of course, this little symbolical drama—this legal miracle-play—was not necessary in the case of property which could be passed from hand to hand. In relation to such things possession was an excellent proof of proprietorship. But in the case of land it was not so. If A had lived on a piece of land for fifty years, and one fine morning B was seen to be about the place, this would not of itself convince the neighbors that A had willed to part with his land, and that B had willed to purchase it. Those were the

days when people acted on

> The good old rule, the simple plan
> That he should take who has the power,
> And he should keep who can.

Hence the necessity of a ceremony at the voluntary transference of land from one man to another, and it was on this necessity that the distinction between *res mancipi* and *res nec mancipi* was founded. It is true that the *res mancipi* included slaves, horses, oxen, and instruments of agriculture; but these last, although they might have been transferred by mere delivery, were really so closely connected with the culture of the particular soil that they were identified with it, so that the same ceremony was necessary for the transference of these, as was necessary for the transference of the land to which they were attached. This transference, in the case of *res mancipi*, was called mancipation (*mancipium*). But we find similar ceremonies connected with the transference of land in the early law of all countries. The archaic law of our own land tells of feoffment with livery of seizin,* either in its form of livery indeed,† or livery in law; and the law of Scotland has records in abundance of its symbolical ceremony of infeoffment or seizin.‡ Now there is an analogy between this acted conveyance and the acted expression of proprietorship which we have seen in the rougher forms of occupancy, such as bodily seizure. Both these were suited for rude times; both were simply outward expressions of inward states of will; and, as they were expressions, they had to be explicit in relation to those persons to whom the expression was addressed. As we find a gradual progression in art, from acting to poetry, from action to words, so do we find a similar progress from bodily seizure to formation and designation, and also a progression from conveyance by act to conveyance by writing, and possibly, in time to come, to a conveyance by word of mouth for things real as well as for things personal.

There are one or two questions which are closely connected with the principles of the law of property which may fairly claim to be considered in this place. They are questions which have attracted popu-

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*Co. Litt., 271 *b*, *n*. †Co. Litt. 48 *a*.

‡ Erskine's Principles, 226. "Originally the symbols by which the delivery of possession was expressed were for lands, *earth and stones*, for right of annual rent payable forth of land, also *earth and stone, with addition of a penny-money*; for parsonage-teinds, *a sheaf of corn*; for jurisdictions, *the book of the court*; for patronages, *a psalm-book and the keys of the church*; for fishing, *net and cobble*; for mills, *clapp and hopper*," &c. Erskine's Principles, p. 227. See also Menzie's Lectures on Conveyancing, 3d edition, p. 570

lar attention, and, therefore, it is the more important, upon that account, that they should receive some satisfactory answer. One of these has to do with inheritance. Can a dead man's will live after him? and if so, is there an immortality of this posthumous will? These questions are really abstract forms of the more concrete question of the justice of inheritance and bequest. The answers that will be found in most books which have dealt with the subject of property begin by taking for granted that the possession of property not only implies the right to keep, but the right to part with, and that not only in market for a price, but in generosity as a gift. And this is an accurate statement of a provable incident of proprietorship; but they go on to argue, that consequently the right of bequest or gift after death forms part of the idea of private property, while the right of inheritance does not.

So far as we can see, the deduction is somewhat loosely arrived at, and contains some elements of error. The words "after-death gift," which are used by Mr. Mill and others, as equivalent to be bequest, are calculated to mislead. Bequests, if there is any meaning in them, take effect in virtue of the will which the proprietor put forth in his lifetime. It is an incident of all contracts and gifts that they may be expressed in anticipation of their completion. Cotemporiety does not necessarily exist between the monstration and the actual transference of property. A man may sell a thing to be delivered in October; he may say, "I will present you with this on Lady-day." So he may make a gift to take effect at his death. We question whether such a thing as a gift to take effect after death can really be made by an owner. We question whether he can, with justice, make his will everlasting by so willing, seeing that he does thereby an injury to the free wills of his successors. His own will dies with him. He can withdraw his will at his death, but never after his death; and, consequently, the statement that bequest forms a part of the idea of private property, contains an obvious error, for those attempts to limit estates to a person, and after him to his eldest son, and to that son's son, so on forever, are evidently unsanctioned by, and are contrary to, the principles of property. At present the right of bequest is limited to "a life or lives in being and twenty-one years;" but upon what principle this power of bequest is granted it is difficult to understand, unless it be simply thought better to arrive at truth by a limitation instead of an extinction of falsehood. The evils of allowing will as posited in property to be immortal has been more curiously manifested in relation to the bequests which have from time to time been made to charities. Because a man's will was once posited in an estate, is that any reason why a sum of money should be expended each year upon a golden knife, wherewith to cut the mistletoe from the branches of the oak, there not being one Druid in the

land? and a time may come when a sum of money left in these days to supply oil for a lamp to burn to the Virgin may seem as foolish as such, as that we have supposed of some fervent Druid would look in our time. The truth is, that dead will ought to be held of none effect. A bequest taking effect at death is good, because, at the instant of withdrawal of the will of the donor, the will of the donee is posited in the thing; but a second bequest taking effect upon the death of such donee, supposes a resurrection of the dead will, of a ghost of a will, again to give this gift. Let us lay this ghost.

But the ordinary statement to be found in works upon political economy is not only wrong in its reference to bequest, but it is wrong in reference to inheritance. Inheritance, according to many writers, does not form a part of the idea of private property. Now it seems to us that inheritance, when rightly understood, is far more in accordance with the principles of property than bequest. As yet it scarcely seems to be rightly understood. The reasons that are usually assigned for giving the property of a person who has died intestate to his children or nearest relatives are, first, that by so doing the law does what the deceased person would have done, and second, that it is a matter of expediency that those who have lived in the warm bed of wealth and luxury should not, of a sudden, be dropped into the cold bath of poverty and privation. But, as we have seen, the inference that the testator would have done it can not be a good ground for doing it by law. It is all very well to arrive at the testator's intention, if you can, in a will, because intention is the direction of volition; but, in the case of an intestacy, there is a lack of all intention, an absence of all will. The property has really ceased to be property, and it is liable at any instant to be occupied as property was in the first instance. It is liable to become his who wills it his; it is capable of rapid prescriptions. But if such no-law existed to regulate devolution, in each case a man's deathbed would be darkened by the wings of human vultures, instead of lightened by the wings of angels. The State is ethical, and the State steps in to give effect to certain principles of inheritance. These are founded on the fact that the property is will-less, and that those of the former owner's household, his family, are those who would naturally be in a position to will his drift-leavings theirs; indeed, so far as they have been already living together and using the property of the deceased in common with him, their will has found its way already into these things. The universal will in the State, by giving effect to the individual will in these particulars, has in times past regarded rather the fact that the eldest son was the strongest and best able to will the property his, and the laws of intestacy has endeavored to run parallel to the facts of bequest, for it is these facts which in any age indicate

those persons who are really in a position to will the property of the deceased their own. Thus we find this fact in the old custom of Borough English, by which the estate descended to the youngest son. The parallelism which has existed between the facts of bequests and the laws of inheritance, has, owing to the defective principles of the former and the unlimited power of settlement, or redivivus condition of dead will, caused many errors to creep into the law of the latter. But, in its principles, the law of inheritance seems just and fair. Its special provisions must necessarily vary in different times and countries. Did time permit we should desire to expose the fallacy of such arguments as that it is expedient that men should have the power of bequest, for otherwise they would not care to accumulate, as it is a reason for having laws of inheritance, that it would be inexpedient to bring children up in wealth as a preparation for poverty, or that the necessities of the State, and the expediency of the circumstances demand that the amount that a man may receive in gift should be limited by law, and the like.

The subject is covered up with such rubbish, and it is no wonder that its real facts have only with difficulty been brought to light. Thus it is a favorite theory with some that the laws of inheritance should exclude collateral relatives. The argument in favor of this proposition is, that there is no duty incumbent upon the proprietor to provide for these, and that the facts of bequests show that it is only when there are no direct heirs that these are thought of. So Bentham has proposed that where there are no heirs, either in the ascending or descending line, the property in case of intestacy should escheat to the State. But we have seen that the "duty" of the owner is not the principle of devolution, and the very fact that the collateral relatives are thought of in the absence of direct heirs, indicated the fact that these are, in case there are no direct heirs, in the position to become the possessors of the property; and, consequently, the laws of inheritance, rightly, we think, consider these after the direct descendants and ascendants are exhausted.

One or two questions which have a close connection with the principles of property have been asked by tongues of fire, and emphasised by the screeches of swords and hissings of grape-shot. These questions have found somewhat startling utterance on that bloody platform—France. Men have asserted their equality, and the equality of their rights, and having taken that for granted—no one at the time denying it, people feeling, like him who was disputing with Cæsar, and remained silent, that it is hard disputing with ten legions, or that the guillotine had a way of clenching a debate—they went on to affirm the necessity of an equal distribution of property. The first article of the "Declara-

tion of Rights" of 1791, was, "All human creatures are born and remain equal in rights." This prodigious lie has been refuted. Some people have been at the trouble to reassert the undoubted fact that inequality is the natural condition of mankind. Bentham over and over again argues against the equal division of property, and gives as reasons why such a thing could not exist, that it is inconsistent with security, that it is inconsistent with wealth, and that both of these are necessary to the well-being of a community.* Yet the old error has been again reasserted, with thunderous accompaniments of burned buildings, shattered monuments, and cruel death.

Under these circumstances it may not be unwise to consider the principles of Communism in this place, in so far as these have to do with property. There are three systems which propose common holding of goods, and each of these deserves some mention. These are Communism, St. Simonism, and Fourierism.

Communists assert the necessity of the absolute equality of distribution of the physical means of life. Mr. Mill has said that such a scheme is, at least, not impracticable. The difficulties in the way of the practical working of such a scheme are, however, not insignificant. The well-known argument, that in such a community each individual would constantly be trying to evade his fair share of work; that equality, although brought about to-day, would cease to be equality to-morrow; and that there would have to be a daily division, which would be a premium to idleness, extravagance, and dissipation, and a daily punishment of industry, frugality, and prudence, is certainly not without weight. But there are other as serious difficulties as that which presents every inducement to demoralization and vice, and every discouragement to probity and virtue. Even if it were practicable, the community would be made up of slaves and thieves, of drudges and spendthrifts. But this equality would simply be illusory if the division of money, of means of life, were to be the only things equally divided. Labor must be divided in the same way. Is it just that I should toil all day in the fields while another sits under shelter from sun and shower, and reads and writes? No! And again, the cannons blow clouds from which rain drops of blood! The new declaration of rights must begin with the statement, "All men are born and remain equal in capacity." There is a palpable difficulty here. The child is not so strong as the woman; the woman not so strong as the man. Men vary in strength, in height, nay, even in skill and in quickness. But they have devised a remedy: each man shall do each kind of work by turns. The poet

* See The Liveling System, App. Part III. Principles of the Civil Code. Works, Vol. I.

shall leave his books, and his eye may roll "in fine frenzy" over the threads of the loom or the clay of the brick-yard. True political economists object to this. What is to become of the division of labor? Is Mr. Wakefield's system of the combination of labor nothing? If that is so, there will be no work done; men will be always learning the new trade. Then all persons are not equally fit for the same labor; we have weak and strong, and if you make the former do as much as the latter it will only be a seeming not a real equality. Remember the Spartan maxim, and "call that equal which is just, and not that just which is equal." That seems a reasonable objection; and it is a point to be noted in this connection in the practical endeavors after Socialism which have been made in France, the associations of workmen who manufactured on their own account, began by an equal division of the remuneration, or profit, without regard to the quantity or quality of the work done by the individual, but invariably, after a very short time, abandoned that method in favor of payment by the piece. Even looked at from this practical point of view, Communism, which proposes that the instruments of production, the land and the capital, should be the joint property of the community, and that not only the produce, but the labor should be equally divided amongst its members, is absurd.

But it is not evident, upon far other grounds, that inequality is inevitable in man, and that any equality existing in property in relation to this inequality of men must, of itself, be an inequality and injustice. But we have seen above that the realization of singular will must be through a singular object; we have seen that, even to make use of air or water, man must take it in breaths or draughts; and, therefore, it follows that a complete realization of will could not take place in relation to a complete community of goods. But even Communism sees that, and allows the equal portions which are given to each citizen for his own use to be his private property. Here, then, is an element of infinite difference; and the equality which has been brought about by your arithmetic and scales is only apparent and not real. Any equality which you introduce is as evanescent as snow-flakes in warm water. Men are equal, of a truth, in free-will; they are equal as persons: every man has a right to property, or rather, it is the duty of every one to possess. Without such act of ownership his nature is rudimentary, undeveloped. That is a law of reason, not of experience; of right, not of expedience. But reason does not say how much a man shall have, nay, reason rather asserts continually that some men will have countries while others will have square yards. There are giants, and there are dwarfs.

St. Simonism is founded upon more rational principles than those

which are the life-blood of Communism; for, surely, principles may be called the blood of systems. It does not assert that it is necessary that all men shall do the same kind of work. It admits the necessity of difference, and holds that men must work according to their vocation and capacity. It also admits the element of authority into the State, and holds that this authority is to be endowed with the choice of the labor each man is to do, and the function he is to perform. The remuneration of each worker in the State is, according to St. Simonism, to be by salary; the amount of this salary is to be determined by the authority with reference to the importance of the office held, and the efficiency and capacity of the holder. Moderns have suggested that the authority is to be elected by vote—ballot, or other; but the authors of the St. Simonian scheme believed that men of virtue and genius would naturally obtain the obedience, the reverence, the love of all the rest in virtue of their superiority, and they imagined that such men might be an authority to their fellows—might be the guides, directors, and rulers of the State. There is much in this system which recommends it; but there are also grave errors, which must make it depend for success upon peculiar conditions—conditions scarcely to be realized in these latter days.

Fourierism does not acknowledge the extinction of private property; nay, it recognizes capital and talent in its scheme of distribution as well as labor. Its central idea is association. It proposes that men should associate in communities numbering about two thousand, that they should combine to labor upon a certain piece of land, and that such labor should be under the superintendence of elected overseers. The profits are in the first instance to be devoted to the necessities of all, so as to secure the subsistence of all the members of the community. The profits which remain after the accomplishment of that purpose are to be devoted in certain proportions to labor, capital, and skill, so that each member of the community who brought any of these into the public service would receive a certain interest for his ability, his work, or his money out of these surplus funds. But talent is to be gauged by the rank its owner has attained, and the attainment of rank is only to be possible through popular election, or choice of one's fellows. These profits are to be private property, and the advantage which is proposed to be gained by this living in community is the abolition of the tax which is laid upon all commodities by those who distribute them. Now, without doubt there is much ingenuity in this scheme, which seems to us to be a way of living in a work-house, paying your poor-rates first of all, and allowing all speculation, enterprise, and distinction to be managed by means of the State, and the State to express itself through the self-will of the many instead of the free-will of one. There is, we admit, considerable in-

genuity; but there is, so far as we can see, all the elements of impracticability. It was designed to avoid the weakness of Communism rather than to have strength in itself. Looked at in comparison with that system, it has evident advantages. It still leaves to men the inducements to labor; it still leaves them private property, and it acknowledges skill and the results of past labor and abstinence—that is, capital as having an equal share to consideration and to dividends out of the profits which without their assistance, all the labor in the world would be powerless to produce. But looked at in relation to the freedom of a State in which free-will is realized, this State is full of slavery; looked at in comparison with a State which is permeated by morals, this State has nothing but the dry bones of arithmetic. Besides, it has the one element of decay: it is a house of bricks without mortar. All men are kept together in it by self-will; ranks are to be determined; men are to find their places in grades, by the voice of their fellows; but these voices are the voices of caprice, not of free-will, and it is only in realized free-will that a State can permanently and harmoniously exist.

These latter considerations may seem remote from the subject of property; but it is to be remembered that these systems had in view the cure of the many evils which are said to exist under present system of private proprietorship.

Some words may seem necessary in regard to that kind of property which existed in early times, and is only now, in these later days, when the principles of free-will are more thoroughly understood, disappearing from the midst of mankind—property in human beings. We have said already what indicates that all slavery must be injustice, for we have pointed out that property is the realization of free will through its immediate other, and that immediate other can never be a man, but must always be a thing. It can never be a thing with an end of its own: its very end is to realize our free-will, therefore it is to be a means to our end. But the history of this attempt to make property of man is full of interest, as showing that it was the very assimilation of human beings to things or animals that made them liable to become the objects of proprietary rights; it was their lack of reason and free-will, their governance by passion and appetite, which suggested to men a little higher in the scale of being, in whom free will was no longer quite latent, that these half-humans were capable of realizing their free-will. There was an excuse for the mistake of these in the thinghood of those. But such a system could not exist for long. The anomaly of the objects of proprietary rights possessing property, must have struck men early. Provisions were made for the emancipation of such slaves as became proprietors, or for the purchase of freedom. But it was long before it came to be generally admitted that men could not really be slaves, or

have slaves. Mr. Carlyle's suggestion, that the question of slavery is whether you shall hire your servants for a year or for life, is founded upon an error of conception. The proprietary rights in a human being, for however long, or however short a time, are totally different from the proprietary rights in the voluntarily-given services of an individual. It is this difference which makes his assertion a fallacy.

But the same tendency to make one free-will dominate another free-will is seen in all rude ages. Thus it is that tyranny differs from good government vested in a single individual; thus it was that marriages were made in old times without the consent of the parties who were principally concerned, and while they were still children; and thus it was, too, that there arose the injustice of slavery, for it is unjust not only to him who is made a slave, but to him who makes his neighbor a bondsman.

THE INTENTION TO CREATE A TRUST.

A remarkable illustration of the changes which, from time to time, occur in the currents of judicial opinion, is furnished by a class of cases relating to the creation of trusts. Words are sometimes appended to gifts of property, which, while they do not unequivocally manifest an intention to impose an obligation, are yet susceptible of that interpretation. When a testator, for instance, bequeaths a legacy to A, the better to enable him to provide for his children, or for bringing up his children, or for the benefit of himself and his children, is he to be understood as creating a trust which the children can enforce, or as merely expressing the motive which actuates the gift? While the disposition of the courts was formerly to fix a trust upon the slightest intimation of a wish, their endeavor is now to construe doubtful words as conferring the absolute ownership. Lord Justice James recently remarked, that "in hearing case after case cited, he could not help feeling that the officious kindness of the court of chancery, in interposing trusts where, in many cases, the father of the family never meant to create trusts, must have been a very cruel kindness indeed." Lamb *vs.* Eames, 19 W. R. 659, L. R., 6 Ch. 599. A curious commentary on these words is supplied by the fact, that this frequent contravention of intention has arisen from the professed desire of the court to ascertain and effectuate the intention of the donor. It is not easy, perhaps, to reconcile all the cases; but as Vice-Chancellor Wigram has said (2 Hare, 611,) the discrepancy which exists in some of them is attributable rather to difference of opinion as to the manner of applying an admitted principle, than to any doubt as to the principle which ought to be applied. The leading canon of construction is the intention of the donor, and

the most obvious method of ascertaining this intention is to consider and compare the language and provisions of the instrument by which the gift is made. Accordingly, it has long been established that the whole instrument must be looked at, in order to enable the court to form an opinion as to the donor's meaning. (See Hamley *vs.* Gilbert, Jac. 354; Wetherill *vs.* Wilson, 1 Keen, 80, 86; Crockett *vs.* Crockett, 2 Phil. 556; Leach *vs.* Leach, 13 Sim. 304; Lambe *vs.* Eames, L. R., 10 Eq. 271.) Without attempting to reduce to definite classification all the various circumstances which have been held to indicate an intention that a trust should or should not be created, we may give, as instances of the application of this rule, a few of the cases in which the meaning of the donor has been collected from a comparison or consideration of the different provisions of the instrument of gift.

1. A gift of a specific fund to a wife "for her own use and disposal," furnishes evidence of intention that a subsequent gift of another fund to the wife, in the same instrument, "for the benefit of her and her children," should raise a trust in favor of the children. (Jubber *vs.* Jubber, 9 Sim. 503, 507; Longmore *vs.* Elcum, 2 Y. & C. C. C. 363; Hadow *vs.* Hadow, 9 Sim. 438.)

2. A direction, that if the parent shall not be living, the trustee shall apply the proceeds of the trust property in the same manner as the parent is directed to apply them, has been said to put an interpretation in favor of a trust, upon a gift to a parent to enable him to maintain and educate his children. (Leach *vs.* Leach, 13 Sim. 304, 308; Wetherell *vs.* Wilson, 1 Keen, 80.)

3. The fact that the donor has given the property to trustees upon trust to pay the income to the father, to be applied by him for the maintenance of his children, has been thought to indicate an intention that the father should not be a sub-trustee. (Byne *vs.* Blackburn, 6 W. R. 861, 26 Beav. 44; Hammond *vs.* Neame, 1 Swanst. 37, 38.) This point appears to have been urged in the argument in Leach *vs.* Leach, 13 Sim. 306, but is not alluded to in the judgment.

In other cases the intention of the donor has been collected from particular expressions used in the instrument of gift. Thus, a legacy to a wife *for her own use and benefit*, and to enable her to bring up, maintain, and educate the testator's children, will, apparently, confer an absolute interest upon her. (Jones *vs.* Greatwood, 16 Beay, 527.) In a recent case, it was said, that the position of the donor, at the time the instrument of gift was made, may be taken into consideration as a means of ascertaining what were his intentions (see the judgment of Mellish, L. J., in Lambe *vs.* Eames, 19 W. R. 660; L. R., 6 Ch. 601), and it appears that the position of the donee must also be borne in mind, since "a gift in aid of the performance of a duty which the donee is al-

ready legally liable to perform, implies an intention to confer a beneficial interest on the person to whom the gift is made." (Byne *vs.* Blackburn, 26 Beav. 44, 6 W. R. 861.)

Where, by these means, an indication can be obtained of the intention of the donor that a trust shall or shall not be created, such intention will prevail. Where, however, no such indication can be discovered, recourse must be had to other rules of construction, which may be briefly stated as follows:

1. A gift to a person to accomplish an object, increasing his funds in order that he may be the better able to accomplish it, is construed as an absolute gift to the individual, with the motive only pointed out. (Thorp *vs.* Owen, 2 Hare, 611; Benson *vs.* Whittam, 5 Sim. 32.) Hence a legacy to A, the better to enable him to pay his debts, expresses the reason for the testator's bounty, but does not create a trust which creditors can enforce. (2 Hare, 611.) A legacy to A, the better to enable him to maintain or educate and provide for his family, as Vice-Chancellor Wigram has said, must, in the abstract, be subject to a like construction (2 Hare, 611); yet the cases usually cited, in support of this proposition, contain indications of intention apparently strong enough, independently of the rule, to account for the conclusion arrived at by the court. Thus, in Brown *vs.* Casamajor, 4 Ves. 698, where a father was held entitled to receive, for his own use, the income of a legacy given "the better to enable him to provide for his younger children," there were expressions in the codicil and paper inclosed in the will indicating that the testator intended the legacy for the benefit of the parents. In Benson *vs.* Whittam, 5 Sim. 22, where it was held that a gift to A, "to enable him to assist such of the children of F as he might find deserving of encouragement," did not create any trust for the children, the words above quoted were placed between brackets, and a subsequent provision contained in the will was admitted to have "fortified" the construction adopted by the court. Lastly, in Thorp *vs.* Owen, 2 Hare, 607, the gift to the wife was expressed to be "for her own use and benefit."

2. A somewhat different construction has been placed on a gift to a parent for the maintenance or education of his children. At one time, indeed, it was thought that a bequest to a father in these terms amounted to a legacy for his absolute use (Bushnell *vs.* Parsons, Prec. Ch. 219; Andrews *vs.* Partington, 2 Cox, 224); but later decisions have modified the rule, and it may now be stated as follows: The parent is bound to apply a competent part of the gift for the object specified; but so long as he properly maintains his children, they are not entitled to calll upon him for an account. (Leach *vs.* Leach, 13 Sim. 398; Hart *vs.* Tribe, 18 Beav. 216, as to the leagacy of £100; see also, Conolly *vs.*

Farrell, 8 id. 347.) This construction is applied even in cases where the interest of children's shares in a fund vested in trustees, is directed to be paid to the parent, and applied by him for the maintenance or education of the children. (Berkeley *vs.* Swinburne, 6 Sim. 613; Hadow *vs.* Hadow, 9 id. 438; Browne *vs.* Paul, 1 Sim. N. S. 93.) The rule applies to a gift to a mother for the maintenance of *herself and her children.* Thus, under a bequest in these terms, in Bowden *vs.* Laing, 14 Sim. 113; Cowman *vs.* Harrison, 10 Hare, 234; and Scott *vs.* Key, 13 W. R. 1030, 35 Beav. 291, the mother was held entitled to the income of the property, subject to the obligation to maintain the children. In all the cases to which this construction is applied, the parent is a trustee for the children. See Woods *vs.* Woods, 1 My. Cr. 401, 408; but the trust extends only so far as is required for their maintenance and support, and is not enforceable so long as they are properly maintained. (Scott *vs.* Key, 13 W. R. 1030; 35 Beav. 294.) Moreover, the obligation of the parent to maintain the children lasts only so long as they form part of the family; hence, when a daughter, by her marriage, becomes "forisfamiliated," she ceases to have any claim for maintenance. (Bowden *vs.* Laing, 14 Sim. 115; Camden *vs.* Benson, cited 8 Beav. 350; Carr *vs.* Living, 28 id. 647.)

3. The construction of a gift to a mother, to be at her disposal for herself and her children, has given rise to considerable discussion. As we incidentally referred to this subject in a previous volume (16 S. J. 196), it will not be necessary now to go through the cases with minuteness. It has been repeatedly decided that, under a bequest in these or similar terms, the mother does not take the absolute interest. Raikes *vs.* Ward, 1 Hare, 445; Crockett *vs.* Crockett, 1 id. 451; 2 Phil. 553; Godfrey *vs.* Godfrey, 11 W. R. 554; but there has been no little divergence of opinion, as to the nature and extent of the trust created in favor of the children. There are two modes of construing the gift, either of which is consistent with the language. It may be held to create a joint tenancy between the parent and children, or it may be considered as giving the parent a personal interest in the property, with a discretionary power to apply it for the benefit of the children. The latter construction was adopted in the case of Crockett *vs.* Crockett, 2 Phil. 553, in which a testator directed that his property should be at the disposal of his wife for herself and children; and Lord Cottenham held, reversing the decision of Vice-Chancellor Wigram, that the widow had a personal interest in the fund, and that, as between herself and her children, she was either a trustee, with a large discretion, as to the application of the fund, or she had a power in favor of the children, subject to a life estate in herself. Following this authority, the master of the rolls held, in Hart *vs.* Tribe, 18 Beav. 215, that a bequest to the wife of

the testator "to be used for her own and the children's benefit, as she shall in her judgment and conscience think fit," was a gift to the wife for life, to be employed by her in such manner as she should think fit for the benefit of herself and her children, she fairly and honestly exercising that discretion, and that subject to that the children took an interest in the capital. Up to a recent period, the balance of authority was certainly in favor of construing a discretionary gift resembling that in Raikes *vs.* Ward, as constituting a trust for the benefit of the children.

This construction, however, was repudiated in Lambe *vs.* Eames, 19 W. R., 659 L. R. 6 Ch. 597, on appeal from the decision of Vice-Chancellor Malins, 18 W. R. 972; L. R., 10 Eq. 267. In that case property was devised to the testator's widow, "to be at her disposal in any way she may think best for the benefit of herself and family." The vice-chancellor held that the mother took an absolute interest in the property, and, on appeal, his decision was affirmed by the lords justices, who expressed their disapproval of the practice of construing gifts similar to that in the case before them, as meaning a trust for the widow for life, and after her death for the children as she should appoint. Lord Justice James declared that "it was impossible to say there was a trust," although he admitted that there "might be some obligation on the widow to do something for the benefit of the children." The judgment, as given in the Law Reports, does not contain an observation, explanatory of the nature of this "obligation," which may be found in the report of the case in the *Weekly Reporter*. "Even if there was in this case such an obligation," said Lord Justice James, "it was impossible to extend it to more than providing maintenance for the children." A similar construction was adopted by Vice-Chancellor Bacon, in the case of Mackett *vs.* Mackett, 20 W. R. 860; L. R, 14 Eq. 48. The interest taken by the children, under gifts of the class now under consideration, has, apparently, been reduced to the lowest point compatible with the existence in them of any interest at all, and it may be hoped that, sooner or later, the conclusion desired by Lord Justice Mellish, 19 W. R. 660, may be arrived at, and that the words appended to such gifts may hereafter be regarded as merely expressive of the motive of the donor, and not as imposing any obligation on the donee.—*Solicitor's Journal.*

UNITED STATES CIRCUIT COURT.

N. D. NEW YORK.

A bankrupt applied for and obtained, in the United States District Court, an order to show cause why all proceedings should not be set aside and vacated, upon the ground that the act of bankruptcy set forth in the creditor's petition was committed more than six months before the filing of the petition. The court, on the hearing, ordered the adjudication of bankruptcy and all subsequent proceedings to be vacated, but making no provision as to costs. From this order the petitioning creditor petitioned to the Circuit Court for a review and reversal of such order.

Held, That the continued non-payment of commercial paper by a merchant or trader is, as it were, a continuous act of bankruptcy and not such a final, completed, and definite act that it could not, after the lapse of six months, be made the basis of adjudication.

That so long as it appears that, in fact, the petitioning creditor authorized the institution of the proceedings in his behalf and so became liable for costs, the matter of signing and authentication is purely formal and unimportant to any right of the debtor.

There is no express provision in the rules or orders in bankruptcy which forbids a petition to be sworn to by an agent or attorney of the petitioning creditor. When the agent is clothed with full authority and is able to present the proper authentication of the petition required by the forms, such petition should be entertained, although the petitioning creditor does not, in person, sign or swear to it.

Order under review reversed.

In re JACOB RAYNOR.

WOODRUFF, C. J.—On the 7th day of May, 1872, Horace B. Claflin and others, composing the mercantile firm of H. B Claflin & Co., of the city of New York, by Rugor, Wallace, and Jenney, their attorneys, filed their petition in the District Court, as creditors of Jacob Raynor, praying that he be adjudged bankrupt. The petition stated that within six months next preceding the date thereof, the said Jacob Raynor committed an act of bankruptcy within the meaning of the "act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, to wit: In that the said Jacob Raynor, being a merchant, has suspended payment of his commercial paper, and has not resumed payment thereof within a period of fourteen days; the said commercial paper being a certain promissory note of which a copy is given in the petition. The note mentioned is dated November 30, 1870, for five hundred dollars, payable on the 1st of June, 1871, with interest after January 1, 1871, to the order of James Nixon, and by him indorsed, and before maturity thereof transferred to the petitioners, by said Raynor, for merchandise sold and delivered by the petitioners to him.

No other act of bankruptcy is stated. The petition is signed, "H. B. Claflin & Co., by Rugor, Wallace, and Jenney, attorneys," and is sworn to by one of the said attorneys, who, in addition to the usual verification, swears that the said attorneys are author-

ized by the petitioning creditors to file the said petition. An affidavit of one of the said attorneys was also annexed to establish the act of bankruptcy, prove the debt due to the petitioners, the formal protest of the said note, that there are several executions against the said Raynor in the hands of the sheriff of Onondaga County to the amount of about two thousand five hundred dollars, which executions have been levied upon the said R ynor's property, and further stating that the said Rugor, Wallace, and Jenney are authorized by the said H. B. Claflin & Co., the petitioning creditors, to make the said affidavit and institute those proceedings in bankruptcy.

An order to show cause was thereupon made by the court, returnable on the 28th of May, 1872. This order, together with a copy of the petition, was served upon Raynor personally on the 20th of May.

On the 28th the hearing was adjourned to a subsequent day. An attorney, acting professedly for Raynor, consented to such postponement, but, as his appearance is stated to have been through a mistake and without authority from Raynor, it is claimed that the proceedings should be considered as they would be if there had been no appearance whatever by Raynor; and without inquiring what effect, if any, should be given to a formal appearance by attorney, the case will, for the present, be treated as if the debtor did not appear on the return day of the order, and the court had adjourned the proceeding until the 25th of June, 1872. On the last-named day the matter was brought to a hearing. The debtor did not appear in person or by attorney, and he was by the court adjudged bankrupt; he was ordered to make and deliver a schedule of his creditors, and an inventory of his property, with other usual directions, and reference to a register.

The proper warrant to take possession of the property of the bankrupt was issued to the marshal, by virtue of which he took possession. Notice to creditors was issued to meet for the choice of an assignee. Edgar P. Glass was duly nominated, approved by the court, and appointed assignee, and on the 6th of August, 1872, the register assigned to him the property and estate of the bankrupt. The assignee received from the marshal possession of the store and merchandise of the bankrupt, and he proceeded to advertise the goods for sale at auction in the discharge of his duties as assignee.

No question is made of the due regularity of these proceedings except in the particulars hereinafter specified.

On the 27th of August the bankrupt applied for and obtained, in the District Court, an order to show cause why all proceed-

ings should not be set aside and vacated, upon the ground that the act of bankruptcy set forth in the petition of the creditors was not committed within six months before the filing of their petition, and on the 24th of September, 1872, the court set aside and vacated the adjudication of bankruptcy and all subsequent proceedings unconditionally, making no provision as to costs, expenses, or in anywise for the indemnity of any of the parties or officers or assignee. The petitioning creditors have come by petition to this court for a review and reversal of the last-named order.

I. The sole ground upon which the order setting aside the proceedings was moved in the District Court, as recited in the order to show cause, is that the act of bankruptcy, specially mentioned in the petition of the creditors, was committed more than six months before the petition was filed.

The note set out in the petition, the suspension of payment and the continued non-payment whereof is particularly specified, became payable June 4, 1871, and the petition was filed May 7, 1872.

This gives rise to the question whether the continued non-payment of commercial paper by a merchant or trader, after suspension of payment thereof, by suffering it to go to protest, is a final, definite, and single act, so completed at the end of fourteen days thereafter that it can not, after the lapse of six months, be made the basis of an adjudication of bankruptcy. Sec. 39.

There is no claim here that the debtor was not insolvent, no claim that the non-payment was not for want of means to pay, and the affidavits show that the debtor had committed other acts of bankruptcy even to suffering his property to be taken on execution without assets sufficient to pay his debts.

The claim of the debtor rested on the single ground that, because the note mentioned in the petition became payable more than six months before the petition was filed, the petition, while it averred that an act of bankruptcy had been committed within six months, showed on its face that the act relied upon was committed more than six months before that filing.

The question is not an open one in this circuit. It has more than once been held here that non-payment of the commercial paper of a merchant or trader, at maturity, and the continued suspension and neglect of payment, were a continuous act of bankruptcy. The debtor, in such case, is in a state of suspension and non-resumption of payment. His duty to pay is just as definite on any day after the day on which his commercial paper is, by its terms, payable, as it is on that day and on any

such day he is in the very position, as between him and the creditors, of neglecting his duty, suspending, keeping in suspense and not resuming payment. Whether his continued suspension and non-resumption of payment be termed a continuous act of bankruptcy, or be regarded as daily successive acts of bankruptcy, is not material; so long as it continues the creditors may avail themselves of it as an act of bankruptcy committed as truly within the preceding six months as on the day on which the debtor first violated his commercial obligation. I can not doubt that this is the proper construction of the bankrupt act, and this construction has been heretofore approved on the review of the like construction given to the act by the district judge of the southern district.

It is in accordance with the opinion of the learned circuit judge of the sixth circuit in *Baldwin* v. *Wilder*, 6 N. B. R. 85. I am therefore compelled to hold that the ground upon which the proceedings were set aside did not warrant the order.

II. On the argument of the review herein, and upon an intimation from the court to the effect above stated, another ground for sustaining the order vacating the proceedings was urgently pressed upon the attention of the court, which does not appear to have been suggested in the court below, or to have been passed upon there. This ground, it is claimed, goes to the jurisdiction of the District Court to entertain the petition or make any adjudication thereon.

The petition herein was not signed or sworn to by the petitioning creditors, or either of them in person, but by their attorney, expressly authorized to institute the proceeding, and file a petition on their behalf. This, it is now insisted, is not authorized by the law, and gave the District Court no jurisdiction to adjudge the debtor bankrupt.

Waiving, for the present, any question of the propriety of entertaining, under the form of a petition of review, in this court, questions not raised and passed upon in the District Court, it seems obvious that, if the proceedings set aside were *coram non judice*, and void for want of jurisdiction, it would not benefit either party to reverse the order merely because the ground upon which it proceeded was disaffirmed.

I therefore consider whether the objection now raised is well founded.

The consequences of a holding in conformity with the claim now made in behalf of the debtor, do not furnish a conclusive reason for denying its force; but in giving a construction to a statute, which is susceptible of more than one interpretation, such consequences may very properly assist in ascertaining the

intent of Congress, and so in determining the meaning of the act.

If, then, the petition here did not give the District Court jurisdiction, the proceedings might have been begun, due notice thereof given to the debtor, he by his silence and inaction give passive acquiescence, the assignee proceed to sell and convey the debtor's property, real and personal, receive the proceeds and distribute them, institute suits for the collection of debts due to the bankrupt, and finally render and settle his accounts, and even the bankrupt receive a discharge. Now, if the objection that the District Court had no jurisdiction because the petitioning creditor did not sign the petition is sound, the discharge of the debtor is void. He, if he have not taken such discharge, may reclaim all his property; may hold all who have intermeddled therewith tort-feasors, and liable to him in damages to the full value of property taken. Debtors of the bankrupt being sued by the assignee may defeat a recovery by impeaching his title, and no purchasers of the real estate of the bankrupt, or their heirs or grantees, would be safe until adverse claims were barred by the statutes of limitation.

It is true that a short answer may be given to all this, viz.: Let all parties who act in faith of a judicial proceeding, see to it that such proceeding conforms to the law. The answer is, however, as unsatisfactory as it is short, when applied to a remedial statute, and a proceeding under it of which the debtor has full notice, a proceeding intended to be made convenient, summary, and beneficial to all parties for the attainment of the highest equity, an actual and equal distribution of an insolvent debtor's property to his creditors, and, if he be honest, a discharge of himself from the heavy burthen of obligations which he is unable to satisfy.

And again, such a construction is harsh and inconvenient to creditors without being of the slightest conceivable benefit to debtors. The very first step based upon the petition is to give the debtor an opportunity to be heard upon the question whether he shall be adjudged bankrupt. On that hearing, so long as it appears that in fact the petitioning creditors authorize the institution of the proceedings in their behalf and so become liable for costs or other resulting responsibilities, it is not of the slightest importance to the debtor who signs the petition. As in the nature of a pleading, the petition should set forth all facts material to the claim made by the creditor to an adjudication, so that the debtor may be distinctly apprised what he is called upon to answer, and that is the reason for specific and definite allegations in the petition. The matter of the signing

and authentication, on any ground other than above suggested, is purely formal and unimportant to any right of the debtor.

Once more; in this widely extended country, where facilities of travel and transportation have made commercial intercourse, the daily and constant habit between parties carrying on business at places thousands of miles removed from each other, creditors are, by the bankrupt law, required to seek their debtors at their homes or places of business. The exigencies which the bankrupt law contemplates, and which entitles creditors to proceed in bankruptcy against such debtors, are very often of sudden occurrence and require instant application to the Bankrupt Court. Creditors may easily clothe their attorneys and agents with full power to act for them in all circumstances for the collection of demands and by such application to the Bankrupt Court as may be proper, and yet if no such action could be taken until by correspondence or otherwise the formal papers could be prepared, signed, transmitted, sworn by the creditor in person, and returned, in many cases no injunction could be had nor other measures taken to restrain, instantly, inchoate or contemplated fraudulent dispositions of property, its fraudulent removal beyond the reach of creditors or other fraud until it is too late to be of any service whatever. To this should be added that in a large proportion of the cases the agent on the spot knows far better the truth of the allegations which the petition should contain than the creditor himself. It is difficult to suggest a reason for increasing the expense, trouble, and embarrassment of the creditor in pursuing so useful a remedy.

So, also, creditors often conduct their business largely through agents; creditors are sometimes required to be absent from their homes; sometimes temporarily abroad, and in such cases they are, by the construction claimed, practically cut off from the privilege of pursuing their fraudulent or insolvent debtor by the just and equitable enforcement of the bankrupt law.

If some respect may be had to creditors resident abroad, the considerations sustaining the right to proceed under this law by their agents or attorneys near the residence or place of business of their debtors, become still more urgent.

What, then, is the foundation of the claim? It rests on the language of the thirty-ninth section and upon a few words of that section; to wit: * * * "shall be adjudged a bankrupt on the petition of one or more of his creditors."

No other terms of the act are involved as expressly prescribing the action of the creditor in person in the matter. In my opinion that language has no such necessary or probable im-

port. It should be construed as similar language is used in the whole field of legislation and in the terminology of courts, and in these the maxim, "*qui facit per aluine facit por so*," is, in civil matters, of almost universal application. The deed, agreement, or covenant of A. B. is his deed or act, although executed or made by his agent or attorney, and it not only may but must be so described.

Even a tortious act may be done by an agent, and yet it is appropriately described as the act of the principal.

In legal proceedings (which are closely analogous, or rather of the identical nature of those under consideration), the bill of complaint of the person seeking redress is the "bill of complaint of the complainant," and yet is authenticated by his solicitor. The declaration of the plaintiff in a suit at law the plaintiff himself rarely sees. So of summary petitions of various kinds in proceedings at law and in equity. Under statutes and at common law, they are called the petitions of the party; the proceedings are had or taken on *his* petition; and yet they are only his because he authorized them, or because they are presented on his behalf. Illustrations almost without number could be found of the use of language like "the petition of a creditor," which imports no more than that it is on his behalf or by his authority.

I think that Congress did not intend to create a restricted meaning to the phrase limiting it to the personal act of the creditor. It has no such necessary meaning, because what is done by an agent is in law done by the principal.

It has no such restricted meaning, according to the common and prevailing employment of such terms in the law. To give it such a restricted meaning would result in manifold inconveniences and evils, some of which have been alluded to, and would often defeat the beneficial and just purposes of the law.

It is, however, urged that the Supreme Court of the United States have given a practical and authoritive construction to this language by exercising the power conferred by the act to make rules, and by those rules prescribing forms of proceeding which import the signing of the petition and the verification thereof by the petitioning creditor in person. If they have done so their construction of the law concludes this court. Section 10 of the act, number 32 of the orders in bankruptcy, and form number 54.

There is no express provision in the rules or orders in bankruptcy in any degree inconsistent with the views above expressed.

The form of petition prescribed (number 54) involves no

question by whom it is to be signed or authenticated. It is in that respect like any bill in chancery or any petition in a summary proceeding or petition collateral to a pending suit or of any ordinary character. "The petitioner states," or "represents," or "shows," or "your orator represents," or "states," or "shows" to the court, and "your orator," or the petitioner further "represents," or "states," or "charges," or "admits," or "denies," and your "orator," or "your petitioner will ever pray," &c.

But the place for the signing is indicated by blank lines with the word "petitioner" appended as descriptive of the signer, and the oath to the petition begins: "I,———, the petitioner above named," and ends with the like blank lines with "petitioner" appended. If there were nothing more than this, these blank spaces thus supplemented would furnish very narrow ground upon which to rest a decision of great practical importance. These blanks may be filled by the words "A. B., attorney (or agent) for the petitioner," or with the name of petitioner "by A. B., his agent and attorney," and no violence will be done to any form, nor to any prescription in the law or the rules.

On recurring to the rules themselves it seems to me that all foundation for an argument founded on the forms disappears. The thirty-second of the rules or orders which adopts the forms expressly directs that they "shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

If, therefore, there is nothing in the bankrupt law itself which requires that the petitioning creditor shall sign and authenticate the petition in person, then the orders in bankruptcy and the forms prescribed do not require it. The blanks may be filled by the name of the attorney or agent of the petitioner, or with the name of the petitioner, "by A. B., his attorney and agent."

It is suggested that, because Congress when prescribing the requisites of the proof of debts by creditors, in section twenty-two, made express provision for the oath of an agent or attorney when the creditor is absent or prevented from testifying, it is inferable that it was not intended that an agent should sign, verify, or present a petition because the act does not say so in terms.

The act does not in terms say that the petition shall be signed or verified at all. When prescribing proof of debts Congress was directing the mode of exhibiting *ex parte* evidence, which should entitle a party to receive a part of the estate in distribution, and section twenty-two is stringent and exact in speci-

fying the oath which must be taken and what it shall embrace. Having made such requirement, and recognizing the fact that creditors may often be compelled to make the proof by agents, they provide for the oath to be taken by such agents.

This, to my mind, shows nothing in regard to the requisites of a petition as to which the act itself specifies no oath whatever. An express provision touching the proof of debts by agents, the proceeding being *ex parte*, to my mind, rather sustains than weakens the presumption that when the proceeding is *inter partes*, so that the debtor must be first heard before any adjudication can be had, no limitation or restriction of the proceeding to the personal act of the petitioner is to be implied.

Several cases from the district courts are cited by counsel, in which it has been said, in substance, that a petitioning creditor must sign and verify the petition, and that it may not be done by agent or attorney, although expressly authorized. *Hunt, Tillinghast & Co.* v. *Pooke & Steere*, 5 N. B. R. 161; *in re* Muller & Brentano, 3 N. B. R. 86; *in re* Butterfield, 6 N. B. R. 257. In which latter case, however, the actual decision only imports that authority to file a petition does not pertain to a mere retainer of attorneys at law in general. Whether those courts would hold that the requirement went to the jurisdiction of the court, and a defect, in this respect, would render the whole proceeding, if carried to full consummation, *coram non judice* and void, is not quite clear. It is not easy to see that their views of the construction of the act would stop short of that. In the southern district of this State and in the district of Connecticut, the contrary has, I understand, been uniformly held.

My own conviction is that the opinions in the cases referred to proceed upon too narrow a view of the subject, and I can not resist the conclusion that when the agent is clothed with full authority and is able to present the proper authentication of the petition required by the forms, such petition should be entertained, although the petitioning creditor does not in person sign or swear to the petition.

The order under review must therefore be reversed. 7 N. B. R. 537.

CHIEF JUSTICE CHASE.

In the funeral to-day of the late Chief Justice Chase, there will disappear from our sight the last of the four great men whom President Lincoln called into his Cabinet during the war of the rebellion.

Messrs. Seward, Stanton, Fessenden, and Chase, were men of diverse character and qualities, but each in his own way was unrivalled. In the

high arena of Senatorial debate, Mr. Fessenden was the master of them all. In the capacity of War Minister, with a million of men in the field, not one of them could have matched Stanton's imperious energy. In the direction of our foreign affairs, neither could have exhibited the copiousness, the fertility, or that genial felicity of exposition that marked Mr. Seward's diplomacy. And it is not too much to say that no man in the whole country could have equaled Mr. Chase in that most embarrassing task of all—the successful management of our finances.

At the opening of the war there was nothing so difficult as the financial problem, and there was none upon which so little light was shed, either by our own experience or that of other nations. The vast proportions of the war required a corresponding system of finance to meet its enormous and constantly expanding demands. It was to Mr. Chase's bold simplicity and clearness of thought, and, above all, to his firm grasp and unbending will that we owe the system which carried the country triumphantly through its trials. He exhibited, far beyond any of his colleagues, that quality of administrative ability which the French set above every other, and which they term initiative. In this respect he was the greatest of them all. To cast down old systems and establish new which shall stand the test of time and experience, and especially to do this during the tempest of civil war, is the work of genius. This is what Mr. Chase did. He overthrew the whole banking system of the country, and he erected another upon its ruins.. And he did this alone, and against the passive or active resistance of the entire community. When all ordinary resources failed to furnish money for the war, he set in motion a unique agency for placing the National loans, which proved instantly and brilliantly successful. He invented the system of five-twenties and ten-forties for the permanent funding of the National debt; and no scheme has yet been found better than this in the completeness and flexibility of its operation. With wonderful daring and force of character, he put aside the constitutional standard of value, and did not hesitate to override the fundamental law against impairing the obligation of contracts, in his eager and patriotic determination that every private interest should yield to the public necessity. He made it the condition of existence for the banks of the country that they should contribute their resources to the support of the public credit. He enforced this condition with vigorous determination against the most powerful opposition. A few banks would not comply, from prudential, and sometimes from political considerations; but Mr. Chase and his system triumphed, and they all at last acquiesced, or went out of existence. And pursuing his resolute methods, and with unabated confidence in his powers and resources, he insisted on the reduction of the rate of interest on the National loans from six

per cent. to five per cent., in the very height and pressure of the war, when three millions of dollars a day were required to maintain the armies in the field.

These were the great leading features of Secretary Chase's financial policy. Even this cursory review of them exhibits their novel and masterly character. They could only have emanated from a bold, original mind, of distinct ideas, strong, unhesitating, revolutionary in its vigor, imbued with self-confidence, and feeling itself equal to any emergency. The novelty of Mr. Chase's situation, and the ease and force with which he met each successive and threatening phase of it, carrying his great burden steadily to the end, have never been fully appreciated. But history will not fail to award him the title of greatness for his deeds during this period.

It were idle to say that in the prosecution of his large and vital schemes Mr. Chase made no mistakes. He would hardly have been human if he had not. The issue of his five-per-cent. legal-tenders was a mistake. The legal-tender measure, in its application to pre-existing contracts, was a mistake, at least in our judgment. The injurious character of this application he himself recognized, and aimed to correct by his noble decision on its unconstitutionality after he became Chief Justice. But the easy-going public, and the lawyers of the great corporations, who became his associate judges, were content to indorse even the errors of the great Secretary, which the wiser judge had himself condemned; thus exhibiting in vivid and striking colors the difference between greatet and lesser men; between mere lawyers, and statesmen who recognize national necessities and maintain the prerogatives of justice over the plausibilities of the law. But we have no need to criticise the defects in Mr. Chase's financial administration, when we find that both judges and legislators are unable to see them, or at least are thus far unwilling to recognize and remedy them, after long years of trial and experience.

The issue of the five-per-cent. legal-tenders by Mr. Chase in the crisis of the war was an effort made with the laudable purpose of reducing the rate of interest on the new loans required. It did not attain this object, while it had the effect, in connection with dissatisfaction with the military situation, to rapidly advance the premium on coin, an effect which Mr. Chase was warned against, but which he refused to believe beforehand. But this, and the legal-tender measure in its applipication to pre-existing contracts, were mere incidents of his general financial policy. While we take exception to them, others do not. The policy itself was broad and statesmanlike. It carried the country majestically through the war. It paid the Nation's debts. It has astonished the world by its success. Some of its leading features are to-day adopted by three millions of British subjects on our northern frontier.

The financial prosperity of the country under the system of greenbacks and National bank notes has been carried to a fabulous height; and so enamored has the whole nation become of it that it is impossible at present to get the popular approval even for any modification of the system, though such a modification has long been considered desirable and necessary by its author. This is a result which might well satisfy the highest ambition of the greatest of financiers.

Of Mr. Chase's career as Chief Justice, we may say it has been comparatively brief, and part of it has been clouded by illness. But without any long training as a lawyer in great cases, his clear and robust intellect was esteemed by Mr. Lincoln as affording an ample reason for his elevation to the head of the court, and that opinion has been fully justified by the event. In every respect he has been master of his place. In the impeachment case of President Johnson all felt the presence of a controlling mind and will, which, to a large extent, shaped the character and result of that memorable trial. The dignity of the Chief Justice's bearing on that occasion, his resolute and impartial purpose, and his lofty aim in behalf of what he deemed sound law and exact justice, were fully recognized at the time, and it will be long before their memory is obliterated.

In transacting the general business of the court Judge Chase manifested those rare administrative powers that marked his whole life. They belonged to the character of his understanding. It was his nature to direct. His mind leaned forward, so to speak, to give tone to, and exercise control over, whatever came within the sphere of his action. He emitted force, resolution, and energy. The business of his court was thus under the impulse of these qualities, and its action has corresponded.

His leading opinions in court were mainly on questions connected with National affairs, questions touching the relations and powers of the rebellious States, the limitations of military authority, the legal-tender question, and others of a kindred character. On all these subjects his judgments were marked by the high qualities of the statesman as well as of the jurist, and they afford unquestionably proof of his clear and lofty intellect, and broad and accurate perception of the demands of his position as the expounder of both law and equity; for he had always, in all the relations of life, a stern sense of justice, into whose service he believed in pressing the law whenever possible. He gained his earliest renown as a lawyer from such convictions.

Mr. Chase became a United States Senator from Ohio, in 1849. Mr. Seward was chosen in the same year. But while their sentiments did not materially differ on the slavery question, there was a variance in their political position. Mr. Seward represented the Old Whig party, and

aimed to preserve its organization. Mr. Chase was the representative of the Liberty party, so-called, and the special advocate of anti slavery ideas in a political organization established to render them practicable in administration. With Mr. Seward the same ideas were of a more sentimental cast, and took on no immediately belligerent attitude. Mr. Chase was thus an object of even greater hostility on the part of the slaveholders than Mr. Seward. He stood alone, the representative and champion of his party in the Senate. Perhaps Mr. John P. Hale, of New Hampshire, who had been chosen Senator in 1846, might claim the honor of holding a similar position; but it was pre-eminently Mr. Chase who was the object of the vindictive wrath of the slaveholding party. All their strong indignation fell first on him. For he claimed to be the enemy of slavery itself, and not merely of its aggressions. His speeches on the subject were not frequent, but they were always terse, passionless, and logical. He was not, like some other anti-slavery men, regarded as a mere fanatic, but as a much more dangerous antagonist. He was considered an enemy to be feared, since he aimed to undermine and overthrow slavery by logical and practical processes and not by sentiment or declamation. His position as Senator was an arduous and trying one. He stood outside of what was termed the "healthy political organization," and was tabooed completely by pro-slavery intolerance, and, as far as possible, ignored in the business of legislation. It was a deliberate and offensive ostracism, of which he was every day made to feel the weight. Yet he bore himself with dignity, never allowing himself to be betrayed into unseemly altercation, which his adversaries aimed always to provoke. His conduct as a Senator under these embarrassing circumstances forms one of the most marked passages in his life. He steadily rose in influence and regard, and by the moderation and force of his character alone conquered the prejudices of his opponents and extorted their respect for his evident sincerity and devotion to his cherished convictions. And he did this without the graces of oratory, and without any commanding ability as a debater. It was the habit of Mr. Sumner at that time, who had not himself then been elevated to the Senate, to say that Mr. Chase's Senatorial efforts were "light without heat." This, was perhaps, in a certain sense, a just criticism; but that was a period in our anti-slavery history when heat was a much more abundant quality in the discussions of the time than light; and Mr. Chase's utterances were thus calculated to supply an important want. He never made an anti-slavery speech that could be replied to with effect, for the very reason that his logic was impregnable, while he indulged in no manifestation of feeling upon the subject.

Mr. Charles Francis Adams, in his late memorial address on Mr. Seward, credits that statesman with being the leader of the anti-slavery

movement in this country, and also the leader of Mr. Lincoln's administration. We can not admit the accuracy of either statement. So far as Mr. Lincoln was concerned, it is certain that he was the leader of his own Cabinet in all its branches. And we may say in passing, that it was not Mr. Seward who settled the Trent difficulty by deciding to surrender the captives, as is alleged by Mr. Adams. Mr. Lincoln himself did this, in the single observation made by him, current at the time, and current ever since, that the country could not afford to have more than one war on hand at a time. This was the key-note of that transaction, and Mr. Seward was left to make the argument. And without wishing in the least to detract from that eminent man's just renown, we must say that he never made a worse one. He lost such an opportunity of striking a blow in favor of the rights of neutrals as may not occur again in a century.

But it is of Mr. Adams' assertion in behalf of Mr. Seward, that he led the political anti-slavery movement, that we now desire particularly to speak. If anybody can claim that distinction it is Mr. Chase. But we conceive that nobody can rightfully claim it. It is the glory of that movement that it had no chief. It was headed by an array of noble and earnest men, who moved shoulder to shoulder in the van of that holy enterprise. No one of them could be fairly said to be in advance of the other, or to be in any sense the leader of the movement. And the removal by death or desertion of any one, two, or three of the foremost could not have destroyed or even weakened the organization, or arrested its impetus. The great wave rolled onward by the force of the mighty inspiring ideas that were its quickening spirit. It was to the vitalizing power of truth, and not to the lead of any man, that its victory was owing. The men were there who represented that truth, but if they had fallen, others were ready to take their places. Among those foremost men was Mr. Chase. He was there by choice. He was an anti-slavery man, pure and simple, first and last. Mr. Seward was a Whig first, and an anti-slavery man afterward. He never led the movement. He was carried onward by it. He believed in the Old Whig party. He was chosen Senator by it when it was overwhelmingly strong. He was averse to its destruction. He believed it could be educated so as to accomplish every needed result. He was thus opposed to the formation of a new party with resistance to the spread of slavery as its fundamental idea. Mr. Seward belonged to the party in which such men as Henry Clay, Daniel Webster, and Millard Fillmore were leaders; and they were wholly hostile to the ideas of the anti-slavery men. Mr. Seward differed from them in this, that he was willing to incorporate the new idea into the Whig creed, while they were not. But he resisted the formation of the new party to the last, and only joined

it when he saw that the movement had attained such force and vitality that it would go on without him.

All this time Mr. Chase was urging with unremitting energy the establishment of the new party under some significant appellation which would express its purpose. He suggested various names for it. In the numerous conferences of its friends at Washington, during the winter of its birth, the titles of "Free Democracy," "Democratic-Republican," and others, were proposed by him. But under whatever name or title he cared not, so long as the party itself was created and christened. As the least objectionable of all, the name of Republican was finally adopted.

This was the difference in the position of these two subsequent leaders in the Republican party. If either led in this great initial step that ended in emancipation, it was not Mr. Seward, but Mr. Chase. And as it was then, so was it afterward. Mr. Chase pressed forward with determined front. Mr. Seward often relented. In his speeches in the session of 1860-61, Mr. Seward seemed ready to compromise; Mr. Chase never manifested the slightest sign of giving way before the terrific events then in prospect. He felt the eternal justice of his cause, and he was ready to brave the consequences. He entered Mr. Lincoln's Cabinet in this spirit. Mr. Seward entered it also, but his recorded acts and utterances show that he did not wish to face the crisis, but was ready to make great sacrifices for the sake of peace. We do not say this with any view to disparage Mr. Seward. We utter it in the interest of historic truth. It illustrates the contrast between the two men.

Mr. Chase feared nothing. He was as averse to war as anybody. But he aimed at justice and righteousness above all things. His moral courage was equal to every occasion. It was buttressed all around by every faculty and quality of his nature. There was never any other question with him but what was the right thing to do, not what was expedient. Originally a Democrat, he left the Democratic party in the heyday of its power and its glory, on a conviction that it was wrong on the slavery question. He espoused the cause of the slave when it was hopeless. Solitary and alone, he raised his flag and called for recruits when there were few to follow. In all his administrative acts he pursued the same line of action. He did the same in his comparatively brief Congressional career. He did not seek what was popular, but vigorously pursued his own ideas, and left the world to follow or refuse to follow as it might. His aim through life was to shape events. This was particularly the case while he was in office. It was the cause of numerous conflicts of a subordinate character with President Lincoln while he was Secretary of the Treasury. He was exacting in his department, and did not share his appointing power with any assistant. He thought he knew better than anybody else who should be appointed; and he or-

ganized his whole department on this basis, and would hardly tolerate the interference even of his chief. It was this strength of conviction and force of will that manifested itself in every situation, and rendered him a marked personality everywhere, and at all times.

It has sometimes been made a subject of reproach to Mr. Chase that after the accomplishment of the great objects of the war, emancipation and enfranchisement, he coquetted with the Democrats, and would have accepted their nomination for President in the election of 1868 if it had been tendered him. But it must not be forgotten that he was a Democrat from the start, by conviction and association. He believed that the general ideas of the Democracy in regard to State rights, limited powers, strict construction, and other fundamental precepts of the old Democracy, embodied the true doctrines of government; and he wished the party that professed them, and really believed in them, to succeed. His aim from the beginning to the end of his career was always to bring the Democratic party into harmony with the anti-slavery sentiment, which he considered was merely to make it consistent with itself. In pursuance of this purpose he was willing to become its candidate. To succeed in this was to achieve a cherished design and accomplish a favorite object. If he could incorporate his own political ideas on the old Democratic creed, he would have a party that represented his ideal of the true political organization to govern in this country. His attitude in the recent Presidential election was in harmony with these views. He advocated the union of Republicans and Democrats under the lead of Horace Greeley, and gave the movement his warm support. He thought the action of the Administration toward the South was cruel, revengeful, and corrupt. He did not believe in General Grant's style of government, and felt very keenly his appointment of judges to the Supreme bench for the purpose of reversing the well-considered and well-founded decision of the court in the legal-tender cases.

Resolution was a leading characteristic of Mr. Chase's mind. He was bold, determined, fearless, even willful. He abhorred indirection and inaction. His conceptions were distinct, and he meant to realize them. He was not a man of roving intellect, or a dilettante optimist. He had precise views and purposes, and the question with him was how to accomplish them. He did not so much believe in things coming right as in putting them right. He did not profess to have a philosophy adapted to every phase of human affairs so much as to have settled and determinate ideas upon the subjects which it was his duty to deal with.

Whether in the domain of public or private life, or in that of ideas, his opinions were fixed and his judgments established. He indulged in no fantasies of speculation. What he knew, he knew; what he did not know, he did not. He had a mental reticence and a profound

sense of the great issues of our being, which forbade him from approaching the discussion of such topics except with feelings of reverence and awe. The religious sentiment was strongly imbedded in his nature, and it is no slight testimony to its validity that it was able to make so firm a lodgement in a mind like his. But his sterling honesty, and the wonderful vigor of his moral fiber, formed a nature so robust and rugged that he did not, so much as other men, need the support of religious conviction. He was of the fullest stature and the highest pattern of manhood, without regard to his beliefs.

But private life is the great test of character. It is comparatively easy to have a Sunday habit for the world, and to remain even unspotted to its gaze. But in the intimate relations of the friendly and family circle, to be wholly irreproachable is given to few. Among these few Mr. Chase stands conspicuous. In this sphere he seemed without faults or failings. Serene, dignified, social, and warm-hearted, he was the joy of his friends and the delight of his associates, not only for his active, but for his negative qualities. He was not merely pleasing, he was in no way displeasing. His habit of command, naturally cultivated in his high duties of administration, and his native decision of character, could never be fully disguised any more than his lofty moral qualities; but they were so tempered by an unfailing sense of justice, and by such sweetness and evenness of disposition that they rather added to the charm of his presence. His affectionate nature was his own great solace. It drew around him tender and faithful hearts, who enjoyed and who sympathized with him, and who, until bereft by death, did not know how much they loved him.

Of Mr. Chase's mental gifts we have not spoken, except incidentally. Without any surprising reach of mind, he possessed extraordinary force and precision of thought. He had a judicial intellect. Nature formed him for a judge. But she also made him for an actor in affairs. So distinct were his conceptions, and so methodical his mental operations, that it is hard to affix a limit to what he was capable of in the line of abstract investigation. He displayed resources as an administrative officer that imply an intellectual power and acumen beyond what would be inferred from his speeches or writings. He had a great faculty of explanation. He could make abstruse things seem very plain by comparatively few words. He was not deterred from undertaking to elucidate any topic because of its difficulty, or because it did not come within the range of his special studies. Anything that was valid and real he attacked with confidence. He had a faculty of knowing what was really knowledge; but he resolutely declined to employ his powers in dim speculations upon the unknown and intangible. And yet he was fond of the lively play of fancy in poetry; his sense of wit was broad and lively; he doted upon the humorists, and could even

make verses himself on occasion. But though his mind, like that of most public men, dwelt mainly in the actual, and expended its vigor in expounding and elucidating known principles and doctrines, yet it did not confine itself to these. It had an original motion of its own. Its tone was progressive, rather than conservative. This was amply shown in his anti-slavery discussions. It was particularly manifested in his financial projects and management, where he broke boldly away from old example and high authority and became a law unto himself, demonstrating his prescience by his success.

He possessed great alertness of mind, showing wisdom to conceive as well as discretion to act. It was not that wisdom which comes of correctly judging the comparative merits of the notions or systems of others, which is the type of most wisdom in the world, but it was that higher quality of mental action which originates problems, and then accurately solves them. This was a quality exhibited by Mr. Chase far beyond any of his contemporaries. It constitutes his chief claim to great intellectual distinction. And this power he displayed chiefly in the discharge of his duties as an Administrative officer. But it is none the less clearly a specific intellectual faculty.

On the whole, therefore, we are amply justified in pronouncing him one of the wisest, greatest, noblest men of his time. His character merits the highest eulogy, and deserves to be held in everlasting remembrance as a precious legacy to the youth of his country; and it is his glory that in the great crucial trial of republican institutions he did as much as any other of his day and generation to demonstrate the efficiency of democratic government, and preserve it pure and stainless before the world.—*New York Sun, May 12th.*

BANKRUPTCY.

AN ACT

To amend an act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

Be it Enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State, for the purpose of winding up the affairs of such corporation or company, and dividing its assets ratably among its creditors, and lawfully among those entitled thereto, prior

to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court, agreeably to the State law, for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company, shall be deemed valid, notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

Approved February 13, 1873.

SUPREME COURT OF OHIO.

TO APPEAR IN 22 O. S. REP.

INSURANCE POLICY.

The Boatman's Fire and Marine Insurance Company *vs.* Marcus C. Parker. Error to the District Court of Cuyahoga County.

DAY, J.

1. A policy of insurance against loss or damage by fire, contained a condition that the company would not be liable "for damage to property by lightning, aside from fire, * * * * nor for damages occasioned by the explosion of a steam boiler, nor for damages by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances."

Held—That the company is not exempted by this clause from liability for damage by fire resulting from an explosion of gas, but is thereby exempted from damage occasioned by the explosive force of the gas, without communicating fire to the insured property.

This case is distinguished from that of the United Life, Fire, and Marine Insurance Company *vs.* Foote, *ante* 340.

Judgment affirmed.

NATIONAL BANK.

John C. Allen *vs.* The First National Bank of Xenia. Error to the District Court of Greene County.

WHITE, C. J.—*Held:*

1. Where a National Bank organized from a State Bank, under the provisions of the National Currency act, at the time of its organization, took from such State Bank, among its discounted notes, one for a larger amount than the National Bank was authorized to loan to a single bor-

rower, such note is not, nor is any note subsequently given in renewal thereof, to be regarded, within the meaning of section 29, of said act, as given for money borrowed of the National Bank

2. In an action brought by a National Bank on a note given by way of renewal for a balance due on a previous loan, which had been reduced by renewals and payments below the maximum sum which it was authorized to loan to a single borrower, it is no defense that the original loan was for a larger sum than the bank was, by its charter, authorized to make.

3. National Banks are authorized to take mortgages on real estate in good faith, to secure debts previously contracted. A National Bank extended the time of payment of indebtedness at a usurious rate of interest, and took therefor notes and mortgage made by the debtor to a third person, the notes being indorsed by the latter.

Held—That the usury only avoided the interest, and that to the extent the debt was valid the mortgage was a *bona fide* security, and that the bank by becoming the owner of the notes acquired the equity in the mortgage.

Judgment affirmed.

INCEST—EMISSIO SEMINIS.

Harvey Noble *vs.* the State of Ohio. Error to the Common Pleas of Huron County.

WELCH, J.:

1. The relation of step-father and step-daughter, within the meaning of the statute against incest, does not exist after the termination of the marriage relation between the step-father and step-daughter's mother.

2. An indictment for incest with one's step-daughter sufficiently describes the relationship of the parties, by alleging it to be that of step-father and step-daughter, without setting forth the marriage of the defendant to the mother, or the subsistence of the marriage relation at the time of committing the crime.

3. On the trial of such an indictment against the step-father, it was shown that the step-daughter's mother had been twice married before her marriage with the defendant; first, to a man by the name of Norwood, and next, to a man by the name of Hopkins; and there was evidence tending to raise a presumption of the death of one or both of these former husbands. The court, thereupon, charged the jury as follows: "If the presumption arises that Norwood, or Hopkins, or both of them, are dead, the subsequent marriage with Noble (the defendant) would be valid, unless from the testimony you should find that in fact they, or one of them, are not dead." *Held*—That in this charge there was error, for which the judgment should be reversed.

4. *Emissio seminis* is an essential ingredient in the crime of incest.

Judgment reversed and cause remanded.

Stone, J., dissented as to the last proposition in the foregoing syllabus.

RAILROAD—STONE PIERS.

Samuel Wagner *vs.* the Cleveland and Toledo Railroad Company.

White, J.—*Held:*

1. Stone piers built by a railroad company as part of its railroad, on lands over which it has acquired the right of way for its road, do not, though firmly imbedded in the earth, become the property of the owner of the lands as part of the realty. And, on the purpose of completing the railroad being abandoned, the company may remove such structures as personal property.

2. In case of such abandonment, the fact that the land-owner has been allowed to take possession of the land embraced in the right of way, and holds it for a term of years less than is required to extinguish the easement, does not, of itself, imply a relinquishment on the part of the railroad company of its right to enter and remove the piers.

Judgment affirmed.

MANDAMUS.

The State *ex rel.* John W. Baen *vs.* Walker M. Yeatman, Auditor of Hamilton County.

Application for writ of *mandamus*.

Day, J.—*Held:*

1. A *mandamus* will not be awarded in the absence of a clear right, in the party seeking the writ, to the object sought to be obtained by it.

2. A contract of County Commissioners for the recopying of the plats of the county, for use in the Auditor's office, the estimated expense of which exceeds five hundred dollars, under the second section of the act relating to the duties of County Commissioners, as amended March 9, 1866 (S. & S., 86), is void, as against the county, unless it be with the lowest responsible bidder, in accordance with the provisions of that section.

3. Where such contract is made in disregard of the provisions of that section, a *mandamus* will not be awarded to compel the Auditor of the county to draw a warrant on the Treasurer for the payment of the sum allowed by the Commissioners as the amount due on the contract.

Mandamus refused.

PASSENGER FARE.

Valentine H. Smith *vs.* Pittsburg, Fort Wayne, and Chicago Railway

Company. Error to the District Court of Richland County.

McIlvaine, J.—*Held:*

1. Whether the rate of passenger fare fixed by a railroad company under the twelfth section of the act of February 11, 1848 [S. & C., 271], for distances less than thirty miles, be reasonable or not, is a question of fact for the jury, to be determined under such instructions by the court as the circumstances of the particular case may require.

2. If the charge as given be unexceptionable, it is no ground for error that the court failed to give other instructions which might properly have been given, unless such other instructions be specifically requested and refused.

3. If a railroad company fix two rates of passenger fare for a distance less than thirty miles, to wit: a ticket rate, and a car rate, the former within, and the latter beyond the limits of its authority, and the conductor of the train, under the direction of the company, refuse to accept from the passenger less than the illegal and unauthorized rate, it is not necessary to entitle the passenger to remain on the train to tender more than the ticket rate, although the company might have fixed such ticket rate at a higher sum.

Query—Whether any tender is necessary in such case.

4. In an action for a personal tort, an injury to the feelings naturally and necessarily resulting from the wrongful act, may be considered by the jury in their estimate of compensatory damages, whether the case be or be not one in which damages beyond compensation may be awarded.

Judgment of the District Court reversed, and the judgment of the Common Pleas affirmed.

Welch, J., dissenting.

CONDITIONAL SALE.

Frederick S. Sage *vs* Andrew Sleutz. Motion for leave to file a petition in error to reverse a judgment of the Superior Court of Montgomery County.

Stone, J.—*Held:*

1. One who bargains for the purchase of a specific chattel does not, by the mere payment of a part of the purchase money, under an express contract that no title shall vest in him until all of the purchase money is paid, acquire any interest therein which is subject to levy and sale on execution.

2. Where, in such case, the levy is made upon the property then under the contract rightfully in the possession of the vendor, and in recognition of his rights, the title of the officer making the levy is not aided, and he does not acquire any interest in the property, or become

entitled to its possession, by tendering to the vendor the amount of the purchase money then remaining unpaid.

3. A judgment will not be reversed for error in sustaining a demurrer to the reply, when the plaintiff, on leave, files an amended reply, presenting, in addition to others, the same issues, and the case proceeds to trial and final judgment upon the issues thus presented.

KENTUCKY COURT OF APPEALS.

LIFE INSURANCE — HOW FAR AN AGENT MAY WAIVE THE CONDITIONS OF THE CONTRACT.

Mississippi Valley Life Insurance Company *vs.* Cornelia A. Negland. Jefferson Common Pleas. Lindsay, Judge.

This is an action for the recovery of $10,000, the amount of a policy of insurance issued to the appellee upon the life of her husband by the appellant. The application was made September 8, 1868, to Hollyman, an agent of the company, authorized to solicit insurance, and to receive applications therefor. On that day he delivered to Negland a receipt signed by one Myers, agent, termed a "binding receipt," which acknowledged that the first annual premium ($320) had been paid, and stipulated that Negland was "to be insured from the date of that receipt, in accordance with the provisions of the policies of said company, the policy to be delivered when issued, and the amount, the receipt whereof is acknowledged, to be repaid to him in the event of said application being declined by said company." The cash portion of the premium ($160) was paid by agreement on the part of the agent, Hollyman, to satisfy the company therefor, he being indebted to Negland. For the balance it is claimed a note was given. Hollyman failed to comply with this contract. On the 6th of November the application was received by Conklin, the general agent for the State of Texas, and was forwarded to the principal office at Covington, Kentucky. On the same day he wrote to Negland that Hollyman had been discontinued as agent of the company. On the 12th Negland wrote to Mellon, another agent, forwarding the "binding receipt," claiming that he had paid one-half the premium and executed his note for the balance, and asking, in case the company did not intend to ratify the contract of insurance, that his money be refunded and his note retufned. This letter was forwarded to Conklin. Negland soon afterward wrote to Conklin to the same effect, which he answered, regretting the complications growing out of Hollyman's conduct, and proposing to deliver the policy if Negland would pay $82, and execute a new note in lieu of the one Hollyman had failed to deliver. This was accepted by Negland, and the policy was delivered; soon after which he died.

To this suit the company set up in defense that Hollyman was not its agent when the application for the insurance was made; that he and Negland combined to defraud it, by falsely pretending that $160 of the first premium had been paid when no money was paid; and that Negland was, at the time of the application, fatally sick, and made false statements as to the condition of his health.

Held—The evidence does not show that Hollyman had been discontinued at the time the application was made.

The weight of modern authority is that a general agent of an insurance company, whose business it is to solicit applications for insurance, and receive the first premiums, has the right to waive the condition requiring payment in money, and to accept the promissory note of the applicant, or of a third party, in lieu thereof, or to undertake to make the payment to the company himself; and that when the cash payment is actually waived in either of these modes, the contract binds the company, notwithstanding the recital in the policy that it is not to be binding until the cash portion of the first premium is actually paid in money. [25 Barbour, 189; 35 New York; 25 Conn. 207.]

The powers of the general agents are *prima facie* coextensive with their business intrusted to their care, and while acting within the scope of their duties and apparent authority, parties dealing with them have the right to presume that they can waive any of the conditions of the contract that might be waived by the principal officers of the corporation. If they disregard limitations placed upon their authority, the company for whom they act, and not the persons dealing with them, should bear the loss, unless such persons had notice of these limitations. [Insurance Company *vs.* Wilkinson, United States Supreme Court, Am. Law. Reg., August, 1872.] This doctrine was recognized by this court in the case of St. Louis Mutual Insnrance Company *vs.* Kennedy, 6 Bush. 450. Negland had no reason to suppose that Hollyman, in making the contract with him, was disregarding private instructions given him by the company. He had the right to assume that Hollyman possessed all the powers that other persons performing similar duties and clothed with like authority possessed. There is no evidence conducing to show a fraudulent combination between the agent Hollyman and Negland. The contract was consummated by the delivery of the "binding receipt," nothing remaining to be done by either party, except that the company was to prepare and deliver the policy—the formal evidence of an already consummated contract.

The company has no right to repudiate the "binding receipt" because Myers, by whom it was signed, had ceased to act as its agent for the State. His successor, Conklin, knew that Hollyman was in possession of receipts signed by Myers. It is doubtful whether, prior to the contract with Negland, he had taken any steps to recall these receipts

from the hands of this agent, and it is clear that the public had not been notified that Myers had severed his connection with the company.

Appellant has no right to complain on account of the exclusion from the jury of the pamphlet containing its private instructions to its agents, nor of letters written by one of its agents to another.

Judgment affirmed.

EMANCIPATION OF SLAVES BY WILL—THE THIRTEENTH AMENDMENT—SURETY PLEADINGS.

Neely, &c., *vs.* Merritt, &c. Logan. Lindsay, Judge.

Thomas Neely, of Logan County, died in 1854, leaving a will providing that his male slaves, Richard, John Franklin, Reuben, and George Henry, "be free as soon as they, respectively, attain the age of twenty-five years; and that my female slave, Melinda Ann, be free as soon as she attains the age of fifteen years. It is also my will and desire that my negro woman, Ellinder, be free if she feels disposed to go with my other slaves to the colony of Liberia, in Africa; and I hereby emancipate and set free my above-named slaves, in the manner aforesaid, upon the terms and conditions prescribed in the Constitution of the State of Kentucky. And it is my desire that they be hired out by my executor until a sufficient fund is raised for their transportation to the colony of Liberia in Africa. It is also my will and desire that should the said Ellinder give birth to any child or children, that it or they be, and I hereby set them free upon the terms and conditions prescribed above for my other slaves; that is, the males at twenty-five, and the females at the age of fifteen years; and that they be hired and transported as aforesaid by the executor. * * * * By way of codicil to this, my last will and testament, it is my will and desire that all my slaves be sent to Liberia when the oldest boy named in said will arrives at the age of thirty years, which will be in the year 1870, according to the provisions and conditions expressed in said will."

He devised his other property to his children and grandchildren. Merritt, the executor, hired out the negroes from year to year until 1865, when the Thirteenth Amendment to the United States Constitution was adopted, and this suit was since brought by them in the name of the Commonwealth against him to recover the amount received for their hire.

Held—It was the manifest object of the testator to secure to the persons named their freedom in any event, subjecting them only to such restraint as was necessary under the laws of the State, and deferring the time when they should enter upon the enjoyment of their liberty for such time only as in his judgment would be required to raise the necessary amount to remove them to the country deemed by him the proper place for their future residence.

Their emancipation was unconditional. They were to be free whether the executor hired them out or transported them to Liberia, or not. If he had failed in this duty the County Court would have been bound to appoint a trustee to do it. The heirs or devisees had no title in or to their services. The executor held and controlled them not because he had any right to their services, or because the heirs or devisees could at any time, or on any contingency, assert title thereon, or their earnings, but because the law would not permit them to enjoy their liberty within the territorial limits of the State, and required that while earning the fund to provide for their transportation they should be under the control of a trustee. Being free, though held in a state of pupilage or *quasi* slavery, they worked for themselves, and under the limitations imposed by the testator, and the restrictions fixed by law, they were entitled to the benefit of the proceeds arising from their labor. Had the institution of slavery continued to exist until 1870, they could not have claimed the benefit of this fund without removing from the State, and, possibly, to the country designated. But the Thirteenth Amendment to the Federal Constitution abrogated the State law on this subject, and left them free to remain in the State if they chose.

Their emancipation became perfect and complete, and they were no longer subject to the control of the County Court. The State itself had been deprived of the power to hold them even in temporary bondage (except for crime), and the functions of the trustee named in the will, but who actually derived his powers from the State, necessarily ceased.

They were, therefore, after 1865, not only free, but the funds in the hands of their trustee was their joint property. Nor did they forfeit their right to it by declining to subject themselves to the control of the trustee after they became absolutely free, or by declining to remove from the State in 1870, they having then the right to remain. The fund could in no contingency pass to the heirs or devisees, nor to the executor, but to those who had earned it and for whose benefit it was created.

Although the will empowered the executor to take control of these persons, and hire them out, yet in accepting the trust and performing his duties, he was in no sense administering "the goods, chattels, credits, and effects," nor "the proceeds of any sale," nor "the rents and profits of any estate," which came to him by color of his office. His surety did not covenant that he would faithfully perform his duty as trustee of the appellants, and his heirs can not be held responsible for his default in this regard. The names of the plaintiffs appear both in the caption and body of the petition, and they were virtually parties, though not so styled. (3 Met. 88; 16 Barbour 541.)

Kentucky Court of Appeals.

LIFE INSURANCE—THE PRELIMINARY PROOF OF DEATH—DELIRIUM TREMENS.

Connecticut Mutual Life Insurance Company *vs.* Seigel, &c., Jefferson Common Pleas. Lindsay, Judge.

The life of Seigel was insured by appellant, the policy containing the stipulation that "In case he shall become so far intemperate as to impair his health or induce *delirium tremens*, * * * * or if the proposals, answers, and declarations made by said Seigel, and bearing date June 7, 1866, * * * * shall be found in any respect untrue, then, and in such case, this policy shall be null and void."

After his death this suit was brought for the recovery of the insurance, which the company resisted on the alleged ground that he had *delirium tremens* from drink, made false statements as to his habit of temperance in his application for insurance, and that the notice and proof of his death set forth a state of facts precluding a recovery in that the affidavit of the attending physician shows that Seigel, just before his death, and while the policy was in force, was suffering from *delirium tremens* from drink, no other evidence being furnished by the plaintiffs. A trial resulted in a verdict and judgment for the plaintiffs.

Held—Whatever effect the statement in the affidavit of the attending physician that Seigel had *delirium tremens* may have upon the ultimate right of the plaintiffs to recover, it did not impair the efficacy of the notice and proof of the death of the insured. The policy requires notice and proof of the death, but does not require the facts and circumstances attending it to be set out in the proof. The last paragraph of the answer does not, therefore, sufficiently deny that due notice and proof of the death were furnished.

Appellant further insists that this paragraph presented a good defense because the proof of the death showed that the conditions of the policy had been violated and the policy forfeited, and that although this proof might not absolutely conclude appellees, yet they could maintain no action until they first corrected the misstatement. This position is not sustained by the cases relied on. Appellees had the undoubted right to sue. Appellant might have pleaded the facts disclosed by the preliminary proof as a defense to the action. It might have introduced these preliminary proofs as evidence to sustain its defense, and the question then would have arisen whether appellees would have been allowed to show that the extraneous matter set forth was not true. In the case of Irving *vs.* Excelsior Insurance Company, 1 Bosw. N. Y. 513, it was held, in an action on a fire insurance policy, which required the assured to deliver to the company a just and true account of his loss, which should be as particular as the nature of the case would allow, and which should be verified by his oath, that the

plaintiff could not change his ground on the trial and impeach the truth of his own statement. The circumstances attending the death of Seigel were not required to be stated, and the statement upon which appellant relies, was not made or sworn to by appellees. The same distinction exists between this and the cases of Campbell *vs.* Charter Oak Insurance Company, 10 Allen 214, and Howard *vs.* Insurance Company, 4 Denio 508, and in each of these cases the insurer pleaded the violation of the policy, and relied on the preliminary proof as evidence to sustain their pleas. The doctrine stated in the case of Cluff *vs.* Mutual Benefit Life Insurance Company, 1 Biglow, L. and A. R. 269, that "when an apparent ground of defense is disclosed by a separate and unnecessary narration of circumstances, and the proofs required by the policy are complete without that narration and disclosure, it can not be said that the party has failed to comply with the condition imposed upon his right to litigate his claim," in the opinion of this court, embodies the correct principle, and controls this case. Hence, the last paragraph of the answer presented no defense to the action not already set up in the first, and the demurrer to it was proplyer sustained.

As appellant did not offer to read the affidavit of the attending physician in support of his first ground of defense, we need not decide whether it would have been competent for the purpose, nor whether if competent the appellees would have been concluded by the statement it contained. The issues raised by the other two grounds of defense were fairly presented to the jury by the instructions, and the evidence is such that this court will not interfere with its finding.

Judgment affirmed.

STATUTE OF FRAUDS—PAROL CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—CONFLICT OF LAWS.

Kleeman & Co., *vs.* Collins. Jefferson Common Pleas. Pryor, Judge.

Kleeman & Co. of Chicago, manufacturers of billiard tables, made a verbal agreement with Collins, by which he undertook to work one year for them for one thousand dollars, in a branch of their house in New Orleans. Whether his term was to begin from that date, or from his beginning work in New Orleans, is not certain. He did, however, leave Chicago as soon as he had made this agreement, and began work under it as soon as he arrived at New Orleans. After working four months, he was paid for that time and discharged without good cause. He brought this suit in Louisville, Kentucky, upon the contract, alleging a faithful compliance on his part, his discharge without cause, and had been deprived of employment for many months. Appellants denied executing such contract, and pleaded in bar the Statute of Frauds.

A verdict and judgment of $408 for Collins, was rendered. The court refused an instruction in effect that if such contract existed and the term of service was not to begin until Collins had reached New Orleans, the contract was within the Statute of Frauds and no recovery could be had upon it.

Held—The statute provides "that no action shall be brought to charge any person upon any agreement which is not to be performed within one year from the making thereof, unless the promise, contract, agreement, &c., or some memorandum or note thereof be in writing and signed at the close thereof by the party to be charged therewith or by his authorized agent."

The authorities are abundant that contracts for personal services for a year or more, the term to begin at any future day, are within the statute. [26 Georgia, 552; 1 B. & A., 722; 46 N. H., 151; 1 Smith's Leading Cases, 144; 13 Wend., 307; 4 B. Mon., 415; 9 B. Mon., 428.] Nor does a partial performance authorize an action to be maintained on the contract. The only remedy is by a *quantum meruit*, or some appropriate action other than on the contract. [5 N. H.; 28 Vermont, 34; 20 Maine, 119.

The legal character and validity of a contract is determined by the *lex loci contractus*, or by the law of the place where it is to be performed, but the mode of proceeding, and character of the action upon a contract is governed by the laws of the place where the remedy is sought. [Story on Conf. of Laws, 556.] The mischief sought to be avoided by rejecting parol testimony when offered, to alter written contracts, is that which arises from the infirmity of human nature in correctly recollecting the particular terms of a contract after a length of time, and the willful misrepresentations that are so often made in regard to such transactions. Statutes of limitation, and of frauds and prejudices, have been enacted for the same purpose. The Statute of Frauds does not make such a contract void, but only declares that no aclion shall be maintained upon it. [3 B. Mon., 247; 1 Met., 553.] In this case the statute of Frauds affects only the remedy or mode of procedure, and consequently the law of this State, where the suit was brought, must be applied. [Lennox *vs.* Brown, 14 Eng. Law and Equity Rep.; 36 Conn. 42.]

A letter written by one of the appellants to his father in New Orleans, showing the nature of the contract with Collins, if produced, or its contents proven, if lost, would be sufficient evidence of the agreement to take it out of the statute. [Sugd. on Vendors, 122.]

Judgment reversed and new trial awarded.

ADVANCEMENTS TO CHILDREN—ADEMPTIONS OF LEGACIES.

Grigsby's executor *vs.* Wilkinson, &c., from Montgomery. Lindsay, Judge.

Grigsby published his will in 1847, and died in 1856. In his will, after specifically providing for his wife and the payment of his debts, he devised the residue of his estate in equal prop ortions to his five children, charging his son Richard, however, with an advancem ent of $1,800. In 1849, Richard paid his father $400 for a slave which he had in his possession when the wili was made, and claims that this should be deducted from the advancement charged. The father in 1853, gave one of his daughters two slaves, which are sought to be charged against her.

Held—The son was entitled to no deduction from the advancement charged, on account of the payment for the slave.

At common law a specific device or a general legacy for a fixed and certain amount, bequeathed by a person *in loco parentis* to a child or grandchild, would be held to be adeemed or satisfied by a gift by the testator during his lifetime to the legatee of a portion equal to or greater than the legacy; it being only necessary that the provisions should be *ejusdem generis*, and that no intention to adeem be indicated. In this case the devise to the daughter was not specific, nor is it a general devise of a fixed amount. It was not, therefore, adeemed or satisfied by the gift of slaves. Though the testator may have expressed an intention to charge her, he failed to do so, and oral testimony can not be allowed to change his legally executed will.

AN EXECUTION SALE—JURISDICTION.

Craig, &c., *vs.* Garnett's Administrator, &c. From Gallatin. Hardin, Chief Justice.

At the death of Craig, in 1862, his divorced wife was prosecuting a suit against him on a claim for $400, and, reversing it against his administrator and heirs, recovered judgment. His land, worth $3,500, was levied on and sold under an execution thereon, she becoming the purchaser for the amount of the debt and costs. No one redeeming the land it was conveyed to her, and afterward a creditor of Craig's estate brought this suit to set aside that sale charging collusion between her and the heirs of Craig to defraud the other creditors.

Held—There was no proof of any collusion either at the sale or in regard to the redemption. The price of the land was grossly inadequate, but this of itself will not affect the validity of the sale. (3 Mon., 273.)

2. Another creditor of the estate having previously obtained judgment in the Quarterly Court against the administrator for amounts less than $50, and executions thereon being returned "no assets found," brought suit and recovered judgment in the Circuit Court against the administrator and heirs, ordering a sale of enough land of the decedent to pay the debt. This suit also questions the jurisdiction of the Circuit Court to order the sale.

Held—The Circuit Court had jurisdiction. The suit necessarily affected the title to land, and no inferior court had jurisdiction of it. The judgments in the Quarterly Court being against the administrator alone, no execution thereon even from the Circuit Clerk's office could reach the land. The judgment against the administrator alone was no bar to the suit in equity on the original demand. (Sec. 10, chap. 40, Rev. Stat.; 6 Bush, 375; 6 Bush, 405.) Judge Pryor not sitting.

FREEHOLD ESTATES WITH CONDITIONS SUBSEQUENT — WHEN DELAY IN ASSERTING CLAIM ON FORFEITURE IS A WAIVER.

Kenner, &c., *vs.* American Contract Company. Christian. Pryor, Judge.

In 1854, Kenner relinqui hed to the Henderson and Nashville Railroad Company the right of way over his land, with the condition "that, should the people of Christian County vote a tax for the building or completion of said road, then this right of way to be null and void." The company soon afterward entered upon and graded the way over the land; but in 1866 the road was sold under a decree of court to Sabree, and, in 1867, he sold it to the Evansville, Henderson, and Nashville Railroad Company. In 1868, on the petition of a majority of the qualified voters of Christian County, the County Court subscribed $200,000 to the capital stock of the latter company, and levied a tax on the property of the county. The road was constructed and leased to the appellees without objection from the devisees of Kenner, he having died in 1863, devising the land to his widow during her widowhood, with the remainder to the children. The widow and children brought this action of trespass for damages against the appellee, claiming that the grant of the right of way had become void.

Held—The County Court having, on the petition of a majority of the voters of the county, imposed a tax to aid in building a road, this was equivalent to a vote at the polls, and the grant might have been avoided. That the tax was imposed in aid of a different corporat on from the one contracted with will not alter the case, as the road was the same, and the succeeding corporation had purchased the rights and franchises of the preceding, subject to existing conditions.

At common law no freehold or fee-simple estate can be destroyed by the breach of non-performance of a condition subsequent, unless there is an entry, by the grantor, or his heirs, after the breach, or some claim equivalent to it. But this rule does not apply in case of estates for years, easements, or incorporeal hereditaments. These not being created by livery of seizin, when a breach of a condition subsequent happens, the estate terminated without any entry (4 Kent, 128). No actual entry was therefore necessary in this case.

But the delay of the widow in asserting her claim, until valuable improvements were put upon the land, should be considered. The modern doctrine on the subject of such forfeitures is that the party entitled to the estate, by reason of the forfeiture, must say whether the estate shall be forfeited or not, and though the use from which the grant of a public passway may be implied, must have continued for a period required to toll the right of entry in ejectment, the waiver of a forfeiture may nevertheless be inferred by reason of the failure of the party entitled to the estate to re-enter, or assert some claim in a reasonable time after the termination of the estate, and particularly in a case where the party to whom the grant is made is permitted to use and make valuable improvements on the land after the condition is broken. The happening of the condition does not, *ipso facto*, determine the estate, but merely renders it liable to be defeated at the election of the grantor or his heirs. The delay in this case waived the forfeiture.

The devisees, the widow and children, occupy the same position toward the estate, and the appellee as the grantor or his heirs would.

Whether the failure to assert their claim within a reasonable time deprived the appellants of a right to compensation, is a question not raised or decided. But they can not maintain this action for trespass.

BOOK NOTICES.

LAWYERS' RECORD AND OFFICIAL REGISTER OF THE UNITED STATES. By H. CHARLES ULMAN, Counselor at Law, and President of the United States Law Association. Law binding, 1143 pages. Price $7 50. A. S. Barnes & Co., Publishers, Nos. 111 and 113 William Street, New York.

This work has already met with a favorable reception from the legal profession, and we deem it a duty we owe to our readers to present them with a plan of the book and a knowledge of its contents. A mere description is sufficient to recommend it to practicing lawyers, many of whom have often felt the need of just such a work as we now design to present to their notice.

The book is divided into twelve parts or chapters, as follows: I. A notice to lawyers, requesting them to forward to the editor, H. Charles Ulman, No. 137 Broadway, New York, for publication in the next number of the *Register*, a record, as follows: Their State, county, city or town, street and number, full name, name of firm, and name of each member; the date and place of admission to the bar; the public offices which have been filled by the person giving the information, together with the special branch of the law to which particular attention is

given, if not engaged in general practice. II. A list of United States officials of all departments. III. The State, territorial, and county officials, with the States, Territories, and counties alphabetically arranged. IV. A list of the officials of seventy-four of the largest cities of the United States, the cities alphabetically arranged. V. The United States Judiciary, with the jurisdiction of the courts. VI. The United States District and Circuit Courts, showing the counties that compose each district. VII. State, county, and city judiciary, with the jurisdiction and time of holding courts; States arranged alphabetically. VIII. The legal forms for deeds, mortgages, depositions, &c., prepared in accordance with the laws of the different States, together with provisions concerning the acknowledgment and recording of deeds, mortgages, &c., and instructions for taking depositions. IX. A record of about forty-five thousand practicing lawyers in the United States, arranged by States and counties alphabetically. X. A digest of the laws of the several States and Territories, on the following subjects: 1. Grounds of Civil Arrests. 2. How, and upon what grounds Attachments may be issued. 3. Bills of Exchange and Promissory notes. 4. Validity of Bills of Sale and Deeds of Trust. 5. Chattel mortgages: Where in use. 6. Evidence: Competency of Witnesses. 7. Executions: Lien of, Stay of, or Stay Laws. 8. Exemptions from Forced Sale. 9. Interest: rate of, and where Usury Laws are in force. 10. Judgments: lien of, and effect of. 11. Limitations of Action. 12. Married Women: Rights and Liabilities of. 13. Release by Operation of Law. 14. Statute of Frauds. 15. Laws relating to Descent of Property. XI. Appendix to Forms, and Lawyers' Record. XII. A copious index to the work.

To find the real value of the work, as a book of reference of the different laws above mentioned, as gathered from the various States, we have carefully examined that portion of it which treats of the Laws of Ohio—we being more familiar with them than with any other—and find that its preparation has been carefully conducted, and that it is reliable; we can, therefore, commend it to our readers, not only as the best "Lawyers' Record," but as a really good digest of the commercial law of each State and Territory of the Union.